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COMMENT

VIA E-MAIL

Eileen A. Donovan
Acting Secretary to the Commission
Commodity Futures Trading Commission
115521st St., N.W.
Washington, D.C. 20581

Re: Comment; "What Constitutes a Board of Trade Located Outside of the United States."

Dear Ms. Donovan:

Eurex Deutschland appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("Commission") request for comment in connection with its public hearing on "Boards of Trade Located Outside of the United States and the Requirement to Become a Designated Contract Market or Derivatives Transaction Execution Facility," 71 FR 34070 (June 13, 2006).[1]

Eurex Deutschland commends the Commission on the foresight and innovation that it has demonstrated over the years through its willingness to address the important issues related to electronic access from the United States to Foreign Boards of Trade ("FBOT"). The Commission should be justifiably proud of the success achieved by its policies relating to the placement in the U.S. of the trading terminals of a foreign market. U.S. members of Eurex Deutschland (and its predecessor Deutsche Terminbörse ("DTB")) have been able to access the Eurex market from U.S. trading terminals under a CFTC staff No-action letter for over ten years.[2] The policies established by that and other similar No-action letters have become a very successful global model, which are widely accepted and emulated by many foreign jurisdictions. In order to avoid any unintended consequences, any change to the current procedures and the policies that underlie them should therefore be taken with the utmost caution.

[1] That hearing was held on June 27, 2006. Eurex appreciates the opportunity that the Commission accorded it to participate in that meeting. References to the transcript of the hearing will be cited as "Tr. at p.".
[2] *See*, "No-action Request to Permit DTB Screen Trading in the United States," CFTC Letter 96-28, 1996 WL 198123 (CFTC)

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Overview and General Comments

The Eurex Market

Eurex Deutschland is a futures and options exchange operated by Eurex Frankfurt AG (hereinafter "Eurex Deutschland" and "Eurex Frankfut AG" together are referred to as "Eurex"). Eurex operates through an all-electronic trading platform and is the world's largest futures and options exchange. More than 1.25 billion contracts were traded on the exchange during 2005. Trading on the fully computerised Eurex market platform differs markedly from trading on traditional open-outcry markets.[3] Trading Members are connected to Eurex via a dedicated communications network from over 700 locations around the world, including locations from within the U.S. To facilitate access to the Eurex trading platform, access points have so far been installed in a number of financial centers including Amsterdam, Chicago, New York, Frankfurt, Gibraltar, Helsinki, London, Madrid, Paris, Zurich and Singapore.

Eurex Deutschland is a German public-law institution. Eurex Frankfurt AG as the operating institution of Eurex Deutschland is registered as a German stock corporation. It is headquartered in Frankfurt, Germany, where the vast majority of its employees and management are located. All transactions on Eurex are governed by Eurex rules and the laws of Germany. The operation of Eurex Deutschland is supervised by the "Exchange Supervisory Authority," the highest competent state authority of the State of Hesse. Intermediaries trading on Eurex Deutschland are supervised by the German Federal Financial Supervisory Authority, Bundesanstalt für Finanzdienstleistungs-aufsicht ("BaFin").

Eurex is the successor exchange to DTB. DTB was the first electronic foreign board of trade ("FBOT") to request that members be able to access the exchange's trading platform through computer terminals in the United States. The Commission's Division of Trading and Markets issued a letter on February 29, 1996, determining that it "would not recommend any enforcement action against DTB in connection with the placement of its trading terminals in the U.S. in order to permit DTB members to execute transactions involving DTB futures and option products which are otherwise approved for trading by U.S. persons, subject to compliance with [a number of] conditions."[4]

Subsequently, DTB combined with SOFFEX to form the Eurex exchange-organization and on August 10, 1999, the Division issued a letter to Eurex which expanded the relief granted by the 1996 No-action letter.[5] Accordingly, its U.S. members have been able to access the Eurex trading platform from trading terminals in the U.S. for over ten years under the provisions and conditions set forth by the No-action letter.

