

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at 978-465-0492, at least 5 days prior to the meeting date.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: January 14, 2009.

**Tracey L. Thompson,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

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## COMMODITY FUTURES TRADING COMMISSION

### Notice of Additional Conditions on the No-Action Relief When Foreign Boards of Trade That Have Received Staff No-Action Relief To Permit Direct Access to Their Automated Trading Systems From Locations in the United States List for Trading From the U.S. Linked Futures and Option Contracts and a Revision of Commission Policy Regarding the Listing of Certain New Option Contracts

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice.

**SUMMARY:** The Commodity Futures Trading Commission (Commission) is providing notice requiring foreign boards of trade that may receive Commission staff no-action relief permitting them to make their automated trading systems directly available from the U.S. to comply with additional conditions for the no-action relief to remain effective if they list for trading from the U.S. contracts that are linked to contracts traded on certain U.S.-based entities. Separately, the Commission is providing notice that it is revising its policy regarding the notification procedures applicable to listing an option on a futures contract

that already is (or can be) listed for trading from the U.S.

**DATES:** *Effective Date:* The conditions and notification procedures are effective immediately.

#### FOR FURTHER INFORMATION CONTACT:

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#### SUPPLEMENTARY INFORMATION:

### I. Background

Since 1996,<sup>1</sup> Commission staff has issued no-action letters<sup>2</sup> to foreign boards of trade (FBOT) stating that, subject to compliance with certain conditions, the staff will not recommend that the Commission take enforcement action against the FBOT or its members if the FBOT permits its members or participants in the United States to have direct access<sup>3</sup> to its electronic trading system without seeking designation under the Commodity Exchange Act (CEA or Act) as a contract market (DCM) or registration as a derivatives transaction execution facility (DTEF).<sup>4</sup> On June 2,

<sup>1</sup> In February 1996, Commission staff issued no-action relief to Deutsche Terminborse (DTB), an automated international futures and options exchange headquartered in Frankfurt, Germany, that permitted DTB, subject to certain terms and conditions, to place computer terminals in the U.S. offices of its members for principal trading. See CFTC Interpretative Letter No. 96-28 (1996-1997 Transfer Binder) Comm. Fut. L. Rep. (CCH) para. 26,669 (Feb. 29, 1996). In June 1998, DTB merged with the Swiss Options and Financial Futures Exchange and DTB changed its name to Eurex Deutschland.

<sup>2</sup> See Commission Rule 140.99, 17 CFR 140.99 (2006), which defines the term "no-action letter" as a written statement issued by the staff of a Division of the Commission or of the Office of General Counsel that it will not recommend enforcement action to the Commission for failure to comply with a specific provision of the Act or of a Commission rule, regulation or order if a proposed transaction is completed or a proposed activity is conducted by the beneficiary.

<sup>3</sup> Direct access means that the member in the U.S. may enter an order directly into the trade matching engine to be matched according to the trade matching algorithm. Direct access is different from an automated order routing system (AORS) in that an order transmitted via AORS is intermediated in that it is entered into the trade matching engine by or through the intermediary, *i.e.*, the intermediary, not the member in the U.S., has direct access.

<sup>4</sup> The no-action letters issued to FBOTs, formerly referred to as "foreign terminal no-action letters," are currently referred to as "direct access no-action letters" and are published on the Commission's Web site at: <http://www.cftc.gov/dea/deaforeignterminaltable.htm>. Hereinafter the letters are simply referred to as "no-action letters." Reference to DTEFs in the no-action letters was added following the establishment of that registration category by the Commodity Futures Modernization Act of 2000.

1999, the Commission issued an order which, among other things, withdrew proposed rules that would have governed automated access to FBOTs from the U.S. and instructed the Commission staff to begin immediately processing no-action requests from FBOTs seeking to place trading terminals in the U.S., and to issue responses where appropriate, pursuant to the general guidelines included in the Eurex (DTB) no-action process, or other guidelines established by the Commission.<sup>5</sup> On October 22, 2006, the Commission issued a Statement of Policy that affirmed the use of the no-action process to permit FBOTs to provide direct access to their electronic trading systems to U.S. members or authorized participants.<sup>6</sup>

Commission staff has issued 21 no-action letters since the DTB letter, all of which grant the no-action relief requested subject to a series of terms and conditions. The terms and conditions, among other things, assure the Division (1) That the FBOT continues to be a bona fide FBOT subject to effective regulation in its home country; (2) that direct access is restricted to authorized entities; (3) that the Division receives notice of any material changes in the information provided to it in support of the no-action request including, without limitation, any modification of the FBOT's membership criteria, the location of its management, personnel or operations, the basic structure, nature, or operation of the trading system, or the regulatory or self-regulatory structure applicable to its members; and (4) that satisfactory information-sharing arrangements between the Commission, the FBOT, and the FBOT's relevant regulatory authorities will remain in effect.

