

exercises was below the Navy's proposed 2009 operations.

#### Planned Activities for 2010

In 2010, the Navy expects to conduct the same type and amount of training identified in the final rules and 2009 LOAs. No modification is proposed by the Navy for its planned 2010 activities.

#### Estimated Take for 2010

The estimated takes for the Navy's proposed 2010 training exercises are the same as those in authorized in 2009. No change has been made in the estimated takes from the 2009 LOAs.

#### Summary of Monitoring, Reporting, and other requirements under the 2009 LOA

##### *Annual Exercise Reports*

The Navy submitted their 2009 exercise report within the required timeframes and it is posted on NMFS website: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>. NMFS has reviewed the report and it contains the information required by the 2009 LOAs. The report lists the amount of training exercises conducted between June 2009 and January 2010. For training exercises conducted at the VACAPES Range Complex, the Navy conducted 26 exercises out of the total of 176 proposed. For training exercises at the JAX Range Complex, the Navy conducted 4 out of 175 exercises proposed. No training exercise was conducted at the Cherry Point Range Complex, though a total of 38 exercises were proposed.

##### *Monitoring and Annual Monitoring Reports*

The Navy conducted the monitoring required by the 2009 LOA and described in the Monitoring Plan, which included aerial and vessel surveys of training exercises by marine mammal observers. The Navy submitted their 2009 Monitoring Report, which is posted on NMFS' website (<http://www.nmfs.noaa.gov/pr/permits/incidental.htm>), within the required timeframe. The Navy included a summary of their 2009 monitoring effort and results (beginning on page 3 of the monitoring report).

##### *Integrated Comprehensive Management Program (ICMP) Plan*

The ICMP will be used both as: (1) a planning tool to focus Navy monitoring priorities (pursuant to ESA/MMPA requirements) across Navy Range Complexes and Exercises; and (2) an adaptive management tool, through the consolidation and analysis of the Navy's monitoring and watchstander data, as

well as new information from other Navy programs (e.g., research and development), and other appropriate newly published information. The Navy finalized a 2009 ICMP Plan outlining the program on December 22, 2009, as required by the 2009 LOA. The ICMP may be viewed at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>.

The ICMP is a program that will be in place for years and NMFS and Navy anticipate the ICMP may need to be updated yearly in order to keep pace with new advances in science and technology and the collection of new data. In the 2009 ICMP Plan, the Navy outlines three areas of targeted development for 2010, including:

- Identifying more specific monitoring sub-goals under the major goals that have been identified
- Characterizing Navy Range Complexes and Study Areas within the context of the prioritization guidelines described here
- Continuing to Develop Data Management, Organization and Access Procedures

##### *Adaptive Management and 2010 Monitoring Plan*

NMFS and the Navy conducted an adaptive management meeting in October 2009 wherein we reviewed the Navy monitoring results through August 1, 2009, discussed other Navy research and development efforts, and discussed other new information that could potentially inform decisions regarding Navy mitigation and monitoring. Because this is the first year of the regulation's period of effectiveness, the review only covered about 7 months of monitoring, which limited NMFS and the Navy's ability to undertake a robust review of the Navy's exercises and their effects on marine mammals. Based on the implementation of the 2009 monitoring, the Navy proposed some minor modifications to their monitoring plan for 2010 for VACAPES and JAX Range Complex training exercises, which NMFS agreed were appropriate. Beyond those changes, none of the information discussed led NMFS to recommend any modifications to the existing mitigation or monitoring measures. The final modifications to the monitoring plan and justifications are described in Section 7(b)(i)(A) of the 2010 LOAs for VACAPES and JAX Range Complexes, which may be viewed at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>. As additional data is obtained in subsequent years, NMFS and Navy will be better positioned to conduct more extensive reviews and modify existing

mitigation and monitoring measures, if appropriate.

