CFE
CBOE FUTURES EXCHANGE

November 17, 2010

Via Electronic Submission

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

Re: Comment Letter on Proposed Rulemaking Relating to Mitigation of Conflicts of Interest; RIN 3038-AD01, 75 FR 63732 (October 18, 2010)

Dear Mr. Stawick:

CBOE Futures Exchange, LLC ("CFE") appreciates the opportunity to provide its comments to the Commodity Futures Trading Commission ("CFTC") with respect to the CFTC's proposals in the above-referenced release ("Release"). The Release proposes to implement certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") by setting forth proposed requirements ("Proposed Requirements") for derivatives clearing organizations ("DCOs"), designated contract markets ("DCMs"), and swap execution facilities ("SEFs") relating to mitigation of conflicts of interest. Because CFE is a DCM, CFE's comments are focused on the Proposed Requirements as they relate to DCMs.

CFE Agrees with the CFTC that the Same Governance and Ownership Requirements Should Be Applied to Both SEFs and DCMs

CFE strongly supports the CFTC's approach in the Release of applying the same governance and ownership requirements to SEFs as are to be applied to DCMs. As the CFTC notes in the Release, SEFs, like DCMs, are required to fulfill self-regulatory obligations under the Commodity Exchange Act and the Dodd-Frank Act. Therefore, it is important to hold SEFs to the same governance and ownership standards that are applicable to DCMs to ensure that SEFs appropriately prioritize their self-regulatory obligations. Additionally, the Dodd-Frank Act contemplates that both DCMs and SEFs may list swap contracts and thus compete with one another. Accordingly, it is crucial that there be a level playing field between both DCMs and SEFs and that there be no regulatory disparities that would make it more advantageous to list a swap on a SEF as opposed to a DCM. Otherwise, the result will be regulatory arbitrage and the goal of promoting competition between DCMs and SEFs will not be realized. This concept is not only applicable with respect to governance and ownership standards and mitigation of conflicts of interest. The CFTC should also take the same approach in its other rulemakings concerning SEFs and apply the same standards and requirements to both SEFs and DCMs with respect to all aspects of their provision and regulation of a venue for the trading of swap contracts.

Consistent with the foregoing, to the extent that CFE's other comments below with respect to the Proposed Requirements as they relate to DCMs would be applicable to equivalent provisions relating to SEFs and DCOs, CFE would support the same requested change or clarification being made with respect the SEF and DCO provisions.

The Proposed Disqualification for Public Directors Serving on a Regulatory Oversight Committee ("ROC") or Membership Committee Is Unnecessary and Ambiguous and Should Not Be Adopted

The Proposed Requirements include a new proposed requirement for the qualification of public directors that serve on a DCM ROC or Membership Committee. Specifically, proposed Regulation 1.3(zz)(C)(1)(v) provides that an individual that otherwise qualifies as a public director is disqualified from serving on a DCM ROC or Membership Committee if the individual accepts, directly or indirectly, any consulting, advisory, or other compensatory fee from the DCM, any affiliate of the DCM, any member of the DCM, or any affiliate of a member of the DCM, subject to two limited exceptions.

CFE believes that the CFTC should not adopt the proposed requirement set forth in proposed Regulation 1.3(zz)(C)(1)(v) for the following reasons.

First, CFE does not believe that proposed Regulation 1.3(zz)(C)(1)(v) is necessary or justified. The Proposed Requirements contain a similar requirement in proposed Regulation 1.3(zz)(C)(1)(iv) which already addresses the same concerns as those sought to be addressed by proposed Regulation 1.3(zz)(C)(1)(v). Proposed Regulation 1.3(zz)(C)(1)(iv) disqualifies an individual from serving as a DCM public director if the individual, or an entity with which the individual is a partner, officer, employee, or director, receives more than $100,000 in combined annual payments for legal, accounting, or consulting services from the DCM, any affiliate of the DCM, any member of the DCM, or any affiliate of a member of the DCM, subject to the same two types of limited exceptions as under proposed Regulation 1.3(zz)(C)(1)(v). Proposed Regulation 1.3(zz)(C)(1)(iv) applies to all public directors of a DCM and is patterned after a currently existing provision under Subsection (b)(2)(ii)(C) of the acceptable practices recently adopted by the CFTC for the DCM core principle relating to conflicts of interest. The CFTC is also proposing to expand this current provision as set forth in proposed Regulation 1.3(zz)(C)(1)(iv) by applying the provision to payments from DCM members and affiliates of DCM members as well as to payments from the DCM and DCM affiliates whereas the current provision under the acceptable practices only applies to payments from the DCM and DCM affiliates. The Release does not cite to any instances in which the current provision is not adequately addressing the underlying concern it was intended to address nor does the Release provide any justification as to why the current provision as it is currently proposed to be augmented in proposed Regulation 1.3(zz)(C)(1)(iv) is not sufficient to address that concern. In fact, the explanatory section of the Release does not even specifically mention or discuss the new proposed requirement set forth in proposed Regulation 1.3(zz)(C)(1)(v).

