CME Group

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VIA ELECTRONIC MAIL

David Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
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Re: Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest (RIN 3038-AD01) (Federal Register Vol. 76, No. 4, Page 722)

Dear Mr. Stawick:

CME Group, Inc. ("CME Group"), on behalf of its four designated contract markets ("Exchanges" or "DCMs"), appreciates the opportunity to comment on the Commodity Futures Trading Commission's (the "CFTC" or "Commission") Notice of Proposed Rulemaking ("Release" or "NOPR") that was published in the Federal Register on January 6, 2011. In the Release, the Commission seeks comment on rules that, in our view, would impose onerous prescriptive requirements on registered entities with little or no corresponding regulatory benefit. In some cases, the rules may actually undermine the ability of registered entities to function optimally.

CME Group, the world's largest and most diverse derivatives marketplace, consists of four separate Exchanges: the Chicago Mercantile Exchange, Inc. ("CME"), the Board of Trade of the City of Chicago, Inc. ("CBOT"), the New York Mercantile Exchange, Inc. ("NYMEX") and the Commodity Exchange, Inc. ("COMEX"). These Exchanges offer the widest range of benchmark products available across all major asset classes, including futures and options based on interest rates, equity indexes, foreign exchange, energy, metals, agricultural commodities, and alternative investment products.

CME also includes CME Clearing, one of the largest central counterparty clearing services in the world, which provides clearing and settlement services for exchange-traded contracts, as well as for over-the-counter derivatives transactions through CME ClearPort®.

The CME Group Exchanges serve the hedging, risk management and trading needs of our global customer base by facilitating transactions through the CME Globex® electronic trading platform, our open outcry trading facilities in New York and Chicago, as well as through privately negotiated transactions.

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I. Background

In its Release, the Commission proposes rules addressing issues related to governance and mitigation of conflicts of interest in Derivatives Clearing Organizations ("DCOs"), Designated Contract Markets ("DCMs") and Swap Execution Facilities ("SEFs"). In support of these rules, it cites as authority Sections 726 and 725(d) of DFA, which specifically address rulemaking on conflicts of interest, and Sections 725(c), 735(b), and 733 of DFA, which set forth core principles for DCOs, DCMs and SEFs, respectively. More specifically, the Commission cites as its authority Core Principles O (Governance Fitness Standards) and Q (Composition of Governing Boards) for DCOs, Core Principle 14 (Governance Fitness Standards) for DCMs, and Core Principle 12 (Conflicts of Interest) for SEFs.

To begin, the proposed rules would require that DCOs, DCMs and SEFs take certain specific actions in order to comply with the Core Principles. Consistent with the Commission's approach in a number of other rulemakings, the proposed rules in this Release illustrate the Commission's efforts to eradicate the highly successful principles-based regulatory regime that has permitted U.S. futures markets to prosper as an engine of economic growth for this nation, and to legislate a prescriptive rules-based regime contrary to Congressional intent. As we have noted in comment letters in response to other proposals, the Commission's proposed action in this regard is contrary to both the letter and spirit of the Commodity Exchange Act ("CEA"). In fact, not only did Congress preserve principles-based regulation in DFA, it reinforced the vitality of that regime by expanding the list of core principles applicable to DCMs and DCOs and creating a regulatory regime for SEFs and swap data repositories ("SDRs") cemented in core principles. Although DFA granted the Commission the authority to adopt rules with respect to core principles, it did not direct the Commission to eliminate principles-based regulation. DFA made clear that SROs were granted "reasonable discretion in establishing the manner in which the [SROs] compl[y] with the core principles."

It is clear that the prescriptive, rules-based approach outlined in the Release will, among other things, strain the agency's already limited resources. In keeping with the President's Executive Order to reduce unnecessary regulatory cost, the CFTC should reconsider the proposed rules included in the Release, with an eye toward performing those functions that are clearly mandated by DFA. As discussed in more detail below, in many instances we believe that the Commission can comply with the President's directive by making the proposed rules acceptable practices or safe harbors.

The agency's prescriptive regulatory approach would convert its role from an oversight agency, whose role is to assure compliance with sound principles, to a front line decision maker that imposes its business judgments on every operational aspect of derivatives trading and clearing. Many of the proposed prescriptive rules will result in extensive costs not only to regulated entities, but to the Commission with no corresponding regulatory benefit. Most notably in this regard, the proposed rules require extensive submissions by registered entities to the Commission the review of which would use Commission resources. Such proposed rules impose costs with little or no corresponding regulatory benefit.

For example, the proposed reporting requirements essentially require registered entities to provide ongoing and extensive evidence to the Commission demonstrating their compliance with Core Principles, even when they are under no suspicion of noncompliance. These submissions will impose significant costs on registered entities — and ultimately on the industry as a whole — without any identified

regulatory or public benefit. Throughout the years in which registered entities have been subject to Core Principles, there has been no indication that such entities are not faithfully adhering to their obligations to comply with the Core Principles.