#### Authorization

The Navy complied with the requirements of the 2009 LOAs. Based on our review of the record, NMFS has determined that the marine mammal take resulting from the 2009 military readiness training and research activities falls within the levels previously anticipated, analyzed, and authorized, and was likely lower given the fact that Navy conducted fewer operations in 2009 than originally planned. Further, the level of taking authorized in 2010 for the Navy's training exercises at VACAPES, JAX, and Cherry Point Range Complexes is consistent with our previous findings made for the total taking allowed under these Range Complexes regulations. Finally, the record supports NMFS' conclusion that the total number of marine mammals taken by the 2010 training exercises at VACAPES, JAX, and Cherry Point Range Complexes will have no more than a negligible impact on the affected species or stock of marine mammals and will not have an unmitigable adverse impact on the availability of these species or stocks for taking for subsistence uses. Accordingly, NMFS has issued three one-year LOAs for Navy training exercises conducted at these East Coast Range Complexes from June 5, 2010, through June 4, 2011.

Dated: June 3, 2010.

**James H. Lecky,**

*Director, Office of Protected Resources,  
National Marine Fisheries Service.*

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## COMMODITY FUTURES TRADING COMMISSION

### **Petition of Hard Eight Futures, LLC for Exemptive Relief, Pursuant to Section 4(c) of the Commodity Exchange Act, From Section 2(a)(1)(C)(iv) of the Commodity Exchange Act and Appendix D to Part 30 of the Rules of the Commodity Futures Trading Commission**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of petition and request for comment.

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**SUMMARY:** Hard Eight Futures, LLC ("HEF") has petitioned the Commodity Futures Trading Commission ("Commission" or "CFTC") for exemptive relief, pursuant to Section 4(c) of the Commodity Exchange Act

(“Act” or “CEA”),<sup>1</sup> to permit U.S. eligible contract participants (“ECPs”),<sup>2</sup> subject to certain conditions, to trade foreign non-narrow-based security index futures contracts where the foreign exchange has not obtained a staff no-action letter with respect to the offer and sale of such futures contracts to U.S. persons. The conditions proposed in HEF’s petition are: (i) Relief is only available for futures on broad-based security indexes; (ii) the securities comprising such an index are principally traded on, by, or through any exchange or market located outside the U.S.; (iii) the Commission must have a Memorandum of Understanding with the foreign exchange’s regulator with respect to information sharing and cooperation;<sup>3</sup> and (iv) an ECP seeking to claim the exemption would file notice with the Commission, which would be effective with respect to that person and index, unless the Commission notifies the person within ten (10) business days that the claimant does not meet the requirements of the exclusion, or that the index does not qualify as broad based.

The Commission seeks comment on HEF’s petition and related questions. Copies of the petition are available for inspection at the Office of the Secretariat by mail at the address listed below, by telephoning (202) 418–5100, or on the Commission’s Web site (<http://www.cftc.gov>).

**DATES:** Comments must be received on or before July 19, 2010. Comments must be in English or, if not, accompanied by an English translation.

**ADDRESSES:** Comments should be sent to David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Comments may be sent by facsimile transmission to (202) 418–5521, or by e-mail to [hardeightfutures@cftc.gov](mailto:hardeightfutures@cftc.gov). Reference should be made to “Hard Eight Futures Petition for Exemption from Section 2(a)(1)(C)(iv) of the Act and Appendix D to Part 30 of the Rules of the Commission.” Comments may also be submitted by connecting to the Federal eRulemaking Portal at <http://www.regulations.gov> and following the comment submission instructions.

<sup>1</sup> 7 U.S.C. 6(c).

<sup>2</sup> The term “eligible contract participant” is defined in Section 1a(12) of the Act, 7 U.S.C. 1a(12).

<sup>3</sup> A foreign exchange seeking to offer foreign security index futures to the general public in the U.S. would still need staff no-action relief, and if it sought to do so through terminals located in the U.S., it would still need a second “direct access no-action letter” from the staff.

Comments will be published on the Commission’s Web site.

