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Re: Registration of Foreign Boards of Trade, 75 Fed. Reg. 70,974 (Nov. 19, 2010); RIN No. 3038-AD19

Dear Mr. Stawick:

Natural Gas Exchange (“NGX”) appreciates the opportunity to comment on the Commodity Futures Trading Commission’s (“Commission”) proposed “Registration of Foreign Boards of Trade,” 75 Fed. Reg. 70,974 (Nov. 19, 2010) (“Proposed Rules”). The Proposed Rules implement Section 738 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,¹ which permits the Commission to require registration for foreign boards of trade (“FBOT”) wishing to provide direct access to NGX’s electronic trading and order matching system by their U.S. participants. NGX commends the Commission for including swaps within the scope of the FBOT registration provision, but suggests that the Commission further clarify the relationship of FBOT registration to other types of contracts listed for trading on an FBOT. For the reasons discussed below, NGX also requests that the Commission clarify the operation of the registration procedures in relation to those FBOTs with pending applications for no-action relief and the definition of “linked contract.”

NGX

NGX is a trading system for energy products in the North American market. Since March 1, 2004, NGX has been a wholly owned subsidiary of TMX Group Inc.² NGX also provides clearing services through which it acts as central counterparty (“CCP”) for transactions entered into on the NGX electronic marketplace, certain transactions executed in the OTC market and transactions entered into on a third party trading platform. On December 12, 2008,

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111–203, 124 Stat. 1376 (2010) (“Dodd-Frank Act”).

² TMX Group operates cash and derivative markets for multiple asset classes including equities, fixed income and energy products. TMX Group is a corporation incorporated under the Business Corporations Act (Ontario) and has its head office in Toronto, Ontario. Its shares have been listed for trading on the Toronto Stock Exchange since November 2002. TMX Group is a reporting issuer in every province and territory of Canada.

NGX was registered by the Commission as a Derivative Clearing Organization (“DCO”). By letter dated May 19, 2010, NGX requested that the staff grant NGX no-action relief permitting direct market access to NGX’s trade execution platform by U.S. participants.³ This request, which was made under, and conforms to the requirements of the Commission’s 2006 Policy Statement on granting FBOT no-action relief,⁴ remains pending.

Proposed FBOT Registration Rules

The Proposed Rules would require registration for FBOTs that wish to provide direct access from the U.S. to their electronic trading and order matching systems. Beginning in 1996, FBOTs seeking to provide such access requested that the Commission staff confirm that it would not recommend enforcement action to the Commission for failure to register as a contract market. On October 27, 2006, the Commission issued a Policy Statement in which it endorsed this FBOT no-action process. To date, the Commission staff has issued approximately 38 FBOT no-action letters.

An FBOT registering with the Commission would have to meet a number of conditions, including the following; (1) the FBOT and clearing members are fit and meet appropriate standards and that the FBOT and its clearing organization have and enforce provisions to minimize conflicts of interest and rules prohibiting disclosure of material, non-public information; (2) the FBOT’s automated trading system complies with IOSCO Principles (including fair trade matching by the algorithm, audit trail, demonstrated reliability, disaster recovery, and limitation to “approved” contracts); (3) the contracts available in the U.S. are limited to futures, options or swaps eligible to be traded on a designated contract market and are subject to prior Commission review; (4) the clearing organization complies with “Recommendations for Central Counterparties” issued by CPSS-IOSCO; (5) the FBOT is subject to “comprehensive and comparable” supervision and regulation by its home regulatory authority; (6) the FBOT has sufficient rules, available compliance resources and disciplinary procedures to enforce appropriate trading practices; and (7) information sharing arrangements are in place among the FBOT, the clearing organization, and home regulatory authorities.⁵

FBOTs with pending no-action requests

The Commission has proposed a “limited” registration procedure for FBOTs that have been granted no-action relief.⁶ The proposed “limited” registration procedure would permit applicants for registration as an FBOT to rely on their previously submitted request for no-action relief and would require the FBOT to update and resubmit the previously submitted documentation, identifying how that documentation meets the new registration requirements. Such requests would be required to be filed within 120 days of the rule’s effective date.

