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VIA EMAIL AND FEDERAL EXPRESS

November 16, 2010

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street NW
Washington DC 20581

Re: RIN 3038 AD01, "Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest"

Dear Mr. Stawick:

On behalf of NYSE Liffe US, LLC ("NYSE Liffe US"), a Commodity Futures Trading Commission ("Commission") regulated Designated Contract Market ("DCM"), I write with respect to the above-referenced Notice of Proposed Rulemaking.[1] NYSE Liffe US supports the overarching objectives contained in the Dodd-Frank legislation to increase transparency and reduce systemic risk by facilitating the migration of OTC derivatives to central counterparties and increasing execution on transparent DCMs and swap execution facilities (SEFs). NYSE Liffe US believes that different groups of market participants should be included in the dialogue and development so as to align interests and promote mutual benefit from achieving these objectives. Being inclusive of the views of different constituent groups is also the most effective way to deliver greater innovation, competition and efficiency. This philosophy was demonstrated by NYSE Euronext in early 2010 through the sale of a significant minority stake in NYSE Liffe US to a balanced, diverse group of both buy-side and dealer/futures commission merchant (FCM) external investors.

We acknowledge that potential conflicts of interest on the boards of DCMs, SEFs and derivatives clearing organizations (DCOs) raise important issues and we commend the Commission and the Securities and Exchange Commission (SEC) for addressing these concerns early on in the rulemaking process. However, we strongly feel that potential conflicts of interest are most effectively addressed through the implementation and enforcement of rules and strong governance structures, rather than through arbitrary ownership limitations.

The final language of the Dodd-Frank legislation removed the specific requirements contained in earlier proposed legislation to impose hard numerical limits on the ownership of DCMs, DCOs

[1] *Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest,* 75 Fed. Reg. 63732 (CFTC Oct. 18, 2010).

and SEFs, thereby allowing for consideration of more effective structures to address potential conflicts of interest. NYSE Liffe US believes that the imposition of any hard numerical limits on the ownership of DCMs, DCOs or SEFs would stifle competition and not consistently and effectively mitigate the conflicts of interest on the boards of such entities that the Commission is seeking to address. The creation or operation of a DCM, DCO or a SEF, particularly under the new requirements prescribed by the Dodd-Frank legislation, requires a significant amount of capital. For example, under the statute, DCMs, DCOs, and SEFs would each be required to have a year's worth of working capital calculated on a rolling basis. As such, access to capital from external investors is essential to the creation of new DCMs, DCOs and SEFs and, therefore, to the promotion of competition in this industry. Additionally, the utilization of ownership restrictions as a means to curtail influence on decision making assumes that governance rights and equity ownership are always equal (*i.e.*, that more ownership means more decision making influence). In practice, this is not always the case, which makes ownership limitations an imprecise mechanism to enforce good governance.

There are many structural options, other than hard numerical ownership limitations, that can achieve the Dodd-Frank goal of mitigating potential conflicts of interest in the governance of DCMs, DCOs and SEFs, while still allowing such entities the flexibility to achieve their optimal governance structure based on their particular circumstances. One approach could be the allocation of board seats/votes in a way that is not tied directly to ownership levels. Market participant shareholders could each hold one seat on the board regardless of their equity stake in the DCM, DCO or SEF, thereby promoting equality across constituents, giving each an equal voice. Alternatively, market participant shareholders could share one or several board seats on a rotating basis, thereby limiting the long-term influence of any one participant. Another approach could be the stratification of voting thresholds for certain key decisions (*e.g.*, specifying that certain matters require the approval of both the overall board including a set percentage of the public directors). Each of these alternative approaches would ensure that the views of a variety of constituents are taken into account during key deliberations and decision making at the board level, without the negative impacts that a one-size-fits-all approach via ownership limitations would have on competition and the ability of new entrants to enter the market, as described above.

Given the vital role of public directors to the decision making process and strategic direction of DCMs, DCOs and SEFs today and in the future, we believe that it is crucial that candidates for these roles have subject matter expertise. NYSE Liffe US is fortunate to have public directors from a variety of backgrounds, including former exchange executives, former FCM management, former regulators and individuals with buy-side expertise. That said, these types of

individuals tend to be rare and in high demand. Without subject matter expertise in these roles, certain technical subtleties affecting the operation of a business may be missed and, as a result, present challenges to the adoption of critical business policies. Therefore, in light of the scarcity of public director candidates with sufficient expertise, we recommend that the final rules explicitly allow for weighted voting arrangements for public directors, particularly in the case of new entrants for which obtaining a sufficient number of qualified public directors may present unique resource challenges, so long as the total number of public directors of the entity satisfies the minimum two public director requirement included in the rule proposal.