Second, CFE believes that proposed Regulation 1.3(zz)(C)(1)(v) is ambiguous and overly broad. In particular, the inclusion of the direct or indirect acceptance of "any . . . other compensatory fee" as a disqualifying event could potentially be read to include just about any type of payment, no matter how immaterial, remote, and unrelated to the public director. The following real life example involving CFE illustrates this point. One of CFE's public directors is Michael Gorham. Mr. Gorham is an Industry Professor and the Director of the IIT Stuart Center for Financial Markets at the Illinois Institute of Technology ("IIT"). He is also a member of the CFTC Technology Advisory Committee and previously served as a Director of the CFTC Division of Market Oversight. In the event that a CFE Trading Privilege Holder ("TPH") were to attend IIT and pay tuition to IIT or some other fee to IIT such as a fee to park the TPH's car in an IIT parking lot, no regulatory purpose would be served by disqualifying an individual like Mr. Gorham from serving on the CFE ROC under some theory that these fees ultimately indirectly contribute toward the payment of his salary. Proposed Regulation 1.3(zz)(C)(1)(iv) is much more

reasonable in its approach by excluding de-minimus payments and focusing upon the types of payments that both proposed Regulation 1.3(zz)(C)(1)(iv) and proposed Regulation 1.3(zz)(C)(1)(v) appear to be targeting (i.e., legal, accounting, consulting, and advisory fees).

Third, proposed Regulation 1.3(C)(1)(v) is not consistent with either (i) the self-regulatory organization governance standards proposed by the Securities and Exchange Commission ("SEC") in 2004 in SEC Release Number 34-50699, 69 FR 71127 (December 8, 2004) or (ii) the SEC's proposed governance and ownership requirements for security-based swap clearing agencies, security-based swap execution facilities, and national securities exchanges that post or make available for trading security-based swaps set forth in SEC Release Number 34-63107, 75 FR 65882 (October 26, 2010). The Release states that some of the modifications that the CFTC is proposing to the definition of public director are intended to bring several aspects of the definition in line with what the SEC proposed in 2004 in order to allow for greater harmonization with the SEC. However, nowhere in either the SEC's 2004 or 2010 proposals did or does the SEC propose to apply the test set forth in proposed Regulation 1.3(C)(1)(v) to public directors that serve on a ROC (or for that matter a Membership Committee, which the SEC did not and does not propose to require). Instead, the SEC proposed and proposes to apply such a test to directors that serve on an Audit Committee. This is a much different context in that public company Audit Committees are already required to comply with a similar requirement by Section 10A(m)(3)(B)(i) of the Securities Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 10A-3(b)(1)(ii)(A). There is no such statutory requirement like this for a DCM ROC or Membership Committee. Additionally, the Audit Committee of CFE's public parent company is already subject to Exchange Act Rule 10A-3(B)(1)(ii)(A) through exchange listing requirements.

Finally, it would also not be sufficient justification for proposed Regulation 1.3(C)(1)(v) that it only applies to a subset of a DCM's public directors and that a DCM may also have public directors that do not satisfy the proposed requirement. CFE is a small DCM with a five-person Board of Directors in which all of its public directors serve on its ROC. Accordingly, for a small DCM like CFE, the practical effect of the proposed requirement is that it would apply to all of CFE's public directors.

For all of these reasons, CFE submits that the CFTC should rely on proposed Regulation 1.3(C)(1)(iv) to address the underlying issue that is sought to be addressed by both proposed Regulation 1.3(C)(1)(iv) and proposed Regulation 1.3(C)(1)(v) and should not adopt proposed Regulation 1.3(C)(1)(v). If despite these reasons the CFTC still intends to proceed to adopt proposed Regulation 1.3(C)(1)(v), the proposed requirement needs at a minimum to further define the types of compensatory fees that are intended to be covered by the proposed requirement like the SEC did in adopting Exchange Act Rule 10A-3(B)(1)(ii)(A). Among other things, Exchange Act Rule 10A-3 includes paragraph (e)(8) which provides that:

> The term *indirect* acceptance by a member of an audit committee of any consulting, advisory or other compensatory fee includes acceptance of such a fee by a spouse, a minor child or stepchild or a child or stepchild sharing a home with the member or by an entity in which such member is a partner, member, an officer such as a managing director occupying a comparable position or executive officer, or occupies a similar position (except limited partners, non-managing members and those occupying similar positions who, in each case, have no active role in providing services to the entity) and which provides accounting, consulting, legal, investment banking or financial advisory services to the issuer or any subsidiary of the issuer.