**FOR FURTHER INFORMATION CONTACT:** Julian E. Hammar, Assistant General Counsel, Office of General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5118. E-mail: [jhammar@cftc.gov](mailto:jhammar@cftc.gov) or Edwin J. Yoshimura, Counsel, Office of General Counsel, Commodity Futures Trading Commission, 525 W. Monroe Street, Suite 1100, Chicago, IL 60661. Telephone: (312) 596–0562. E-mail: [eyoshimura@cftc.gov](mailto:eyoshimura@cftc.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

In general, foreign exchange-traded futures and commodity option products may be offered or sold by properly registered or exempt intermediaries to persons located in the U.S., without prior product approval.<sup>4</sup> Special review procedures apply, however, to the offer or sale of futures contracts based on a group or index of securities (“security index”).<sup>5</sup> Specifically, Section 2(a)(1)(C)(iv) of the CEA<sup>6</sup> generally prohibits any person from offering or selling a futures contract based on a security index in the U.S., except as otherwise permitted under Section 2(a)(1)(C)(ii) or Section 2(a)(1)(D).<sup>7</sup> By its terms, Section 2(a)(1)(C)(iv) applies to futures contracts on security indexes traded on both domestic and foreign boards of trade.

Section 2(a)(1)(C)(ii) of the CEA<sup>8</sup> sets forth three criteria to govern the trading of futures contracts on a security index to be traded on contract markets and derivatives transaction execution

facilities designated or registered by the Commission:

(a) The contract must provide for cash settlement;

(b) The contract must not be readily susceptible to manipulation or to being used to manipulate any underlying security; and

(c) The security index must not constitute a narrow-based security index.<sup>9</sup>

The CEA does not explicitly address the standards to be applied to a security index futures contract traded on a foreign board of trade. Historically, though, Commission staff has applied the aforementioned three criteria in evaluating requests by foreign boards of trade seeking to offer and sell their foreign security index futures contracts in the U.S. (without becoming designated as a contract market, or registered as a derivatives transaction execution facility).

In reviewing such requests, Commission staff evaluates the foreign security index futures contract to ensure that it complies with the three criteria of Section 2(a)(1)(C)(ii) of the CEA. In making its determination, the staff considers the design and maintenance of the index, the method of index calculation, the nature of the component security prices used to calculate the index, the breadth and frequency of index dissemination, and other relevant factors.<sup>10</sup> With respect to whether a foreign futures contract based on a foreign security index is not readily susceptible to manipulation or being used to manipulate any underlying security, one preliminary consideration is the requesting board of trade’s ability to access information regarding the securities underlying the index.<sup>11</sup>

<sup>4</sup> See Foreign Commodity Options, 61 FR 10891 (Mar. 18, 1996).

<sup>5</sup> The CEA, as amended by the Commodity Futures Modernization Act of 2000 (“CFMA”), Appendix E of Public Law No. 106–554, 114 Stat. 2763 (2000), provides that the offer or sale in the U.S. of futures contracts based on a security index, including those contracts traded on or subject to the rules of a foreign board of trade, is subject to the Commission’s exclusive jurisdiction, with the exception of security futures products, over which the Commission shares jurisdiction with the Securities and Exchange Commission (“SEC”). A security future, in turn, is defined in CEA Section 1a(31) as a futures contract on a single security or a “narrow-based security index.” 7 U.S.C. 1a(31). Thus, the Commission’s jurisdiction remains exclusive with regard to futures contracts on a security index that is broad-based, i.e., that does not meet the definition of a “narrow-based security index” in CEA Section 1a(25), 7 U.S.C. 1a(25).

<sup>6</sup> 7 U.S.C. 2(a)(1)(C)(iv).

<sup>7</sup> CEA Section 2(a)(1)(D), 7 U.S.C. § 2(a)(1)(D), governs the offer and sale of security futures products.

<sup>8</sup> 7 U.S.C. 2(a)(1)(C)(ii).

<sup>9</sup> With regard to the third criterion, the CFTC and SEC have jointly promulgated Commission Rule 41.13 under the CEA and Rule 3a55–3 under the Securities Exchange Act of 1934, governing security index futures contracts traded on foreign boards of trade. These rules provide that “[w]hen a contract of sale for future delivery on a security index is traded on or subject to the rules of a foreign board of trade, such index shall not be a narrow-based security index if it would not be a narrow-based security index if a futures contract on such index were traded on a designated contract market or registered derivatives transaction execution facility.” Commission Rule 41.13, 17 CFR 41.13; SEC Rule 3a55–3, 17 CFR 240.3a55–3.