³ Letter to Richard A. Shilts, Director Division of Market Oversight from Paul M Architzel (May 19, 2010).

⁴ Boards of Trade Located Outside of the United States and No-Action Relief From the Requirement To Become A Designated Contract Market or Derivatives Transaction Execution Facility,” 71 *Fed. Reg.* 64,843 (Nov. 2, 2006) (“Policy Statement”).

⁵ Proposed Rule 48.7.

⁶ Proposed Rule 48.6.

Although the Commission's "limited" registration procedures do not include FBOTs that have a pending no-action request, FBOTs with pending requests are in many respects similarly situated to those that have been granted no-action relief. Like an FBOT that has been granted no-action relief, an FBOT with a pending request has already submitted extensive documentation in support of its request. And, although the determination to grant relief is not final, Commission staff is likely to have already expended significant resources in the review and analysis of the pending request. In order to ease the burden on both the requesting FBOT and on Commission staff, NGX respectfully suggests that the Commission treat FBOTs with requests for no-action relief that were pending at the time of the enactment of the Dodd-Frank Act the same as those that previously have been granted relief. This would ease the administrative burden on both the applicant and Commission staff during this transitional period.

Moreover, the Commission has proposed that FBOTs that are currently operating under a grant of no-action relief be required to submit their limited registration applications within 120 days. However, this does not address how FBOTs with pending no-action requests should be treated. Clearly, the Commission's resources will be challenged by the need to review all of the applications for registration by FBOTs with pending requests and those that have already been granted no-action relief. As between the two, the review of registration applications of FBOTs that have pending requests for no-action relief should take precedence.

This goal could be accomplished by making clear that FBOTs with pending requests for no-action relief will be permitted to supplement their pending requests with the documentation necessary to perfect their registration application. The Commission could further make clear that the order in which it reviews pending applications will not be affected by the transition to the proposed registration regime, conditioned upon timely supplementation of the pending requests. In this regard, NGX respectfully suggests that the Commission adopt a two-deadline approach, requiring that FBOTs with pending no-action requests supplement their documentation within 120 days and that FBOTs with existing relief submit their application for limited registration sometime thereafter. Completely new applicants would be reviewed subsequent to those with pending applications in the order in which they are received and prior to the review of FBOTs with existing no-action relief. This will ease the administrative burden on staff, result in a commercially acceptable sequencing of applications and provide a degree of transparency to the order of review of the large number of likely applications.

Clarifications of products subject to registration

Proposed Rule 48.7(c)(1)(i) requires that the contracts that may be made available by direct access must be "futures, option or swaps contracts—only such contracts as would be eligible to be traded on a designated contract market are eligible to be traded by direct access on a registered foreign board of trade." First, NGX strongly supports the proposal to make clear that a registered FBOT may list swaps for trading through direct access from the U.S. This is consistent with the fact that an FBOT is subject to regulation by its home regulator that is comparable to a U.S. designated contract market, an acceptable venue for the execution of

swaps.⁷ The proposed rule will enable U.S. participants to directly access a greater variety of swaps execution venues and at the same time will conserve Commission resources by providing comparably regulated foreign trading venues with an established avenue to register in the U.S.

However, Proposed Rule 48.7(c)(ii) provides that all contracts listed for trading on a registered FBOT must be cleared. However, under section 2(h)(7) of the Commodity Exchange Act, 7 U.S.C. §1 *et seq.* (“Act”), a swaps end-user may opt to execute a swaps contract on a swaps execution facility even if it chooses to forego clearing the swap. In order to fully implement the full range of end-user choice granted by the Act, the Commission should clarify that swap contracts may be available for execution on an FBOT through direct market access even if the contract is not cleared.⁸

Secondly, NGX operates an electronic marketplace through which NGX contracting parties (“Participants”) may enter into, among other contracts, spot and forward physically settled natural gas and oil contracts for delivery at various Canadian locations. This is similar to the listing by a U.S. designated contract market of certain spot contracts and other exempt contracts. Nothing in the Act would prohibit an FBOT from listing such contracts and U.S. persons from entering into such contracts. Accordingly, the Commission should clarify that although an FBOT may list for trading through direct market access any contract that is legally offered in the U.S., only those contracts regulated under the Act are within the scope of the FBOT registration provision. In this regard, NGX also notes that the Act does not define “contract for future delivery.”⁹ Because the exact demarcation between contracts that are subject to the Act and those that may not be is not always clear, NGX respectfully suggests that the Commission continue the staff’s current practice when issuing no-action relief of noting those contracts that are offered on a FBOT through direct market access but that are not considered by the Commission to be futures contracts. This would provide a greater degree of certainty to market participants with respect to FBOTs that list for trading spot or forward contracts.

