DRAFT

Preamble discussion regarding Anti-Trust Core Principles and DCMs with affiliated DCOs "giving away execution".

With respect to DCM Core Principle 19 on Antitrust, which states in part that a board of trade shall not adopt any rule or take any action that results in any unreasonable restraint of trade, market participants have raised concerns related to discriminatory pricing and or fees with respect to the listing and trading of swap contracts. Congress chose to permit both DCMs and the newly created Swap Execution Facilities ("SEFs") to list and provide a regulated forum for members to trade swap contracts. This construct was designed to generate competition between execution facilities for the listing and trading of swap contracts, which would lead to benefits for market participants. Congress was well aware of the concentration of execution volume in the futures contracts and decided that it wanted to promote competition among execution platforms in the swaps market. DCMs sometimes compete for trading volume in similar or identical futures contracts (Treasury futures complex, crude oil, natural gas, etc). Part of the competition in this area between DCMs comes in the form of setting low or reduced execution fees, with rebates and in some instances no execution fees for limited time periods. Competition between DCMs on execution fees for similar or identical contracts is generally good for market participants. We believe, however, that certain fee practices could be inappropriate and potentially a violation of the Antitrust Core Principles.

We are also aware of the fact that in the futures market the major DCMs are affiliated with registered DCOs. These entities derive significant revenues from both execution fees as well as from clearing fees. Some have suggested that certain DCMs with affiliated DCOs could charge $0 for execution services to grab swaps contract market share from the SEFs which will only be charging execution fees. DCMs with affiliated DCOs could subsidize the money losing DCM services with the fees made from clearing swaps at the affiliated DCO. The Commission believes that "giving away execution" and subsidizing DCM operations through the clearing fees earned by the affiliated DCO could constitute "predatory pricing" or "price-line competitive injury" which could violate the Antitrust Core Principle, antitrust laws and Commission precedent under Section 15. [1] We have made it clear in other parts of the Proposal that DCMs can not charge different fee structures as part of the "impartial access" provisions of the Act as that would be anti competitive and frustrate Congress's intentions. Further, Congress stated specifically in the SEF "rule of construction" that it was a statutory goal to promote the trading of swaps on swap execution facilities[2]. The Commission supports competition in the futures and swaps market and competition between DCMs and SEFs will lead to lower execution fees and more attractive service offerings which will benefit market participants. However, it would be inconsistent with Congress' goals if a DCM with an affiliated DCO were permitted to engage in "giving away execution" or provide

[1] See Brooke Group Ltd v. Brown & Williamson Tobacco Corporation, 509 U.S. 209 (1993); Utah Pie Co. v. Continental Banking Co., 386 U.S. 685 (1967); Spirit Airlines Inc. v. Northwest Airlines Inc., 431 F 3d 917 (6th Cir. 2005) and Commodity Futures Trading Commission, Contract Market Rules; Proposed Disapproval, Chicago Board of Trade, 48 Fed. Reg. 3395 (Jan. 25, 1983).

[2] See CEA Section 5h(e) which is codified at 7 U.S.C. 7b-3(e).

execution services below cost and subsidize such activities with a portion of the clearing fees which the affiliated DCO receives for clearing swaps.