

From: Stephen Humenik <stephen.humenik@erisfutures.com>
Sent: Friday, January 28, 2011 2:27 PM
To: dcodcmsefGovernance <dcodcmsefGovernance@CFTC.gov>; DCOGovernance <DCOGovernance@CFTC.gov>
Subject: RIN 3038-AD01 - Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest
Attach: RIN 3038-AD01 2011-01-28 Comment Letter from Eris Exchange re Governance Ownership Control.pdf

Please see attached comment letter from Eris Exchange, LLC related to the following proposed rule:

Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest

Sincerely,
Stephen Humenik

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January 28, 2011

VIA ELECTRONIC MAIL

David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

Re: RIN 3038–AD01 - Proposed Limits on Ownership or Voting Power of Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding Conflicts of Interest

Dear Mr. Stawick:

Eris Exchange, LLC (“Eris Exchange”) appreciates the opportunity to supplement its previous comments regarding the application of ownership and control restrictions to DCMs and SEFs.¹ In particular, Eris Exchange is submitting this letter in response to the Department of Justice’s (“DOJ’s”) recommendation that the Commodity Futures Trading Commission (“Commission”) impose an aggregate cap on ownership of DCMs and SEFs by Enumerated Entities,² as well as limiting ownership and control by individual DCM and SEF members as the Commission proposed.³

As discussed more fully below, Eris Exchange believes that an aggregate cap on ownership by Enumerated Entities would be contrary to the Commission’s efforts to encourage new liquidity providers to participate in the swaps market. Because the definition of Enumerated Entity includes *all* swap dealers, regardless of such dealers’ size, an aggregate cap on ownership of DCMs or SEFs by Enumerated Entities would preclude the creation of new trading venues by even a large number of users of those platforms. Further, any increase over the proposed thirty-five percent public director board composition requirement for DCMs or SEFs would also serve to preclude the creation of new trading venues.

¹ Letter from Neal Brady, Chief Executive Officer, Eris Exchange, LLC to David Stawick, Secretary, Commodity Futures Trading Commission (September 29, 2010).

² Enumerated Entities are defined as: (1) a bank holding company with total consolidated assets of \$50 billion or more; (2) a nonbank financial company supervised by the Board of Governors of the Federal Reserve System; (3) an affiliate of such bank holding company or nonbank financial company; (4) a swap dealer; (5) a major swap participant; and (6) an associated person of a swap dealer or major swap participant. See 75 Fed. Reg. 63732-01, 63750 (October 18, 2010) (proposing § 39.25(b)(1)(ii)).

³ Letter from United States Department of Justice to David Stawick, Secretary, Commodity Futures Trading Commission (December 28, 2010).

I. Introduction

Eris Exchange is an Exempt Board of Trade subject to the jurisdiction of the Commission. Eris Exchange is an open platform that currently offers the trading of an interest rate swap futures contract that replicates the economics of a standard over-the-counter (“OTC”) interest rate swap (the “Eris Futures Contract”). The Eris Futures Contract is cleared by CME Clearing.

Eris Exchange was founded by five major independent liquidity providers: Chicago Trading Company; DRW Trading; GETCO; Infinium Capital Management; and, Nico Trading (the “Founders”). The Founders are principal trading firms that trade across a wide range of asset classes and have significant experience in the equity and futures markets. Eris Exchange plans to apply for registration as a designated contract market (“DCM”), which would allow Eris Exchange to trade futures and swaps.

The Founders created Eris Exchange to increase access to traditional over-the-counter (“OTC”) markets that are migrating to centrally-cleared trading venues as a result of recent US financial regulatory reform. The market for trading OTC interest rate swaps has historically included high barriers to entry that effectively prevented the emergence of independent liquidity providers, such as the Founders. Recognizing the need for additional participants in the interest rate swaps market and the value those participants could add to price discovery and liquidity, the Founders created an open venue for all market participants to trade the Eris Futures Contract.

II. Discussion

The Commission proposed a 20% limit on the voting equity or voting power than any single member of a DCM or SEF may own or control. This 20% limit is consistent with limits on ownership of securities exchanges. The Commission did not propose aggregate caps on ownership of DCMs or SEFs by any group of entities, such as Enumerated Entities. In addition, the Commission proposed that the boards of DCMs and SEFs be composed of thirty-five percent public directors, among other composition requirements.