With respect to the listing of new contracts, initially FBOTs that received no-action relief that wished to list additional futures and option contracts for trading by direct access from the U.S. were required to request in writing and receive supplemental no-action relief from Commission staff prior to listing the new contracts. On June 30, 2000, the Commission issued a Statement of Policy that permitted FBOTs with no-action relief to list additional futures and option contracts for trading from the U.S. merely by filing with Commission staff no later

<sup>5</sup> Access to Automated Boards of Trade, 64 FR 32829 (June 18, 1999).

<sup>6</sup> 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 FR 64443 (November 2, 2006).

than the business day preceding the initial listing of the contracts: (1) A copy of the initial terms and conditions of the additional contracts and (2) a certification that it is in compliance with the terms and conditions of its no-action letter and that the additional futures and option contracts would be traded in accordance with such terms and conditions.<sup>7</sup> On April 14, 2006, in light of its experience since the issuance of the Statement of Policy and in recognition of the fact that the listing of new products may raise previously unidentified regulatory issues, the Commission issued a revision to the new contract listing policy (Notice of Revision).<sup>8</sup> The Commission determined to establish a ten business day advance notification requirement in order to give Commission staff the opportunity to review the terms and conditions of proposed additional contracts to address any regulatory issues raised prior to the contract being made available for trading by direct access from the U.S.

## II. Additional Conditions on the No-Action Relief

On January 17, 2006, ICE Futures Europe<sup>9</sup> notified the Division pursuant

<sup>7</sup> See Statement of Policy of the Commodity Futures Trading Commission Regarding the Listing of New Futures and Option Contracts by Foreign Boards of Trade That Have Received Staff No-Action Relief to Place Electronic Trading Devices in the U.S., 65 FR 41641 (July 6, 2000). The Statement of Policy did not apply to broad-based stock index futures and option contracts that are now covered by Section 2(a)(1)(C) of the Commodity Exchange Act. Foreign boards of trade were (and presently are) required to seek and receive written supplemental no-action relief from Commission staff prior to offering or selling such contracts.

<sup>8</sup> See Notice of Revision of Commission Policy Regarding the Listing of New Futures and Option Contracts by Foreign Boards of Trade That Have Received Staff No-Action Relief To Provide Direct Access to Their Automated Trading Systems from Locations in the United States, 71 FR 19877 (April 18, 2006). The notice of revision did not alter a FBOT's obligation to seek and receive written supplemental no-action relief from Commission staff prior to offering or selling broad-based stock index futures and option contracts. The FBOT is still required to file with Commission staff a copy of the initial terms and conditions of the additional contracts and a certification that it is in compliance with the terms and conditions of its no-action letter and that the additional futures and option contracts would be traded in accordance with such terms and conditions.

<sup>9</sup> On November 12, 1999, the Division of Trading and Markets granted to the International Petroleum Exchange of London (IPE) (now ICE Futures Europe) no-action relief to make its electronic trading and order matching system, Energy Trading System II (ETS), available to IPE members in the United States. CFTC Staff Letter No. 99-69 (November 12, 1999). The November 12, 1999 IPE no-action letter was amended by the Division of Market Oversight (Division) four times between July 26, 2002 and April 14, 2003 as trading of the contracts was transitioned from the ETS to the ICE Platform operated by IntercontinentalExchange, Inc., in Atlanta, Georgia and trading hours were extended.

to the Statement of Policy of its intent to list for direct access from the U.S. a West Texas Intermediate (WTI) Light Sweet Crude Oil Futures Contract that cash-settled on the price of a physically-settled Light Sweet Crude Oil Futures contract traded on the New York Mercantile Exchange (NYMEX), a U.S. DCM. On April 12, 2006, ICE Futures Europe notified the Division of its intent to list for direct access from the U.S. the ICE Futures New York Harbour Heating Oil Futures Contract and the ICE Futures New York Harbour Unleaded Gasoline Blendstock (RBOB) Futures Contract, each of which cash-settled on the price of physically-settled contracts traded on the NYMEX. On April 2, 2007, ICE Futures Europe notified the Division of its intent to launch the ICE Futures WTI Light Sweet Crude Oil Options Contract. On December 19, 2007 the Dubai Mercantile Exchange (DME)<sup>10</sup> notified the Division pursuant to the Notice of Revision of its intent to list for trading by direct access from the U.S. on DME Direct the DME WTI Crude Oil Financial Futures Contract which cash-settled based on the NYMEX Light, Sweet Crude Oil futures settlement price on the penultimate trading day.