<sup>10</sup> See generally Appendix D to Part 30 of the Commission’s regulations.

<sup>11</sup> In general, staff has requested that the foreign board of trade provide a copy of the surveillance agreements between the board of trade and the exchange(s) on which the underlying securities are traded; assurances that the board of trade will share information with the Commission, directly or indirectly; and when applicable, information regarding foreign blocking statutes and their impact on the ability of U.S. government agencies to obtain information concerning the trading of futures contracts on security indexes. The staff reviews this

Upon determination by staff that the subject futures contract and underlying index comport with the criteria set forth in Section 2(a)(1)(C)(ii) of the CEA, Commission staff issues a no-action letter to the foreign board of trade with respect to the offer and sale of such futures contract in the U.S.<sup>12</sup> A foreign board of trade that has received prior no-action relief with respect to a particular foreign security index futures contract must file a new submission for each foreign security index futures contract that it seeks to offer or sell in the U.S.

## II. HEF's Petition

By letter dated April 21, 2008 ("Petition"), HEF, a registered commodity trading advisor ("CTA"), applied for exemptive relief, pursuant to Section 4(c) of the Act, from Section 2(a)(1)(C)(iv) of the Act and Appendix D to Part 30 of the Rules of the Commission.<sup>13</sup> According to the Petition, this exemption is necessary to promote responsible economic innovation and fair competition. Granting the exemption will enable U.S. ECPs<sup>14</sup> to trade a foreign security index futures contract even if the foreign board of trade that lists the contract has not obtained no-action relief relating to the offer and sale of that contract to U.S. persons.

Under the exemptive relief requested by HEF's Petition, U.S. ECPs could trade, on a foreign board of trade, futures contracts on foreign security indexes that are not security futures

products (*i.e.*, the index is not a narrow-based security index) on the same basis as they may trade any other futures contract on a foreign board of trade. Currently, no prior qualifying action by the Commission or its staff is required in order for U.S. persons to enter into non-security-based futures contracts traded on a foreign board of trade. Rather, U.S. customers are permitted to access futures products offered by a foreign board of trade through a U.S. registered futures commission merchant or introducing broker, or through a foreign firm pursuant to an exemption under Commission Rule 30.10.<sup>15</sup> HEF's Petition asks that for U.S. ECPs, the same rules apply to foreign security index futures contracts as well.

## III. SEC Exemptive Order Regarding Foreign Security Futures

Due to the applicability of the federal securities laws, though, security index futures are not the same as futures on non-security based commodities. In this regard, with respect to security futures products (*i.e.*, futures on a single security or a narrow-based security index) traded on foreign boards of trade, Section 2(a)(1)(E) of the CEA and Section 6(k) of the Securities Exchange Act of 1934 ("Exchange Act") provide that: (i) The CFTC and SEC "shall jointly issue such rules, regulations, or orders as are necessary and appropriate to permit the offer and sale of a security futures product traded on or subject to the rules of a foreign board of trade to United States persons;" and (ii) such rules, regulations or orders "shall take into account, as appropriate, the nature and size of the markets that the securities underlying the security futures product reflects."<sup>16</sup>

After HEF's Petition was filed, the SEC on June 30, 2009, issued an Order ("SEC Order")<sup>17</sup> exempting certain persons from Section 6(h)(1) of the Exchange Act, which makes it unlawful for U.S. persons to enter into security futures traded on foreign boards of trade ("foreign security futures").<sup>18</sup> The SEC Order, among other things, permits certain sophisticated investors to access foreign security futures and provides relief for certain intermediaries in order to effect these transactions under certain conditions, including that the "primary

trading market" for the underlying securities of foreign private issuers is outside the U.S.<sup>19</sup> Specifically, the sophisticated investors to which the SEC Order applies include qualified institutional buyers ("QIBs") as defined in SEC Rule 144A under the Securities Act of 1933.<sup>20</sup> A QIB is generally an entity that owns and invests on a discretionary basis at least \$100 million in securities of unaffiliated issuers; it is, therefore, a narrower class of investors than the class of ECPs as defined in the CEA.<sup>21</sup>