Clarify definition of “Linked Contract”

“Linked contracts” that are listed for trading by a registered FBOT are subject to a number of additional proposed conditions.¹⁰ The Commission in Proposed Rule 48.2(d) defines a “linked contract,” as a “futures or option or swaps contract made available for direct access from the United States by a registered foreign board of trade that settles against any price (including the daily or final settlement price) of one or more contracts listed for trading on a registered entity as defined in section 1a(40) of the Act.” The prices of certain contracts listed for trading on NGX are quoted with reference to the settlement price of another market (“the reference market”). These contracts, known to the market as “basis contracts,” provide for

⁷ Letter from Peter Krenkel, President, NGX, to David A. Stawick, Secretary, CFTC (Oct. 28, 2010).

⁸ In addition, certain contracts that are not subject to mandatory clearing and execution on a swaps execution facility, contract market or registered FBOT may at the option of the end-user be submitted for clearing to a DCO. Some DCOs may share electronic infrastructure with the trading platforms for which they clear. The Commission should make clear that it does not consider such contracts which are only submitted for clearing to touch upon the FBOT registration provisions even if the DCO and the FBOT share some electronic infrastructure.

⁹ See Section 1a(27) of the Act, which provides that “future delivery” does not including “any sale of any cash commodity for deferred shipment or delivery.”

¹⁰ See Proposed Rule 48.8(c).

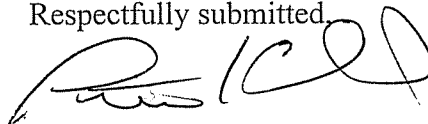
physical delivery of the commodity and are not cash settled to the price of another market. This quoting convention provides that NGX contracts are priced at a premium or discount to the reference market. The price for the NGX basis contract is determined through the matching of bids and offers on the NGX market based upon the supply and demand characteristics of the commodity deliverable on the NGX contracts, not of the reference market. The Commission recognized this difference in its determinations that NGX markets did not constitute significant price discovery markets.¹¹ NGX respectfully requests that the Commission clarify the definition of “linked contract” to take into account the nuanced distinction between contracts which are settled against the settlement price of a U.S. contract market and basis contracts, the prices of which are merely quoted with reference to another market.

Conclusion

NGX supports the proposed registration framework for FBOTs and commends the Commission for its leadership in facilitating cross-border access by foreign markets that are comparably regulated. For the reasons discussed above, NGX believes that it is important that the Commission provide a degree of transparency with respect to its administrative procedures for processing the many applications for registration that it will receive, and that it provide priority to those FBOTs with requests for no-action relief pending as of the enactment of the Dodd-Frank Act. As discussed above, NGX also believes that those FBOTs with pending requests are in a unique category for which a special transitional procedure would be appropriate.

NGX appreciates the opportunity to comment on the Commission’s Proposed Rules. Please feel free to contact Peter Krenkel, President & CEO of NGX at (403) 974-1705, or our outside counsel, Paul M. Architzel of Wilmer Cutler Pickering Hale and Dorr LLP, at (202) 663-6240, with any questions about these comments.

Respectfully submitted,



Peter Krenkel,
President & CEO

¹¹ “Orders Finding that the (1) Phys, BS, LD1 (US/MM), AB-NIT; (2) Phys, BS, LD1 (US/MM), Union-Dawn; (3) Phys, FP, (CA/GJ), AB-NIT; (4) Phys, FP, (US/MM), Union-Dawn; and (5) Phys, ID, (CA/GJ), AB-NIT Contracts, Offered for Trading on the Natural Gas Exchange, Inc., Do Not Perform a Significant Price Discovery Function,” 75 Fed. Reg. 23729 (May 4, 2010).