The listing for trading by direct access from the U.S. by ICE Futures Europe and DME of contracts which settle on the price of contracts traded on a CFTC-regulated exchange raises very serious concerns for the Commission. Such linkages can create virtually a single market for the subject contracts consisting of both the underlying contract at the CFTC-regulated exchange and the cash-settled "look-alike" contract traded on the FBOT. In the absence of certain preventive measures at the FBOT, this contract linkage could compromise the Commission's ability to carry out its market surveillance responsibilities, as well as the integrity of prices established on CFTC-regulated exchanges.

In response to these concerns, the Division amended the no-action relief granted to ICE Futures Europe and DME, in letters dated June 17, 2008 and July 3, 2008 respectively,<sup>11</sup> by adding certain conditions<sup>12</sup> with respect to any ICE

<sup>10</sup> On May 24, 2007, the Division granted to the DME no-action relief to make its electronic trading and order matching system, known as DME Direct, available to DME members in the U.S. CFTC Staff Letter No. 07-06 (May 24, 2007).

<sup>11</sup> CFTC Staff Letter No. 08-09 (June 17, 2008); CFTC Staff Letter No. 08-10 (July 3, 2008).

<sup>12</sup> The no-action letters include a provision pursuant to which the Division may further condition the relief granted therein. See, e.g., CFTC Staff Letter No. 99-69 (November 12, 1999), issued to the International Petroleum Exchange, Inc., which states as follows: "As with all no-action letters, the Division retains the authority to

Futures Europe or DME contract which settles against any price, including the daily or final settlement price, of (1) a contract listed for trading on a DCM or DTEF, or (2) a contract listed for trading on an exempt commercial market (ECM) that has been determined to be a significant price discovery contract<sup>13</sup> (collectively, linked contracts).<sup>14</sup> The purpose of the conditions is to ensure that ICE Futures Europe and DME apply to any linked contract comparable principles or requirements regarding the daily publication of trading information and the imposition of position limits or accountability levels for speculators as apply to the DCM, DTEF or ECM contract against which the linked contract settles. The conditions would also ensure that ICE Futures Europe and DME provide the Commission with information regarding the extent of speculative and nonspeculative trading in linked contracts that is comparable to the information provided to the Commission by DCMs, DTEFs or ECMs for publication of the Commitments of Traders Reports.

Accordingly, the ICE Futures Europe and DME no-action letters were amended with respect to the linked contracts to include the following conditions, to be satisfied within 120 days of the date of the amended no-action letter:

(1) ICE Futures Europe (DME) will impose on linked contracts, by rule or otherwise, position limits or position accountability levels (including related hedge exemption provisions) that are comparable to the existing position limits or position accountability levels (including related hedge exemption provisions) as adopted by: (i) The DCM, DTEF or ECM for the contract against which the linked contract settles or (ii) the DCM, DTEF or ECM for a

condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, in its discretion."

<sup>13</sup> In 2008 Congress authorized the Commission to determine, in its discretion, that a contract performs a significant price discovery function under criteria established in Section 2(h)(7) of the CEA, including price linkage, arbitrage, material price reference, and material liquidity. When the Commission by order makes such a determination, the ECM on which the significant price discovery contract is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations, and must comply with nine core principles established by Section 2(h)(7)(C). See CFTC Reauthorization Act of 2008, Pub. L. 110-246 at sec. 12304. See also Notice of Proposed Rulemaking: "Significant Price Discovery Contracts on Exempt Commercial Markets," 73 FR 75888 (December 12, 2008).

<sup>14</sup> ICE Futures Europe has listed for trading by direct access from the U.S. the four linked contracts previously identified. DME has not listed the one linked contract notified to the Division.

financially-settled equivalent of such contract;

(2) ICE Futures Europe (DME) will inform the Commission in a quarterly report of any trader that had positions in a linked contract above the applicable ICE Futures Europe (DME) position limit, whether a hedge exemption was granted, and if not, whether a disciplinary action was taken;

(3) ICE Futures Europe (DME) will publish daily trading information (*e.g.*, settlement prices, volume, open interest, and opening and closing ranges) that is comparable to the daily trading information published by the DCM, DTEF or ECM for the contract against which the ICE Futures Europe (DME) contract settles; and

(4) ICE Futures Europe (DME) will provide to the CFTC (through the Financial Services Authority (FSA) in the case of ICE Futures Europe), a daily report of large trader positions in each linked contract for all contract months in a form and manner that (a) can be fully integrated into the CFTC's market surveillance systems, including full identification of each position's beneficial owner comparable to the reporting that is provided by the DCM, DTEF, or ECM; and (b) can, (subject to any Memorandum of Understanding between the CFTC and FSA in the case of ICE Futures Europe), be fully integrated into the CFTC's *Commitments of Traders Report*, including appropriate categorization of traders and their positions.