The relief granted by the SEC Order, although not coterminous with the relief requested by HEF, is relevant to HEF's Petition. Prior to the SEC Order, if a foreign broad-based security index underlying a foreign exchange-traded futures contract became a narrow-based security index for a certain period of time, a U.S. person had to exit its position in that futures contract during a specified grace period, or be in violation of the Exchange Act's prohibition on trading foreign security futures.<sup>22</sup> Since June 30, 2009, though, if an ECP is eligible for and the contract satisfies the requirements for the exemption issued in the SEC Order, the ECP could continue to trade such a contract as a foreign security future pursuant to the terms and conditions of the SEC Order. But if an ECP is not eligible—that is, if the ECP does not meet the high threshold to qualify as a QIB—or the contract is not eligible under the SEC Order, then the ECP would not have relief in trading such a contract.

information to ensure that the requesting foreign board of trade (and/or its regulator) has the ability and willingness to access adequate surveillance data necessary to detect and deter manipulation in the futures contracts and underlying securities, as well as share such data with the Commission.

<sup>12</sup> A no-action letter generally is a written statement issued by the staff of a Division or Office of the Commission 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 by the requestor. See Commission Rule 140.99(a)(2), 17 CFR 140.99(a)(2). A no-action letter to a foreign board of trade does not affect or alter the application of Part 30 of the Commission's Rules, which governs the offer and sale by financial intermediaries of foreign futures and foreign option contracts to persons located in the U.S.

<sup>13</sup> Appendix D to Part 30 sets forth the process by which Commission staff evaluates requests for no-action relief from foreign boards of trade seeking to offer and sell their futures contracts on non-narrow-based security indexes in the U.S., and sets forth the information that such a foreign board of trade should submit when seeking no-action relief. 17 CFR Part 30, Appendix D.

<sup>14</sup> The CEA provides that the Commission may only issue exemptive relief to "appropriate persons" as described in CEA Section 4(c)(3), 7 U.S.C. 6(c)(3). For purposes of its Petition, HEF requests that the Commission define "appropriate persons" as including all ECPs.

<sup>15</sup> 17 CFR 30.10.

<sup>16</sup> 7 U.S.C. 2(a)(1)(E); 15 U.S.C. 78f(k).

<sup>17</sup> See Order Under Section 36 of the Securities Exchange Act of 1934 Granting an Exemption From Exchange Act Section 6(h)(1) for Certain Persons Effecting Transactions in Foreign Security Futures and Under Exchange Act Section 15(a)(2) and Section 36 Granting Exemptions From Exchange Act Section 15(a)(1) and Certain Other Requirements, 74 FR 32200 (July 7, 2009).

<sup>18</sup> 15 U.S.C. 78f(h).

<sup>19</sup> In light of questions received following the issuance of the SEC Order, the Commission's Division of Clearing & Intermediary Oversight has recently issued an "Advisory Concerning the Offer and Sale of Foreign Security Futures Products to Customers Located in the United States."

<sup>20</sup> 15 U.S.C. 77a *et seq.*

<sup>21</sup> 17 CFR 230.144A (a QIB is one of the enumerated entities, "acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with the entity").

<sup>22</sup> If an index becomes narrow-based for more than 45 business days over three consecutive calendar months, the CEA and the Exchange Act provide a grace period of three months during which the index is excluded from the definition of a "narrow-based security index." See Section 1a(25)(D) of the CEA, 7 U.S.C. 1a(25)(D) and Section 3(a)(55)(E) of the Exchange Act, 15 U.S.C. 78c(a)(55)(E). Although these provisions apply to security index futures contracts traded on certain U.S. exchanges, by joint regulation, the Commission and the SEC have made these provisions applicable to security index futures contracts traded on foreign boards of trade. See Commission Rule 41.13, 17 CFR 41.13 and SEC Rule 3a55-3, 17 CFR 240.3a55-3.

#### IV. Relief Sought by HEF

Section 4(c)(1) of the Act empowers the Commission to “promote responsible economic or financial innovation and fair competition” by exempting any transaction or class of transactions, including any person offering or entering into such transaction, from any of the provisions of the CEA (subject to exceptions not relevant here) where the Commission determines that the exemption would be consistent with the public interest.<sup>23</sup> The Petition requests relief from the requirement that U.S. persons may only enter into a futures contract on a foreign security index listed on a foreign board of trade if the foreign board of trade has first received a letter providing no-action relief to offer and sell that futures contract to U.S. persons.

