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Mr. David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

November 11, 2010

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

Dear Mr. Stawick:

Eurex Clearing AG ("Eurex Clearing"), the leading futures and options clearing organization in Europe, welcomes this opportunity to comment on the Commodity Futures Trading Commission's ("CFTC" or "Commission") proposed regulations to mitigate the potential for conflicts of interest at derivatives clearing organizations ("DCOs"), designated contract markets ("DCMs") and swap execution facilities ("SEFs").¹ The comments provided in this letter will be limited to the effects of the proposed rules on DCOs. Eurex Clearing is fully owned by Eurex Frankfurt AG ("Eurex Frankfurt"), which in turn is fully owned by Eurex Zürich AG ("Eurex Zürich"). Eurex Zürich is fully owned in equal shares by Deutsche Börse AG ("Deutsche Börse"), a publicly traded company listed on the Frankfurt Stock Exchange, and SIX Swiss Exchange, a part of the SIX Group.

Background information on Eurex Frankfurt and Eurex Clearing

Eurex Clearing clears, among other things, futures and options contracts traded on Eurex Deutschland ("Eurex") and identical contracts that are traded OTC, as well as otherwise unlisted credit default swaps contracts.² Last year – 2009, which was not a record year for volume at Eurex, Eurex Clearing cleared 1,687,487,486 futures and options contracts listed on Eurex, including contracts on interest rates, equity indexes, equities, equity-related indexes, commodities, and events.³

¹ *Requirements for Derivatives Clearing Organizations, Designated Contract Markets and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, Notice of Proposed Rulemaking; 75 FR 63732, October 18, 2010, (the "Notice").*

² Eurex Clearing also acts as the central counterparty for and guarantees transactions on Eurex Bonds (a cash market for bonds), Eurex Repo (repurchase agreements), for equities on the Frankfurt Stock Exchange and the Irish Stock Exchange and for certain contracts executed on the European Energy Exchange.

³ Equity-related indexes include stock index volatility measures and stock dividend products.



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Eurex Clearing is incorporated under the laws of Germany. Accordingly, Eurex Clearing is governed by two boards of directors, its Supervisory Board and an Executive Board, the latter of which must vote on matters that require implementation at Eurex Clearing.

Under the Articles of Association of Eurex Clearing, its Supervisory Board has 12 members, elected for three-year terms by the shareholders. The most important functions and duties of the Supervisory Board are to supervise the work of the Executive Board, approve corporate decisions with a substantial financial or economic impact, approve company planning, appoint the Executive Board and decide on the remuneration of the Executive Board. A shareholders' meeting must be held at least once a year where the shareholders approve the annual financial statements and the work of the Executive and Supervisory Boards during the financial year. At this meeting, the shareholders also appoint the auditor of the company as well as the Supervisory Board members and decide on their remuneration. Transactions which have an impact on shareholders' rights, e.g. any dilution of their shareholding or amendments to the Articles of Association, also must usually be approved at the shareholders' meeting.


Eurex Clearing's Executive Board is responsible for day-to-day management and operations of Eurex Clearing pursuant to sections 76 through 78 of the German Stock Corporation Act, the *Aktiengesetz* ("AktG"). These sections of the AktG stipulate that Eurex Clearing be managed by the Executive Board at its sole discretion except with regard to transactions which need the approval of the Supervisory Board according to the Articles of Association or the Executive Board's rules of procedure.

Looking upstream through the ownership structure, Eurex Clearing has two owners, both of which are widely held. Deutsche Börse is listed on the Frankfurt Stock Exchange. As a stock company with publicly issued and widely held shares, Deutsche Börse complies with the governance rules required of publicly traded companies in Germany. SIX Swiss Exchange is part of the SIX Group which, except for a 1.5% government holding, is owned by 150 Swiss and non-Swiss banks. Ownership shares are not freely transferable.

Eurex Clearing is licensed as a central counterparty by the Bundesanstalt für Finanzdienstleistungsaufsicht ("BaFin"). Its license was granted on December 12, 2006. On July 31, 2009, the CFTC recognized Eurex Clearing as a multilateral clearing organization. Eurex Clearing received an exemption from the Securities and Exchange Commission on July 29, 2009 to admit certain US persons for the purpose of clearing credit default swaps. Eurex Clearing adheres to the internationally recognized standards of CPSS IOSCO.

Comments on the Commission's Proposed Rulemaking

The provisions to expand the use of central counterparty clearing in the United States form the centerpiece of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Title VII will require a large swath of the off-exchange derivatives markets to be cleared by DCOs. Accordingly, the Act instructs the CFTC to adopt measures to assure that conflicts of interest do not have the effect of limiting the availability of cleared instruments or hindering access to clearing services. The Commission's Notice of proposed rulemaking addresses the potential for conflicts of interest to affect decision making in a derivatives clearing organization with regard to the instruments that are cleared, the criteria for direct clearing participation and how those criteria



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are applied to individual clearing participants. If adopted, the Commission's proposals will have an appropriately strong impact on DCOs that are structured as mutual organizations dominated by the interests of clearing members.

Ownership and organization

Profit-seeking entities characterized by widely dispersed shareholders and an open ownership structure assure that their management is independent of and neutral to undue influence from any narrow group. Such entities have the incentive to operate efficiently with close attention to risk management issues and are the best antidote to concerns about the effects of conflicts of interest that might arise in more narrowly controlled clearing organizations. Proposed Rule 39.25(b)(4) *Parent Companies* states, in part, "If any parent is publicly listed on a domestic exchange, then such parent must follow the voting requirements promulgated by the Securities and Exchange Commission or the entity on which such parent is listed." Eurex Clearing, whose indirect parent entities comply with the national corporate laws of Germany and Switzerland, supports the CFTC's deference to the voting and governance requirements that apply to publicly traded companies.