NYSE Liffe US is also concerned that the bright-line test included in the "public director" definition of the rule proposal is an imprecise tool for boards of registered entities in assessing the independence of a prospective public director, and could have the adverse consequence of unnecessarily reducing the already limited pool of qualified applicants described above. For example, prong (iv) of the bright-line test would prohibit a director from serving as a public director if the director's employer receives more than $100,000 in combined annual payments for legal, accounting or consulting services from the registered entity and its affiliates, *as well as any member of the registered entity or any affiliate of such member*, irrespective of whether such services were rendered by the director him or herself or by persons under the director's supervision or within the director's business unit, *i.e.*, in circumstances where the provision of such services could potentially impair the independent judgment of the director. Rather than employing a bright-line test, NYSE Liffe US would recommend that the Commission instead adopt an overarching materiality standard consistent with its 2009 guidance regarding current DCM Core Principle 15 (Conflicts of Interest). To the extent that the Commission determines that additional safeguards are necessary "in light of current concerns regarding further protecting regulatory functions from directors that are conflicted due to industry ties,"[2] the Commission could issue general guidance regarding factors to consider in determining which relationships with a registered entity's member could potentially be considered "material" for purposes of determining a prospective public director's independence, depending on the particular circumstances under consideration. For instance, relevant considerations could be:

- Does the payment relate to services personally performed by the public director, by staff reporting to the public director or by staff in the public director's business unit or profit center?

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[2] 75 Fed. Reg. at 63742.

- Is the payment made directly to the public director, and if so, is it material to the director's annual income?
- If the payment is made to the director's employing firm, is it material to the firm as a whole, or to the business unit or profit center to which the public director belongs?

Such an approach would also further the Commission's stated intent of allowing for greater harmonization with the SEC[3], as it would be consistent with the approach taken by the SEC in its rule proposal regarding ownership limitations and governance requirements for security-based swap clearing agencies, security-based SEFs and national securities exchanges.[4]

Moreover, although the release justifies the proposed requirements relating to Nominating Committees of DCMs, DCOs, and SEFs as "protect[ing] the integrity of the process by which the DCO, DCM or SEF selects public directors"[5], the proposed rule language would appear to place the nomination of all directors of a DCM, DCO or SEF, both public and non-public directors, in the hands of a Nominating Committee. This requirement seems beyond the Commission's stated rationale for mandating Nominating Committees and unnecessarily cumbersome, so long as there are minimum standards for non-public directors such as those that exist in current DCM Core Principle 14 (Governance Fitness Standards).

In addition to detailed measures that can be applied at a board level, NYSE Liffe US believes that subjecting DCMs, DCOs and SEFs to a consistent set of acceptable practices would mitigate conflicts of interest. Setting forth a common set of requirements that address sources of potential conflicts, such as objective and transparent membership standards, access requirements, disciplinary standards and risk management protocols would help prevent conflicts from interfering with the achievement of regulatory objectives. In particular, the release requests comment on whether SEFs should be required to have a Regulatory Oversight Committee (ROC) given that the Dodd-Frank legislation requires SEFs to have a Chief Compliance Officer (CCO).

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[3] *See* 75 Fed. Reg. at 63742.

[4] *See* Proposed 17 CFR § 242.700(j)(2)(iii) ("A director is not an independent director if any of the following circumstances exists: . . . [t]he director, or an immediate family member, has received during any *twelve* month period within the past three years payments that *reasonably could affect* the independent judgment or decision-making of the director . . . .") (emphasis added) at 75 Fed. Reg. 65928.

[5] 75 Fed. *Reg*. at 63739.

As SEFs may compete directly with DCMs, we believe this is one of many examples where the Commission should be wary of creating differing standards. A SEF's CCO, who under the Dodd-Frank legislation reports to the entire board or to the senior SEF officer, does not have the same organizational insulation to pursue the public interest as a DCM's ROC enjoys.

NYSE Liffe US appreciates the opportunity to provide comments on the proposed rulemaking and applauds the Commission and SEC for bringing potential conflicts of interest concerns to the forefront early on in the Dodd Frank rulemaking process. We continue to support the objectives set forth in the Dodd Frank legislation and look forward towards working in partnership with the industry to enact these objectives in the coming months.

Respectfully submitted,

Janeth L McKinness

cc: Chairman Gary Gensler
Commissioner Michael Dunn
Commissioner Bart Chilton
Commissioner Scott O'Malia
Commissioner Jill E. Sommers
Ananda Radhakrishnan
Nancy Schnabel