In response to this proposal, DOJ provided its views. In particular, DOJ expresses concern that the Commission’s rule does not include aggregate ownership caps on DCMs and SEFs.⁴ DOJ believes that

⁴ Indeed, the Commission stated in the proposal:

The Commission, however, does not propose imposing a limitation on the voting equity that the enumerated entities may own in the aggregate. As mentioned above, the Dodd-Frank Act specifically attempts to encourage sustained competition between multiple DCMs and SEFs over listing the same swap contract. Based on comments from Roundtable participants, the enumerated entities would be the most likely source of funding for a new DCM or SEF. In this instance, **the Commission believes that the benefits of sustained competition between new DCMs and SEFs outweigh the incremental benefit of better governance through limitations on the aggregate influence of the enumerated entities.**

75 Fed Reg. 63732-01, 63745 (October 18, 2010) (emphasis added).

Based on the highlighted statements above, it would appear that the Commission would have to publish a supplemental proposed rule for comment, if it desired to impose aggregate caps on the voting equity of Enumerated Entities. See 5 U.S.C. § 553 (2010) (the Administrative Procedures Act).

the absence of aggregate ownership caps does not sufficiently protect and promote competition in the industry because it preserves the opportunity for major derivatives dealers to achieve majority ownership of DCMs and SEFs. Thus, DOJ recommends that the Commission impose aggregate caps on ownership by Enumerated Entities.

DOJ's recommendation that the Commission impose aggregate ownership caps on DCMs and SEFs is premised on the concern that major derivative dealers would control swaps trading platforms. Eris Exchange shares the DOJ's concern, but believes that by imposing an aggregate ownership cap on a broadly defined group of Enumerated Entities would be counterproductive. The definition of Enumerated Entity encompasses more than just the major derivatives dealers. It also includes all swaps dealers, which under the Dodd-Frank Act include *any person* who holds itself out as a dealer in swaps, makes a market in swaps or regularly enters into swaps with counterparties as an ordinary course of business for its own account.⁵ Thus, liquidity providers, such as the Founders, would likely be swap dealers if they provide liquidity in the swaps market. For this reason, Eris Exchange does not agree with the DOJ's view that the Enumerated Entities as a group likely share very similar incentives to limit access and to otherwise insulate themselves from competition.

Eris Exchange agrees with DOJ's statement that "[p]rotecting competition in [the over-the-counter derivatives] sector is crucially important both for consumers and for the nation's economic health." However, Eris Exchange does not agree that limiting Enumerated Entities from owning in the aggregate more than 40% of a DCM or SEF would protect competition. In fact, because Enumerated Entities include *all* swap dealers, it would preclude new liquidity providers in the swaps market – who would be swap dealers – from establishing new trading venues.

As the CFTC recognizes, Enumerated Entities are the most likely source of funding for new DCMs and SEFs and the CFTC indicated that "the benefits of sustained competition between new DCMs and SEFs outweigh the incremental benefit of better governance through limitations on the aggregate influence of the enumerated entities."⁶ Eris Exchange agrees with this analysis by the Commission and views itself as an example of the type of new exchange that can provide competition. For this reason, Eris Exchange believes that aggregate caps on ownership on DCMs and SEFs by a broadly defined category of Enumerated Entities would reduce the likelihood that new swaps trading venues with a broad group of liquidity providers would be established.

DOJ also expressed the view that DCM and SEF "boards of directors and all committees have a majority of independent directors," which "would reduce the risk that DCMs/SEFs will erect anticompetitive access barriers to competitors or otherwise limit competition in this sector." Eris Exchange supports the view that the board of a DCM or SEF should include public directors. However, Eris Exchange believes

⁵ The Commission has proposed a de minimis exception to the definition of swap dealer, which would exclude persons that meets four enumerated conditions. 75 FR 80174, 80212 (December 21, 2010) (proposing § 1.3(ppp)(4)). This proposed exception would not significantly narrow the group of dealers that would be swap dealers and thus Enumerated Entities.

⁶ 75 FR 63732-1, 63745 (Oct. 18, 2010).

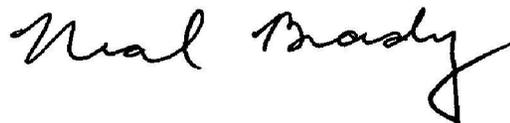
that requiring boards to have a majority of independent directors would actually limit competition. An initial investor in a marketplace that is already highly competitive would want to have some control over the initial direction of the exchange to preserve its investment. In combination with the other aspects of the Commission's proposal, the thirty-five percent public director requirement would temper any undue influence of the directors. The proposed voting equity and board composition requirements, combined with open access to trading and clearing, provide a foundation for competition.

III. Conclusion

Eris Exchange is fully operational today for trading and clearing of interest rate swap futures, thus incorporating the guiding principles of the Dodd-Frank Act. Eris Exchange is committed to complying with the principles of the Dodd-Frank Act, but seeks implementation in a manner that fosters competition and open access to the markets.

If you have any questions or would like to learn more about Eris Exchange, please do not hesitate to contact Stephen Humenik, General Counsel and Chief Regulatory Officer at 312-626-2681 or stephen.humenik@erisfutures.com or Neal Brady at 312-253-9056 or neal.brady@erisfutures.com.

Sincerely,



Neal Brady
Chief Executive Officer
Eris Exchange, LLC

cc: Chairman Gary Gensler
Commissioner Michael V. Dunn
Commissioner Jill E. Sommers
Commissioner Bart Chilton
Commissioner Scott D. O'Malia