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[3] Transactions on Eurex Deutschland are cleared through Eurex Clearing AG, a German wholly owned subsidiary of Eurex Frankfurt AG.

[4] See, "No-action Request to Permit DTB Screen Trading in the United States," CFTC Letter 96-28, 1996 WL 198123 (CFTC) at 10.

[5] See, http://www.cftc.gov/tm/letters/tmeurex_no-action.htm.

Eurex offers trading in a wide array of liquid broad-based equity index and fixed income futures and options.[6] Although the contracts that Eurex lists are generally geared toward the hedging and price shifting needs of its European home, U.S. participants have benefited from their ability to access the Eurex market. Today, many large investors hold a global portfolio and access to markets in which to hedge their exposure from such assets is crucial. They have also benefited generally from the innovation that the Eurex market model introduced. The CFTC No-action policy enabled U.S. firms to experience trading on a fully electronic exchange and that experience no doubt has acted as a catalyst to greater innovation by U.S. and non-U.S. exchanges.

During the ten years that the Eurex (and DTB) No-action letters have been in effect, Eurex (and DTB) have been highly responsive to requests for information from the Commission. Eurex (and DTB) have fulfilled all reporting and other requirements of the No-action letters, including notice of all Eurex rule changes. Moreover, during this period, the Commission and Eurex' regulators have forged a close and productive working relationship for the sharing of information and other cooperative regulatory oversight efforts. To our knowledge, there has not been a single instance during this period when the CFTC or Eurex's regulators have been unable to fulfill their respective oversight roles as a consequence of the CFTC's decision to permit Eurex' U.S. members to access the market directly through trading terminals in the U.S.

Current Commission Procedures

The foreign terminal No-action letters are based upon two broad policies: 1) conduct by Commission staff of a thorough pre-admission due diligence review to ensure that the FBOT is a bona fide market subject to a comparable regulatory scheme, and 2) deference by the Commission to the home country regulator with respect to the regulation and oversight of the operation of the foreign market.

The pre-admission due diligence review is extensive and thorough. Under this pre-admission review, the CFTC carefully examines:

> general information about the FBOT, as well as detailed information about (i) Membership criteria (including financial requirements); (ii) various aspects of the automated trading system (including the order matching system, the audit trail, response time, reliability, security, and, of particular importance, adherence to the IOSCO principles for screen-based trading); (iii) settlement and clearing (including financial requirements and default procedures); (iv) the regulatory regime governing the FBOT in its home jurisdiction; (v) the FBOT's status in its home jurisdiction and its rules and enforcement thereof (including market surveillance and trade practice surveillance; and (vi) extant information–sharing agreements among the Commission, the FBOT, and the FBOT's regulatory authority.

71 FR 34070, 34072.

Although under the No-action letters deference is given to the FBOT's home country regulator and the home country regulatory scheme, it is important to note that the No-action letters are issued with conditions that the FBOT must fulfill. These conditions include, among others,

[6] Equity options, money market options, single stock futures, and futures on exchange-traded funds which are also traded on Eurex, are not available for trading from U.S. terminals.

appointment by the FBOT of a U.S. agent for receipt of Commission communications, assent by the FBOT's members operating under a No-action letter to the jurisdiction of the Commission and appointment of a U.S. agent to receive legal process, a number of requirements relating to maintenance and accessibility of original books and records and required reporting by the FBOT to the Commission of specified information both on a periodic and special request basis.[7] FBOTs must also keep the Commission informed of any material changes to their operations and the home country regulations under which they operate and must stand ready to demonstrate compliance with the conditions of the No-action relief. Finally, the FBOT must notify the Commission ten days prior to listing new contracts for trading from its U.S. terminals and must request supplemental relief with respect to contracts subject to section 2(a)(1)(B) of the Commodity Exchange Act.[8] It is also important to note that notwithstanding the placement of foreign trading terminals in the U.S., all intermediation services offered to U.S. persons must be by U.S.-registered futures commission merchants ("FCMs") or entities recognized under Commission rule 30.10 as comparably regulated.