The proposed exemptive relief would require that a person wishing to trade a particular security index futures contract listed on a foreign board of trade that has not received no-action relief notify the Commission of the person’s intent to do so. The notice would require the claimant to demonstrate his or her qualification for the exemption (*i.e.*, that he or she is an ECP), and that the index is not a narrow-based security index. The exemption would be effective with respect to that person and index unless the Commission notifies the person within ten (10) business days that the claimant does not meet the requirements of the exclusion, or the index does not qualify under the Act as a non-narrow based index (including an explanation of why it considers the person not to be qualified or the index to be narrow-based, respectively).

<sup>23</sup> Section 4(c)(1) of the Act, 7 U.S.C. 6(c)(1), provides that:

In order to promote responsible economic or financial innovation and fair competition, the Commission by \* \* \* order, after notice and opportunity for hearing, may (\* \* \* on application of any person, including any board of trade designated or registered as a contract market \* \* \*) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of this section (including any person or class of persons offering, entering into, rendering advice or rendering services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods \* \* \* from any \* \* \* provision of this Act (except subparagraphs (C)(ii) and (D) of section 2(a)(1), except that the Commission and Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D)), if the Commission determines that the exemption would be consistent with the public interest.

While Section 4(c)(2) of the Act, 7 U.S.C. 6(c)(2), imposes additional requirements with respect to any exemption from the requirements of Section 4(a) of the Act, 7 U.S.C. 6(a), HEF is not seeking such relief.

Further, this exemption would be available only for contracts traded on foreign boards of trade for which the applicable foreign regulator has entered into a Memorandum of Understanding (“MOU”) with respect to information sharing and cooperation with the CFTC.<sup>24</sup> Also, the securities comprising the index underlying the futures contract would have to be principally traded on, by, or through an exchange or market located outside the U.S.

The Petition does not seek an exemption from the requirement that a foreign board of trade be granted no-action relief before offering and selling such foreign security index futures contracts to the general public. Nor does it seek an exemption from the requirement that such contracts may be traded through direct access from the U.S. to a foreign board of trade’s electronic trading system only pursuant to a Commission staff direct access no-action letter.<sup>25</sup>

More specifically, HEF is seeking an exemption, pursuant to Section 4(c) of the Act, from Section 2(a)(1)(C)(iv) of the Act and 17 CFR Part 30 Appendix D in the following form, with conditions:

(X) *Exemption for Eligible Contract Participants Trading Non-narrow Based Stock Indexes on a Foreign Board of Trade.* The Commodity Futures Trading Commission, pursuant to its authority under Section 4(c)(1) of the Commodity Exchange Act, hereby determines that notwithstanding the provisions of Section 2(a)(1)(C)(iv) of the Act and Appendix D to Part 30 of its Rules, nothing in the Act is intended to prohibit any “eligible contract participant,” as defined in Section 1a(12) of the Act, located in the U.S. from purchasing or carrying futures contracts on a securities index that is not a “narrow-based index” as defined in Section 1a(25) of the Act, traded on or subject to the rules of a foreign board of trade to the same extent such person may be authorized to purchase or carry a futures contract on any other commodity so long as the underlying securities comprising such index are principally traded on, by or through any

<sup>24</sup> This could be either a bilateral MOU between the Commission and the applicable foreign regulator, or a multilateral MOU such as the “Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information” created by the International Organization of Securities Commissions (“IOSCO Multilateral MOU”).

<sup>25</sup> See Policy Statement Regarding 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 (Nov. 2, 2006).

exchange or market located outside the United States, and the regulator of such foreign board of trade has entered into a Memorandum of Understanding with respect to information sharing and cooperation with the Commission.