CME Group has the same concerns with regard to the Commission's proposed transparency and public disclosure requirements. In that case, most of the information subject to the requirements is already publicly available to interested parties. Thus, again, the proposed regulations likewise place an additional burden on registered entities without any corresponding regulatory benefit and stand to waste the Commission's scarce resources.

Perhaps most troubling, the proposed rules require registered entities to specify and enforce fitness standards for directors, members of any disciplinary panel or committee, members and affiliates thereof with direct access to the DCO, natural persons who directly or indirectly own greater than 10% of any one class of equity interest, and parties affiliated with members of the Board of Directors or members of a disciplinary panel or committee. In particular, the proposed rules require DCMs and DCOs to collect and verify information that supports compliance with the proposed fitness standards, including requiring that criminal background checks are run on all of the individuals described in the proposed regulation in order to determine if they fall within the scope of Section 8(a)(2) of the CEA, and provide that information to the Commission. Notably, the proposed regulation covers many persons and entities which would have no involvement in the futures or swaps markets whatsoever. Requiring registered entities to monitor this breadth of individuals and entities and report the information to the Commission would be extraordinarily costly while providing no corresponding regulatory benefit.

Further, as it did in its prior notice of proposed rulemaking on conflicts of interest, the Commission proposes specific composition requirements for the Board of Directors and Risk Management Committee of DCOs. As we noted in our comment letter in response to those proposed rules, CME Group believes that such rules exceed the Commission's authority under the CEA. Moreover, the Commission's efforts to regulate the composition of its Board of Directors and internal committees represent an impermissible reach into an area firmly committed to state law. See, e.g., CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89-91 (1987). Matters of internal corporate governance are firmly-established as the province of the states, and nothing in DFA compels the Commission to violate such well-established jurisdictional bounds. See, e.g., ABA v. FTC, 430 F.3d 457, 471-72 (D.C.Cir. 2005) (regulators may not enact rules or regulations that reach into an area of State sovereignty unless the plain language of the federal law compels the intrusion).

Significantly, as with the prior notice of proposed rulemaking on conflicts of interest, the Commission failed to determine, as is required by Section 726(b), whether the rules proposed in this Release are necessary and appropriate. That is, the Commission noted some *areas of potential conflict* in the prior notice of proposed rulemaking, but it did not find that the prescriptive and exhaustive approach it proposed was an appropriate way – let alone the only way – to address those issues, should they arise. As discussed in more detail below, we believe that the proposed rules in this Release likewise are neither necessary nor appropriate, in part because companies, such as CME Group, already address the potential conflicts raised by the Commission by virtue of their obligations under state law. For example, Delaware law, which applies to CME Group by virtue of its status as a Delaware corporation, holds that

directors of corporations are fiduciaries who owe duties of due care, good faith and loyalty to the corporation. Skleen v. Jo-Ann Stores, Inc., 750 A.2d 1170, 1172 (Del. 2000). This duty of loyalty mandates that directors act in the best interest of the corporation and its shareholders and forbids them from using their position to further private interests. Guth v. Loft, 5 A.2d 503, 510 (Del. 1939). As such, state law, already imposed on CME Group, addresses the Commission's overriding concern that directors of a DCO, DCM or SEF will act in their own personal interests rather than those of the exchange or clearinghouse as a whole.

II. Detailed Comments

A. Reporting Requirements

The Release requires DCOs, DCMs and SEFs to make extensive submissions related to their governance to the Commission. Specifically, proposed rule 40.9 requires a DCO, DCM or SEF to submit the following: 1) a list of all members of the Board, each committee for which the Commission has adopted a composition requirement, and each other committee that has the authority to constrain the actions of the Board; 2) a description of any relationships between directors and the entity or members thereof (including affiliates); 3) the basis for any determination that a director qualifies as a "public director" under the regulations; and 4) a description of how the composition of the Board and other committees noted above allows the entity to comply with the applicable core principles, regulations, and rules of the entity. Additionally, in the event that a committee that is not subject to the composition requirements of the Risk Management Committee ("RMC") of the DCO (or the Risk Management Subcommittee, in the event that the RMC has delegated its function and composition requirements to a subcommittee) overrules a decision of the RMC, the DCO must submit a report to the Commission detailing, among other things, the rationale for the rejection of the recommendation. See proposed rule 39.25. Similarly, a DCM or SEF must submit a report when the Board of Directors rejects a recommendation of the Regulatory Oversight or Participation Committees. See proposed rules 37.9, 38.851.