Additionally, the carve-out in proposed Regulation 1.3(C)(1)(v) for payments received in the

capacity of a committee member or director of the DCM should be extended to payments received as a committee member or director of the DCM's affiliates consistent with proposed Regulation 1.3(C)(3) which provides that a public director of a DCM may also serve as a public director of a DCM affiliate if the individual otherwise meets the public director qualification requirements.

However, CFE believes that the best course of action is for the CFTC to simply not adopt proposed Regulation 1.3(C)(1)(v) in any form.

The CFTC Should Clarify that the Proposed Requirement that a ROC Review All Regulatory Proposals Prior to Implementation Is Directed to Regulatory Proposals that Have a Significant Regulatory Impact

CFE requests that the CFTC clarify its proposed requirement that a DCM ROC review all regulatory proposals prior to implementation and advise the DCM's Board of Directors as to whether and how such changes may impact regulation. This proposed requirement is set forth in proposed Regulation 38.250(b)(1)(ii)(E) and is substantially similar to a current provision under Subsection (b)(3)(ii)(G) of the acceptable practices for the DCM core principle relating to conflicts of interest. The current provision under the acceptable practices is that a ROC shall review regulatory proposals and advise the Board of Directors as to whether and how such changes may impact regulation. The only difference in the two provisions is the application of the proposed requirement to all regulatory proposals instead of just to regulatory proposals and the inclusion in the proposed requirement of a stipulation that the review by the ROC occur prior to implementation of the proposal.

In light of the insertion of the word "all" in the proposed requirement under proposed Regulation 38.250(b)(1)(ii)(E), CFE is concerned that it is possible that the proposed requirement could potentially be construed to encompass day-to-day, routine regulatory operations, notices, circulars, and rule amendments. CFE believes that such an interpretation would be cumbersome and ultimately slow down and hinder the timeliness and effectiveness of the regulatory process, especially when coupled with a requirement that all regulatory proposals be reviewed by the ROC prior to implementation. CFE also believes that such an interpretation would be inconsistent with the stated approach of the CFTC in the CFTC release that originally adopted the acceptable practices applicable to ROCs (CFTC Release RIN 3038-AC28, 72 FR 6936, February 14, 2007)). In that adopting release, the CFTC repeated from the CFTC's proposing release for the acceptable practices (CFTC Release RIN 3038-AC28, 71 FR 38740 (July 7, 2006)) that the purpose of the substantially similar provision under the acceptable practices was that ROCs should be given the opportunity to review, and, if they wish, present formal opinions to management and the Board of Directors on any proposed rule or programmatic changes originating outside of the ROCs, but which they or their Chief Regulatory Officers believe may have a significant regulatory impact. The CFTC also made clear in that adopting release that ROCs are oversight bodies and are not expected to perform managerial responsibilities or direct compliance work. CFE agrees with these clarifying statements and requests that the CFTC clarify that they are applicable to proposed Regulation 38.250(b)(1)(ii)(E) as well so that it is clear that the types of regulatory proposals that a ROC is required to review prior to implementation are those with a significant regulatory impact.

CFE Agrees that a Board of Directors Should Not Be Required to Use External Facilitators for Performance Reviews

Proposed Regulation 40.9(b)(5) proposes to require that a DCM Board of Directors

review its performance and that of its individual members annually. Proposed Regulation 40.9(b)(5) also provides that a DCM Board of Directors should consider periodically using external facilitators for such reviews. CFE agrees with the approach taken by the CFTC in this provision of not requiring a DCM Board to use an external facilitator and of providing instead that the Board consider whether or not to periodically do so. A Board may determine after due consideration that use of an external facilitator is not necessary and thus should not be required to use one. Although proposed Regulation 40.9(b)(5) does not by its literal meaning require use of an external facilitator, CFE wishes to make clear its understanding that the provision should not be read or interpreted as a de facto requirement that a Board periodically use an external facilitator or as an expectation that a Board will need to do so.

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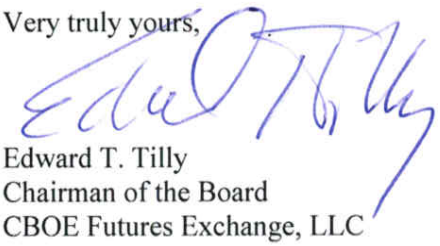
CFE is available to provide any further input desired by the CFTC regarding these issues and to work cooperatively with the CFTC to address them. Please contact Arthur Reinstein in our Legal Division at (312) 786-7570 if you have any questions regarding our comments.

Very truly yours,



Edward T. Tilly
Chairman of the Board
CBOE Futures Exchange, LLC