As noted above, the practice of conducting a pre-admission due diligence review to determine the bona fides of the foreign market and whether it is subject to comparable home country regulatory oversight prior to permitting placement of foreign trading terminals in a jurisdiction is a commonly followed practice. For example, paragraph 37i of the German Securities Trading Act governs the placement of foreign trading terminals in Germany. Under this provision, any non-E.U. foreign exchange, including of course U.S. exchanges, who wish to place their trading terminals in Germany are required to receive BaFin's written authorization to do so. To obtain such authorization, the requesting exchange must submit an application that includes the name and address of exchange management; information relating to the trustworthiness and fitness of management; a business plan that shows the entity's organizational structure, internal control mechanisms and the type of planned market access; information on the home country authorities that will monitor trading and their surveillance authority; information on the products to be listed; and the name and address of trading participants domiciled in Germany with direct access to the foreign trading platform. In addition, there must be an information-sharing agreement in place between the home country and BaFin. Like the CFTC's No-action letters, under paragraph 37i of the German Securities Trading Act, intermediaries must be authorized to use the direct access facilities and the authorization may be granted subject to conditions. At least two U.S. exchanges, the Chicago Board of Trade and U.S. Futures Exchange, L.L.C., have applied to, and have been authorized by, BaFin to place trading terminals in Germany.

The policies established by the CFTC staff No-action letters have been so widely accepted because international comity and deference to home country regulation are critical to the ability of both U.S. and foreign markets to operate global electronic trading systems. The No-action letters implement a workable system for all major markets—adherence to minimum international standards, such as those of IOSCO standards relating to screen-based trading, and deference to home country regulation. This model has increased exchange and intermediary efficiencies and lowered costs for U.S. and foreign market participants. It has also benefited U.S. investors and consumers by easing access to foreign markets and foreign risk management tools, a benefit that is particularly important to pension funds and others who over the years have lowered their risk by diversifying their portfolios to include non-U.S. interest rate and equity instruments.

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[7] See e.g. http://www.cftc.gov/tm/letters/tmeurex_no-action.htm at 14.
[8] See 71 Fed. Reg. 21003 (April 24, 2006).

The general acceptance of the model established by the No-action letters has been accompanied, with the active encouragement and participation of the Commission, by an increased level of consultation and cooperation between and among national regulators. As Chairman Jeffery noted during the Commission's public hearing on these issues,

> from my personal and professional perspectives, that the CFTC and the FSA have enjoyed a long-standing, close and very constructive working relationship that works both on a formal and an informal basis. . . . And I ditto those comments for any number of other regulatory authorities around the world with whom we have the opportunity, and we have increasing opportunities as the nature of the business has evolved, to interact in the normal course of our business.[9]

Tr. at p. 36. Significantly, there have been no identified regulatory problems over the past ten years as a result of the No-action letters or their underlying policies.

In addition to the success of the policies that underlie the No-action letters, the process of applying for no-action relief has worked well. The individual determination to issue a No-action letter is well-suited to the due diligence inquiry that Commission staff undertakes of each requesting exchange.[10]

In light of the clear benefits that the current structure provides[11] and the absence of any identified regulatory problem resulting from the current procedures and policies, Eurex urges the Commission to refrain from disturbing the current No-action letters or the current process for seeking such relief. The No-action letters are long-standing, well-accepted and well-understood. The oldest has been in effect for ten years. Even the simple goal of codifying existing procedures and standards for placing foreign terminals in the U.S. poses a substantial danger of creating adverse, unintended consequences. The process of proposing and adopting a new rule that addresses placement of trading terminals in the U.S. by FBOTs may raise issues relating to legal certainty. For example, most exchanges, both domestic and foreign, list contracts that expire years in the future. Some contracts listed for trading on Eurex have expirations ten years in the future. The Commission should not take any steps that would upset the now well-settled understanding regarding the trading of such contracts from the U.S., particularly, when any issues that have been identified can be addressed under the existing procedures.