Based on its own experience, Eurex Clearing believes that the profit motive is the force which best impels clearing organizations to be innovative and prudent in risk management and to clear as many products as possible for as many participants as are financially and operationally capable to take part in clearing. Profit-seeking clearing organizations want to expand their businesses to the extent that is economically prudent for the benefit of their shareholders. Eurex Clearing's focus on prudent management has driven its innovation in risk management practices and led to the development of sophisticated risk tools for its members. In for-profit clearing organizations like Eurex Clearing, shareholders' interests are naturally aligned with Dodd-Frank's goals. The Commission should focus its attention on measures that will support the development of a robust marketplace for clearing services provided by well-capitalized clearing organizations. Consequently, Eurex Clearing recommends that the Commission avoid specific measures that would apply limits on ownership by classes of members or impairments of their voting rights because such measures might impede the attractiveness of investment into clearing organizations or their parent organizations.

Eurex Clearing believes that a clearing organization should rely on the expertise of its professional management (e.g., the "management board," "management committee," or "executive committee") which has properly designed incentives both to maximize profits and manage risks under the direction of a supervising Board of Directors. Eurex Clearing values the role of independent directors and believes the Board of Directors should include at least one-third independent directors.

Under German law, Eurex Clearing's Executive Board is directly responsible for the decisions about products, membership standards and member access to clearing. This structure has assured that Eurex Clearing could expand the number and types of products it clears apace with expansion of the derivatives industry without incurring undue risks and while continuously improving the soundness of its operations. The Supervisory Board provides guidance but does not direct decision making about products or members.



Earlier this year, in response to a public consultation by the European Commission,⁴ Deutsche Börse Group on behalf of Eurex Clearing and other constituent entities commented on the European Commission's proposed organizational standards for clearing organizations and recommended that its proposal be modified to include the following minimum organizational standards.⁵

- a clear organizational structure;
- adequate policies and procedures;
- a business continuity policy and disaster recovery plan;
- a clear separation between the reporting lines for risk management / clearing operations and those for the other operations activities of the CCP like sales and marketing or investment activities;
- a remuneration policy which is consistent with and promotes sound and effective risk management and which does not create incentives to relax risk standards;
- information technology systems adequate to the complexity, variety and type of services and activities performed;
- the record keeping of all the records on the services and activity provided and all transactions it has processed;
- persons who effectively direct the business of a CCP (Executive Management) should be of sufficiently good repute and experience so as to ensure the sound and prudent management of the CCP.

Eurex Clearing believes that these principles-based standards, if adopted by the CFTC and applied directly to DCOs or upstream to its owners in case the DCO is a subsidiary, would assure that DCOs are properly governed. Furthermore, such a rule would preserve the Commission's authority to oversee ownership and control of the entities it regulates while allowing an appropriate level of flexibility in those entities' legal organizations.

The Commission proposes to grant waivers to certain of the rules concerning ownership and voting rights for reasonable periods of time when the clearing organization demonstrates that compliance with those requirements is not necessary to improve governance, mitigate systemic risk, promote competition, etc. (Proposed Rule 39.25(b)(3)). Eurex Clearing believes that the Commission should preserve the flexibility to grant such waivers and adopt this portion of the proposed rule. Finally, Eurex Clearing endorses the Commission's proposed exemption from the voting rights limits for clearing organizations that are subsidiaries of publicly traded companies and would encourage the Commission similarly to recognize companies traded publicly on non-US exchanges which are regulated substantially equivalent to US exchanges.

Risk management committee

Eurex Clearing believes that both the proposed composition and proposed authority of the risk management committee as set forth in the Notice are too far reaching and, at any rate, may interfere with the role of the Board of Directors in publicly traded companies. Such proposals, if adopted, would interfere with the professional management of critically important areas of a DCO,

⁴ European Commission. *Public Consultation on Derivatives and Market Infrastructure*. June 14, 2010.

⁵ Deutsche Börse Group. Response to European Commission "Public Consultation on Derivatives and Market Infrastructure." July 8, 2010.

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needlessly introducing the potential for conflicts of interest in a professionally operated DCO where otherwise there would be none.

The Commission's proposals are meant to counteract the potential pernicious effects of decision making concentrated in the hands of the enumerated entities. In reaction to this, Proposed Rule 39.13(g)(3)(i) would require minimum representation of the risk management committee by clearing "customers." Eurex Clearing agrees with the Commission when it states in the Notice that, "customers have an incentive to ensure that the membership criteria of a DCO are risk-based." Eurex Clearing believes that final decision making about admissions, admission standards and cleared instruments should be conducted by the professional management of the DCO with the advice and support of the employees. These decisions should be reviewable only by the Board of Directors.

Eurex Clearing recognizes that an appropriately constituted risk management committee can serve an important advisory role. The risk management committee could advise the clearing organization management in material risk-related topics, but the management can decide against the advice of the risk management committee at its own discretion. Risk management committees should be balanced to include approximately equal numbers of clearing members, customers and independent industry experts. Eurex Clearing respectfully suggests that the proposed rules be revised to limit the risk management committee's role to an advisory one, to revise the composition to balance independent, customer and clearing member representation and to require such a risk management committee to report conflicts with the management to the Board of Directors.

Eurex Clearing thanks you for your attention to our concerns. If you have any questions please do not hesitate to contact us or Mr. Vassilis Vergotis, Head of US Offices (312-544-1058; vassilis.vergotis@eurexchange.com).

Yours faithfully,

Thomas Book
Member of the Eurex Executive Board

Matthias Graulich
Executive Director