(a) *Notification:* Persons wishing to avail themselves of this exemption shall so notify the Commission. This notification shall be filed with the Secretary of the Commission at its Washington, D.C. headquarters, in electronic form, shall be labeled as “Notification of Trading in a Non-narrow Based Index Traded on a Foreign Board of Trade,” and shall include:

(1) The name and address of the person and representation that the person qualifies as an Eligible Contract Participant, and the basis upon which the person so qualifies;

(2) The name of the non-narrow based index and of the foreign board of trade on which the index is traded;

(3) A demonstration that the index is not a “narrow-based index” under the definition of Section 1a(25) of the Act; and

(4) A representation that the regulator of the foreign board of trade has entered into an information-sharing agreement with the Commission or to which the Commission is also a signatory.

(b) *Effective Date:* The exemption shall be effective ten (10) business days after filing of the notice with the Commission, unless the Commission within that period notifies the person claiming the exemption that the exemption may not be made effective with respect to that person and/or that index and its reason for so finding.

According to HEF, the purpose behind the no-action process is in furtherance of Congress’ expressed intent “to protect the interests of U.S. residents against fraudulent or other harmful practices.”<sup>26</sup> HEF maintains that ECPs, due to their size and sophistication, are not dependent upon the terms and conditions imposed on the trading of foreign security index futures in the staff’s no-action relief for protection from fraud. Further, HEF notes that in the U.S., ECPs currently are able to trade contracts, agreements, or transactions that replicate futures contracts on foreign security indexes in the over-the-counter (“OTC”) markets. HEF states that granting this exemptive relief will enable ECPs to trade futures contracts on a foreign board of trade that are equivalent to contracts that ECPs are able to trade in the OTC markets. Because contracts on foreign security

<sup>26</sup> H.R. Rep. No. 97–565, Part I, at p. 85 (May 17, 1982).

indexes are already traded in the OTC markets by U.S. ECPs, HEF believes that it is in the public interest to provide U.S. ECPs the choice to trade foreign security indexes in a more regulated, transparent exchange environment on foreign boards of trade.

#### V. Request for Comments

The Commission requests public comment on any aspect of the Petition that commenters believe may raise issues under the CEA or Commission regulations. In particular, the Commission invites comment regarding the following:

(1) *Conditions Proposed by HEF:* Should an order granting the request for relief include any one or more of the conditions proposed by HEF in its Petition?

(2) *Surveillance:* In granting no-action relief to a foreign board of trade seeking to offer and sell a futures contract on a foreign security index to U.S. persons, Commission staff generally rely on surveillance sharing agreements between the securities exchanges on which the securities comprising the index are traded, and the foreign board of trade. See *infra* n.11. Also, before issuing such no-action relief, Commission staff often requests a representation or commitment from the foreign board of trade of its willingness and ability to share information with the Commission. *Id.* Similarly, in granting no-action relief to a foreign board of trade seeking to offer and sell any futures contract to U.S. persons through direct access to its electronic trading system from the U.S., Commission staff typically confirm that the market and its regulator have the ability to obtain the specific types of information that may be needed by the Commission, as well as the authority to share that information with the Commission on an “as needed” basis. Moreover, Commission staff generally obtains evidence of the foreign market’s and regulator’s willingness to share information (*e.g.*, through explicit undertakings) with the Commission.

To ensure that there are similar protections in place in the circumstances posed by HEF’s Petition, should an order granting the request for relief require that the foreign board of trade that lists the foreign security index futures contract to be traded by the ECP have: (i) Submitted a pending request for no-action relief with respect to that futures contract; (ii) received a prior no-action letter for another foreign security index futures contract; and/or (iii) received a foreign direct access no action letter?

(3) *MOUs:* The Commission is concerned that the condition for an MOU included in HEF’s Petition may not be workable in practice, given the wide spectrum of information sharing agreements to which the Commission is a party. An MOU may only mean that the foreign regulator will share information, not that it has access to surveillance information to share. Should an order granting the relief requested in HEF’s Petition be conditioned on the existence of an MOU that is specifically tailored to obtain the information that the Commission needs to assess the efficacy of the foreign board of trade and its regulator, and to obtain surveillance information as it deems necessary? Should any such relief be limited to foreign security index futures contracts listed in jurisdictions that are signatories to the IOSCO Multilateral MOU?