To the extent that the Commission determines that the process by which FBOTs request staff no-action relief should be more formalized, the Commission could consider promulgating an interpretative rule that sets forth the information that must be included in such a request for relief and considered by the staff. The Commission has, in this manner, formalized the no-action procedure administered by the Office of the General Counsel in granting permission to FBOTs to offer and sell to persons located in the U.S. futures contracts on non-narrow-based security indices. *See* 17 C.F.R. Part 30, Appendix D. Such an interpretative rule would elevate the

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[9] In this regard, Eurex fully supports and commends the Commission's initiative undertaken cooperatively with The Committee of European Securities Regulators on a common work program to facilitate trans-Atlantic derivatives business.

[10] During the Commission's public hearing, many of the panelists voiced their support of the current no-action procedures based on its inherent flexibility. That flexibility permits the CFTC to keep pace with fast-changing market developments and to enable the Commission, in appropriate circumstances, to include additional conditions upon the grant of the no-action relief. See e.g., Tr. at pp. 61, 165, 174, 176.

[11] Many of the panelists during the hearing noted that the CFTC's current policies had brought about significant benefits for market participants both within and outside the U.S. See e.g.Tr. at pp. 49, 61, 64-65, 66, 91 and 179.

formality of the process for requesting no-action relief, provide Commission guidance to the staff and to the public on the required information to be submitted, and yet maintain the flexibility inherent in the process which has made it so successful.[12]

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Based upon this overview, Eurex is pleased to offer the following specific comments in response to the issues posed by the Commission in its request for comment.

Is there a point at which an FBOT permitting direct U.S. access could have a level of contacts with the U.S. that should make it subject to Section 4(a) and the requirement to register as a U.S. exchange? If so, what factors should be considered in making such a determination?

As discussed above, the key principle explaining the success of the current policy with respect to placement of foreign terminals and their widespread international shared acceptance is the avoidance of multiple national regulators. Because electronic trading systems (including those of U.S. contract markets) do business in many jurisdictions, deference to a home country regulator is necessary for legal certainty, avoidance of confusion, avoidance of regulatory conflict and for the continuity of expert regulatory oversight. Without such deference to a home-country regulator, an exchange will be subject to conflicting regulatory mandates. When more than one regulatory framework applies, such conflicts are inevitable. Even comparable regulatory schemes that are highly similar in approach will nevertheless differ in particular details and nuances. These differences, although they may be minor, will lead to conflicting mandates and requirements. Under such a regime, exchanges that operate globally, including U.S. exchanges, could very well become subject to a web of multiple regulatory frameworks, all comparable but differing in their detail. This would defeat the basis of the success of the Commission's current policies.

The relevant time for determining whether an exchange is a *bona fide* foreign board of trade is when it initially seeks to place its terminals in the U.S. That determination should be made based on objective criteria. In determining whether an exchange is a bona fide FBOT, the primary criterion should be the jurisdiction of the exchange's legal organization and the acceptance by the regulatory authority of that jurisdiction of its oversight responsibility for the exchange. Secondary criteria that may also be weighed and balanced in their totality in determining whether an exchange is a FBOT include where the exchange is headquartered, where its management and board are located, where the bulk of its employees are located, where its self-regulatory functions are centered, and where it pays taxes.[13] Generally, an exchange's status as a FBOT would not be expected to change unless it decides to legally re-organize in the U.S.[14]

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[12] If the Commission nonetheless determines to propose a codification of its existing procedures, it should address the legal certainty issue by making it clear that the FBOTs that have already been issued No-action letters will be grandfathered under any proposed rule. This would reassure the markets and foreign regulators that the fundamental policies that underlie the No-action letters are not intended to be disturbed by a codification. Finally, grandfathering the sixteen markets that have already been thoroughly reviewed by the staff prior to their having received No-action letters would be a sensible response to the likelihood of disruption and the waste of resources that would occur if the Commission sought to reproduce during a transition period the due diligence reviews that the staff has already conducted over a number of years. By way of analogy, Congress grandfathered all existing Derivative Clearing Organizations when in 2000 it imposed a registration requirement. See section 5b(d) of the Commodity Exchange Act.