This, simply put, is a model of overregulation. The Commission states that, when a board of directors does not accept the recommendation of the regulatory oversight committee ("ROC"), it must provide a report detailing, among other things, the rationale for the rejection of the recommendation. See proposed rule 39.25. The purported reason for such a requirement is that the board is not subject to the same composition requirements of the ROC. This statement conveniently overlooks the fact the registered entity itself has an obligation to comply with the Core Principles, which, among other things, requires it to have established policies and procedures in place to mitigate conflicts of interest. Thus, if the recommendation which the board does not adopt involves a decision for which a conflict at the board level exists, the procedures that the registered entities have in place would suffice to address the Commission's concerns. Further, a process for reviewing such decision making already lies in the existing rule enforcement review process which allows the Commission to review a registered entity's compliance with the Core Principles.

The Commission has not identified any problem with the Commission's current practice of requiring registered entities to certify their compliance with the Core Principles. We are aware of none. Thus, there is no reason to impose significant cost on the industry without any identified benefit when the

current practice works and is much more cost efficient than the one proposed. Accordingly, CME submits that the self-certification process is an appropriate mechanism for ensuring that an entity's compliance with the core principles and nothing further is necessitated.

B. Transparency/Public Disclosure Requirements

The proposed rules regarding "transparency" require DCOs, DCMs and SEFs to make various information available to the public and ensure that such information is up to date, accurate, and readily accessible. More specifically, a regulated entity must make available: 1) its charter; 2) the charter of its Board of Directors and of each committee with a composition requirement and each committee that can amend or constrain the actions of a committee subject to a composition requirement; 3) the nomination process for directors and the process for assigning them to various committees; 4) the identities of "public directors;" and 5) the lines of responsibility and accountability for each operational unit of the entity. As a matter of good corporate governance, CME Group and other publicly traded companies do make publicly available its governing documents and the charters for its Board committees; included in our annual proxy is a description of the process followed by our Nominating Committee and the factors considered when identifying nominees for the Board. The proxy further discloses our assessment as to what directors are considered independent under the rules of the stock exchange on which our common stock is listed. We believe that duplicative or additional requirements imposed by the CFTC with respect to our internal governance and management processes are unduly burdensome and completely unnecessary for purposes of mitigating conflicts of interest.

Entities also must disclose summaries of "significant decisions." CME Group also notes that, although the Commission provides some guidance as to what constitutes a "significant decision," the term as defined in the Release remains vague. Without further clarification by the Commission, this aspect of the proposal is likely to result in needless work on the part of registered entities that may construe the term broadly in order to ensure compliance with the regulation.

C. Governance Fitness Standards

In the Release, the Commission proposes fitness standards for a wide array of persons or entities involved in, or related to persons involved in, a DCM or DCO. See proposed rules 38.801 (DCMs) and 39.24 (DCOs). More specifically, the Release further requires DCMs and DCOs to specify and enforce fitness standards for their directors, members of any disciplinary panel, and members of the disciplinary committee including, at a minimum, bases for refusal to register a person under Section 8(a)(2) and absence of a significant history of serious disciplinary offenses such as those that would be disqualifying under Regulation 1.63. Additionally, a DCM or DCO must specify and enforce fitness standards for members and affiliates thereof with direct access to the DCO's settlement and clearing activities, natural persons who directly or indirectly own greater than 10% of any one class of equity interest, and parties affiliated with members of a Disciplinary panel or the Disciplinary Committee. At a minimum, these standards must include those bases for refusal to register a person under Section 8a(2) of the CEA.

CME Group agrees with the proposed rules to the extent that it should establish and enforce fitness standards for its directors, members of disciplinary committees and panels and members. CME Group has established standards for its FCMs and members and enforces those standards. However, it is simply

outside of a DCM or DCO's jurisdiction and expertise to establish standards of conduct for all affiliates of their board and committee members as well as affiliates of members. This is especially true considering the broad definition of "affiliate" suggested in the Release. To this end, CME Group suggests that the Commission adopt a definition of "affiliate" similar to that in the Investment Company Act.[1] Further, CME Group is a publicly-traded company and has no ability to impose any standards on an investor that acquires more than 10% of our stock.

CME Group objects to these proposed regulations to the extent that they require it to proactively set standards for "affiliates" with no involvement in its markets and presumably disqualify directors, disciplinary committee and panel members and members on the basis of the characteristics of those affiliates. CME Group's rules currently allow it to deny access to any non-member who has violated its rules or who refuses to cooperate in an investigation, and clearing members must suspend or terminate a non-member's access if the Exchange determines that the actions of a non-member threaten the integrity or liquidity of any contract, violate any Exchange rule or the Act, or if the non-member customer fails to cooperate in an investigation. See CME Group Exchanges' Rule 574, Globex Access Restrictions, and Rule 402.D, Actions Against Non-Members. Through such rules, CME Group is able to effectively regulate which persons and entities have access to its markets. CME's current approach of excluding individuals who do not meet minimum fitness standards seemingly serves the interests of the Commission without requiring registered entities to proactively screen multitudes of affiliates that likely will never attempt to access markets and thus will never be of interest to either the CME Group Exchanges or the Commission.[2] In the event that CME Group's ability to deny access to its markets is ineffectual in securing a non-member's participation, the Commission is in the best position to prosecute the matter.