The Commission is hereby providing notice that these conditions henceforth will be imposed on the no-action relief of any FBOT that lists for trading by direct access from the U.S. any futures or option contract which settles against any price, including the daily or final settlement price, of (1) a contract listed for trading on a DCM or DTEF, or (2) a contract listed for trading on an ECM that has been determined to be a significant price discovery contract.

### III. Listing Option Contracts

Both the Statement of Policy and the Notice of Revision required separate notification for futures and option contracts in order to permit the contracts to be listed for direct access from the U.S. Thus, even if the futures contract is currently listed, the FBOT must separately notify the Division, pursuant to the ten business day advance notification requirement of the Notice of Revision, of its desire to list the option on that futures contract. In contrast, when the Commission's Office of General Counsel (OGC) issues a no-action letter to allow the offer or sale of a FBOT-traded broad-based security

index futures contract to persons located in the U.S., the option on that particular futures contract may also be offered or sold in the U.S. without any further regulatory action from OGC. This leads to an unusual situation when the FBOT, pursuant to Appendix D of Part 30,<sup>15</sup> requests permission to list a futures contract for trading by direct access from the U.S. in the same no-action request letter in which the FBOT requests the OGC no-action position. When OGC issues the no-action letter, both the futures contract and the option on that contract may be offered or sold in the U.S. and, with the concurrence of the Division, the futures contract (but not the option on that futures contract) may be listed for direct access from the U.S. pursuant to the terms and conditions of the direct access no-action relief. The FBOT must then separately request permission from the Division to make the option contract available by direct access.

In order to eliminate this inconsistency and to streamline the procedures for listing option contracts for direct access from the U.S., the Commission is hereby providing notice that the provisions in the Notice of Revision, insofar as they apply to options on futures contracts that are, or could be,<sup>16</sup> listed for trading by direct access from the U.S. pursuant to the conditions of the FBOT's no-action relief, are revised as follows:

(1) If the option is on a broad-based security index futures contract which may be offered or sold in the U.S. and listed for direct access from the U.S. pursuant to a no-action letter issued by OGC, the option contract may be listed for direct access without further action by either the requesting FBOT or the Division.

(2) If the option is on a futures contract that is neither a linked contract nor a broad-based security index futures contract which may be offered or sold in the U.S., the option contract may be listed for direct access merely by filing with Commission staff no later than the business day preceding the initial listing of the contract: (i) a copy of the initial terms and conditions of the additional contract and (ii) a certification that the FBOT is in compliance with the terms and conditions of its no-action letter and that the additional option contract would be traded in accordance with such terms and conditions.

(3) If the option is on a futures contract that is a linked contract, the

option contract may be listed for direct access merely by filing with Commission staff no later than the business day preceding the initial listing of the contract: (i) a copy of the initial terms and conditions of the additional contract and (ii) a certification that the FBOT is in compliance with the terms and conditions of its no-action letter, *including the conditions specifically applicable to linked contracts*, and that the additional option contract would be traded in accordance with such terms and conditions.

Issued in Washington, DC on January 14, 2009, by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

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## COMMODITY FUTURES TRADING COMMISSION

### Agency Information Collection Activities Under OMB Review

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Extension of an Existing Collection—3038-0007.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected costs and burden; it includes the actual data collection instruments [if any].

**DATES:** Comments must be submitted on or before February 20, 2009.

#### FOR FURTHER INFORMATION OR A COPY

**CONTACT:** William Penner, Division of Clearing and Intermediary Oversight, U.S. Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581, (202) 418-5407; Fax: (202) 418-5536; e-mail: [wpenner@cftc.gov](mailto:wpenner@cftc.gov) and refer to OMB Control No. 3038-0007.

#### SUPPLEMENTARY INFORMATION:

*Title:* Rules Relating to Regulation of Domestic Exchange-Traded Options (OMB Control No. 3038-0007). This is a request for extension of a currently approved information collection.

*Abstract:* Rules Relating to Regulation of Domestic Exchange-Traded Options, OMB Control No. 3038-0007—Extension.

The rules require futures commission merchants and introducing brokers (1) to provide their customers with

<sup>15</sup> 17 CFR 30, App. D. (2003), 68 FR 33623.

<sup>16</sup> This procedure also applies where the FBOT has permission to list the futures contract for trading by direct access but has not yet done so at the time it also decides to list the option contract.