[13] Kathleen Cronin, General Counsel of the Chicago Mercantile Exchange said during the public hearing that the CFTC should "look at where the decision-making authority resides, where its employees are located, and where its headquarters are. To expand the inquiry to look at something more broad like contacts with the jurisdiction takes you down a very

Should volume from the U.S. be a criterion?

Volume is neither a relevant nor a practical criterion for determining whether a market is a FBOT or a U.S. exchange. The Commission's regulatory interest of ensuring the integrity of markets within its jurisdiction, the protection of customers from fraud and abuse and the avoidance of systemic risk,[15] does not vary based upon the volume of use of a FBOT's terminals operating from the U.S. These regulatory interests are addressed by the Commission's pre-admission due diligence review of the FBOT, the comparability of the home regulatory framework to which it is subject, the Commission's on-going cooperation with the home country regulator to resolve issues that may arise, and the application of U.S. regulation relating to the relationship between U.S. customers and their intermediaries using such trading terminals.[16] These regulatory interests are addressed by the Commission when the decision has been made to permit the placement of a FBOT's terminals in the U.S., irrespective of the level of volume which may originate from those terminals.

Moreover, volume is not a practical criterion for determining the status of a market as a FBOT. The intuitive appeal of volume being a readily quantifiable metric is deceptive. Exchange-trading of derivatives is international in scope and market intermediaries are global in their operations. Intermediaries may "pass the book" of orders depending on the time of day or their internal systems. Intermediaries may choose to route all orders to a particular market from a particular location without regard to the nationality of the customer. For example, an FCM may route all orders for Eurex to its London office. Conversely, another intermediary might route Eurex orders from all of its customers worldwide through its New York office. In light of these systems that have been developed by intermediaries in an effort to achieve greater efficiencies in order routing and execution, the changes necessary to accurately capture U.S. customer volumes, even if possible to implement, would be unduly burdensome and costly.[17]

More fundamentally, if volume were to be the only criterion defining what constitutes a U.S. market, then events taking place outside of the U.S. might determine which markets are defined as U.S. exchanges. For example, if an exchange that is headquartered in Chicago lists a contract that trades 100,000 contracts the first year from its non-U.S. terminals, is that market no longer a U.S. market? Conversely, if a FBOT trades 100,000 contracts the first year from U.S. based terminals and no contracts from its non-U.S. terminals, but the following year trades 100,000 contracts from its U.S. terminals and 300,000 from its non-U.S. terminals, does it status as a FBOT change?

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dangerous path. . . . I believe if you focus on the true location of an exchange, the exchange's infrastructure leads you to a single primary regulator." Tr. at p. 36.

[14] Changes that would affect the authority of the home country regulator identified in the No-action letter would constitute a material change of circumstance that would require notification of the Commission.

[15] See section 3 of the Commodity Exchange Act.

[16] The staff No-action letters require that trading for customers be carried out by registered FCMs or entities determined under Commission rule 30.10 to be comparably regulated. Commission financial requirements that apply to such entities address in large degree issues of financial risk to customers. These safeguards are designed to be robust at all levels of volume.

[17] In this regard, Mr. Berliand during the public hearing illustrated the complexity of using volume as a criterion by noting that the origin of a particular position could be identified by the nationalities of the investor, the fund vehicle, the investment adviser company, and the adviser, as well as where the account is opened, the office at which the order is received, the location of the order routing technology and the location of the exchange gateway to which the order is routed. Tr. at p. 117.

The use of volume as a criterion for finding that a FBOT has become a U.S. market will lead to an unacceptable level of legal uncertainty. Volume fluctuates from year to year, varying with business cycles and other factors. Using volume as a metric could result in a FBOT being redefined as a U.S. contract market one year and reverting to its former status the next. Futures contracts are listed for trading with expirations far into the future. Moreover, back office systems are built to comply with particular regulatory requirements, such as particular types of reporting requirements. Such inconstancy in regulatory jurisdiction would have an enormously adverse impact on global markets.