Similarly, these rules already enforced by CME Group render unnecessary and unnecessarily costly the Commission's proposed rule requiring that, as a condition of access to a DCM, "members and non-member market participants must agree to become subject to the jurisdiction of the [DCM]." Similarly, with regard to DCOs, "as a condition of access, clearing members and other persons with direct access to the settlement and clearing activities of a [DCO] must agree to become subject to the jurisdiction of the

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[1] The Investment Company Act, 17 U.S.C. § 80a-2(a)(2)-(3), defines an "Affiliated company" as "a company which is an affiliated person" and an "Affiliated person" of another person as "(A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof."

[2] CME Group also disagrees with this proposed regulation to the extent that it imposes a "verification" requirement. The verification requirement proposed by the Commission would require CME Group to proactively screen "affiliates" and others and provide in order to provide a certification to the Commission. See proposed rules 38.801(d), 39.24(b)(4). Such an approach is, again, for the reasons stated above, a waste of resources.

[DCO]." As we noted in our letter addressing Core Principles and Other Requirements for Designated Contract Markets, implementation of this rule would require DCMs to require their clearing firms to amend all of their existing customer agreements and secure their customers' consent to submit to the jurisdiction of each DCM on which they seek to trade. As such, implementation of these regulations would be extremely costly, and regardless, the regulation will be ineffective in achieving the Commission's desired outcome. And, for the reasons noted above, CME Group's enforcement options and the regulatory outcome do not change based on whether the non-member chooses to participate in the DCM's investigatory and disciplinary processes; and there is no reason that this cannot occur on an as-requested basis. Regulations such as these will impose significant costs and burdens on clearing member firms without offering any perceptible regulatory value.

Further, the imposition of fitness standards for affiliates (as defined by the Commission in the Release) of public directors, member of disciplinary panels and committees may do more harm than good. In particular, this result in shrinking the talent pool from which DCMs and DCOs can choose directors and committee members for reasons unrelated to the conduct of the potential directors and members themselves.

D. Composition Requirements

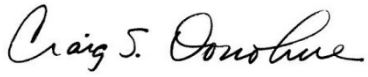
The Release sets forth further composition requirements for the Board of Directors of a DCO in proposed rule 39.26. This aspect of the Release purports to amend or modify a previous proposal published for comment on which a final rule has yet to be adopted. Based on comments received, the Commission reconsidered whether requiring customer representation on the RMC or Board of Directors would be preferable, and thus proposed this rule. We do not believe that the Commission's efforts in this regard comply with the Administrative Procedures Act ("APA").

Aside from the procedural issues presented by this proposed rule, there are substantive issues presented by it as well. The regulation of the composition of its board and internal committees is of notable concern in the case of DCOs due to the level of expertise necessary to effectively serve on the Board of Directors or RMC of a DCO. This is particularly true in the case of the risk committee. The RMC is charged with making detailed and complicated decisions regarding the risk posed to the DCO. An individual must have detailed knowledge and experience in clearing and derivatives markets in order to be qualified to make these important decisions on behalf of a DCO. Imposing arbitrary composition percentages on the RMC is problematic given the unique nature of the clearing function and the small number of available individuals with the requisite clearing experience.[3] Indeed, such a requirement would be even more troublesome if the Commission also chose to enforce a 35% public director requirement for the RMC, as was proposed in its prior Release on conflicts of interest.

[3] To the extent that DCOs utilize separate committees that implement the hedging and liquidation of positions held by a clearing member who has been defaulted, CME Group does not interpret these requirements as applying to such committees. Indeed, such committees are not involved in making the decisions allocated to the RMC, merely in dealing with defaulted positions in an efficient manner, and expertise is absolutely critical to the taking appropriate and efficient actions in such situations.

CME Group has been well-served over time by a Clearing House Risk Committee consisting of a variety of market participants. We seek expertise and balanced views on the Risk Committee such that no one perspective prevails in our decision-making process. Our Risk Committee achieves a balance in views between large and small firms, non-clearing firm audiences such as settlement bank representatives and independent parties. However, needs will evolve over time, and CME Group needs the flexibility to ensure that individuals serve on the committee that are qualified rather than complying with a set one-size-fits-all standard. As such, CME Group suggests that the Commission consider suggesting acceptable practice guidance or a safe harbor for representation on the Board of Directors and RMC rather than imposing bright-line rules which could have the unintended affect of lowering the level of expertise of board and committee members and thus lowering the quality of decision-making of the board or committee.

Sincerely,



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