Fluctuations in volume may also be related to particular characteristics of a new or existing contract. For example, U.S. volume may rise if a FBOT lists an innovative contract that provides attractive hedging opportunities for U.S. traders. Innovation should not be discouraged by carrying with it the possibility of the application of an additional regulatory framework. Such a result would clearly have an anti-competitive effect. The effect of using volume as a criterion would be to impose an additional layer of regulation on any FBOT that proved to be too popular with U.S. traders, making the market less competitive over-all. The nature of a market as a FBOT or as a U.S. contract market should not vary depending upon how successful it is in attracting customers to its products in a particular region or country. Such a result would discourage FBOTs from offering products that may be particularly appealing to U.S. traders. This would reduce competition and possibly discourage the introduction of new products, processes or systems that could particularly benefit U.S. traders. Section 15 of the Commodity Exchange Act requires the Commission in taking any action "to endeavor to take the least anticompetitive mean of achieving the objectives of the Act . . . ."

Should the nature of an FBOT's contracts be a criterion?

Determining to regulate a market on a contract-by-contract basis is unworkable because, except for product-specific terms and conditions, most rules are general to the market as a whole. Accordingly, finding that only specific contracts traded on a FBOT would be subject to contract market designation would cause confusion and legal uncertainty with respect to the applicability of U.S. regulations to the remaining contracts. Indeed, it is conceivable that under this type of regulatory framework one exchange would be required to adopt two sets of rules and to make effective two procedures for many exchange processes, likely causing conflict between overlapping regulators. Of course, were other regulators to follow suit, the result could be a host of conflicting requirements applicable to the various contracts traded on an exchange.[18]

[18] As Eurex noted during the public hearing, "We as exchanges are all licensed as exchanges, not a per contract [basis] with our home regulators. . . . Regulating an exchange on a per contract basis, in Eurex's case, again we would probably be subject to, I don't know, 17 regulators regulating us because we do have so many contracts that would spur specific interest and specific regulations. It is not a Eurex-specific problem, obviously. A lot of U.S. exchanges have even contracts that are physically delivery in South America or elsewhere. . . If you shift over to a regime where you do it on a per contract basis, then these contracts would probably be regulated elsewhere other than the U.S. as well." Tr. at p. 148-149.

Moreover, such a result does not have a foundation within the Commodity Exchange Act following its amendment in 2000. Prior to the Commodity Futures Modernization Act of 2000 ("CFMA"), boards of trade were required to be designated as contract markets on a commodity by commodity (contract) basis. Although designating individual contracts as U.S. contract markets would have been consistent with the statutory framework as it existed prior to the CFMA, it is no longer. The CFMA modernized the Act in this respect, bringing it into harmony with the framework in other nations which license the exchange, not individual contracts. *See* section 5 of the Commodity Exchange Act. Designating a board of trade as a contract market in individual contracts is contrary to section 5, as amended by the CFMA.

Although it is possible that the Commission may have a higher regulatory interest in certain contracts that are listed for trading on a FBOT than in others, this interest would not be dependent upon the volume tests discussed above, nor would such a heightened interest be created simply by price discovery of the underlying commodity occurring in the U.S. or the underlying product being produced, created or held principally in the U.S. This is overbroad. In a global economy where all economies are linked, many products traded on a FBOT will have an effect on the U.S. domestic economy. For example the Brent oil market has an impact on world oil prices including those in the U.S. even though it is not produced, created or held principally in the U.S.

Moreover, the Commission should recognize that in most instances, having a heightened regulatory interest in a particular contract listed on a FBOT does not displace the role of the home country regulator. The Commission should in the first instance seek to address its regulatory interest in a particular product listed by the FBOT through enhanced cooperative arrangements with the FBOT's home country regulator. This is especially true in light of the many contracts traded by U.S. contract markets that have delivery abroad, that are produced abroad, or that have some other fundamental nexus with a country other than the U.S. The Commission has over the years done a very fine job of overseeing trading on such contracts as the New York Board of Trade world sugar contract, the Chicago Mercantile Exchange's Eurodollar and foreign currency contracts and the formerly traded NYMEX Brent oil contract. The Commission should recognize that comparable foreign regulators have the ability to oversee trading on their home exchanges of contracts that may call for delivery in the U.S. or price a commodity produced in the U.S. [19]

[19] In this regard, the New York Board of Trade in its comment letter to the Commission dated June 26, 2006, warned that, "the international nature of NYBOT's commodity markets makes us particularly susceptible to compensatory actions that foreign regulators may take if the CFTC determines to use measures of 'level of contact with the U.S.' to determine whether a market is a FBOT. The commodities underlying NYBOT's sugar 11, coffee and cocoa contracts are produced overseas and often in countries where the CFTC does not have information-sharing arrangements. . . . . NYBOT plans to make electronic trading available for all of its products and to place terminals for trading sugar, coffee and cocoa in foreign countries, including some where the products are produced, stored and delivered. Considering the importance of the underlying commodities to their economies, these countries will likely take a strong interest in how our markets are regulated by the CFTC and, specifically, how the CFTC treats FBOTS wishing to place terminals in the United States. . . . Therefore, the Commission should carefully consider the possibility of unintended consequences in determining how to proceed." Letter from Audrey R. Hirschfeld to Eileen Donovan, dated June 26, 2006 at p. 2.

If the Commission has a heightened interest in a contract because, for example, it deems the contract to be readily subject to manipulation, affect the national security or have a profound and broad effect on the U.S. economy as a whole, the Commission can certainly take the actions that it perceives to be necessary to address such a situation under the current no-action procedures. This should be the extraordinary exception and should be invoked rarely.

Absent an exemption, an FBOT that becomes subject to Section 4(a) must become designated as a DCM (or registered as a DTEF). What should the regulatory treatment be for FBOTs that become subject to Section 4(a)?

A modern exchange will have distribution in many countries. The Commission should not seek to be a duplicate regulator where an exchange is already regulated under a comparable regulatory framework. This system has worked well both for U.S. exchanges and for foreign exchanges.

At a minimum, the Commission has already recognized that Eurex and the fifteen other FBOTs that have been provided with no-action relief are comparably regulated by their home regulators and the Commission need not add duplicative and additive regulation which may expose these markets to possibly contradictory regulatory mandates. U.S. customers are fully protected by the requirement they trade though an FCM or through entities found under Commission rule 30.10 to be comparably regulated.

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The Commission has raised a number of important issues for consideration. It should not lose sight, however, that it has played a crucial role in the development of the current international system of qualifying non-resident exchanges to place their trading terminals in foreign jurisdictions through a pre-admission review of the exchange and of the comparability of the regulatory structure under which it operates, deference to the home country regulator, the application of the host country's regulation with respect to the intermediary relationship and the requirement that information and cooperation arrangements between the regulators be in place. Nor should the Commission lose sight of the success of the current model which it pioneered, its general acceptance by foreign regulators in considering access requests by U.S. exchanges, and the consequent benefits that have arisen under the current no-action policies and procedures. The current system works well and has been emulated by other regulators. If the Commission retreats from its well-accepted approach, other regulators are likely to follow, leading to a general break-down of the current system for granting cross-border access. This would have a profoundly negative impact on exchanges, market users and consumers in the U.S. and world wide.

For these reasons, Eurex urges the Commission to restate its commitment to the application of the current no-action policy and procedures relating to the placement of trading terminals in the U.S. by foreign boards of trade. Such a position in our view is very much in the public interest.

Respectfully submitted,

Peter Reitz
General Manager
Eurex Deutschland

Cc: Chairman Reuben Jeffery III
Commissioner Walter L. Lukken
Commissioner Michael Dunn
Commissioner Fred Hatfield

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