(4) *Broad vs. Narrow-Based Security Indexes:* As discussed above, a futures contract on a security index that moves from broad to narrow-based thereby becomes a security future that may no longer be traded by U.S. persons subject to the exclusive jurisdiction of the CFTC. To ensure full compliance with the requirements of the CEA and the federal securities laws, should an order granting the relief requested in HEF’s Petition require an undertaking by the ECP to: (i) Continually monitor the underlying index to ensure that it remains broad-based; (ii) notify the Commission if the index becomes a narrow-based security index; and (iii) if the index continues to be narrow-based for more than 45 business days during 3 consecutive calendar months, to cease trading the futures contract and liquidate existing positions in an orderly manner over the next 3 calendar months (provided, however, that if the ECP and the futures contract are eligible for the exemptive relief granted by the SEC Order, the ECP may continue to trade that contract as a foreign security future)?

(5) *Additional Conditions:* Should an order granting the relief requested in HEF’s Petition require that there be no solicitation of ECP orders, and/or that ECPs be required to trade only for their own account? <sup>27</sup>

(6) *OTC Derivatives Reform Legislation:* As discussed above, HEF’s Petition justifies its request for relief, in part, on the proposition that: (i) U.S. ECPs currently are able to trade contracts that replicate futures on

foreign security indexes in the unregulated OTC markets; and (ii) it is in the public interest to enable them to do so in a more regulated and transparent exchange environment on a foreign board of trade. Yet, legislation currently pending before the Congress, if eventually enacted, could change this premise to some degree, as it would significantly enhance the transparency of OTC derivatives and require that certain swaps (subject to an “end-user exception”) be traded on a contract market or a “swap execution facility” as provided for in that legislation. What are the implications of the OTC derivatives reform legislation pending in Congress, if any, on HEF’s Petition?

(7) *Foreign Securities:* As discussed above, HEF’s Petition proposes that an order granting its request for relief be conditioned upon all the securities in the index underlying the foreign futures contract being principally traded on, by, or through an exchange or market located outside the U.S. This “principally traded” formulation may be based on the language of CEA Section 2(a)(1)(F)(ii), which addresses trading of foreign security futures by ECPs in the U.S.<sup>28</sup> What are the implications, if any, of the use of this standard in an order granting the relief requested in HEF’s Petition in comparison to the “primary trading market” test that the SEC created for securities of foreign private issuers in a narrow-based security index as set forth in paragraph (1)(a)(ii) of the SEC Order? <sup>29</sup> Should an order granting the relief requested in HEF’s Petition treat securities in an index as being principally traded on, by, or through an exchange outside the United States if they meet the criteria for securities in a narrow-based security index contained in paragraph (1)(a)(ii) of the SEC Order? <sup>30</sup>

<sup>28</sup> 7 U.S.C. 2(a)(1)(F)(ii). See text accompanying n.31 *infra* for full text.

<sup>29</sup> The SEC Order provides that for U.S. QIBs to be able to trade foreign security futures, the securities issued by foreign private issuers that underlie a foreign security future must have their “primary trading market” outside the U.S. For purposes of this condition, under the SEC Order a security’s “primary trading market” is deemed to be outside the U.S. if at least 55% of the worldwide trading volume in the security took place in, on, or through a securities market or markets located in either: (i) A single foreign jurisdiction; or (ii) no more than two foreign jurisdictions during the most recently completed fiscal year. If the trading in the foreign private issuer’s security is in two foreign jurisdictions, the trading for the issuer’s security in at least one of the two foreign jurisdictions must be greater than the trading in the U.S. for the same class of the issuer’s securities in order for such security’s “primary trading market” to be considered outside the U.S.

<sup>30</sup> In addition to securities of foreign private issuers whose primary trading market is outside the

<sup>27</sup> Granting the relief requested in HEF’s Petition would in no way alter the requirements of Part 30 of the Commission’s regulations concerning foreign futures and options transactions.

(8) *ECPs vs. QIBs*: CEA Section 2(a)(1)(F)(ii), cited in the preceding paragraph, provides in full as follows:

Nothing in this Act is intended to prohibit any eligible contract participant located in the United States from purchasing or carrying securities futures products traded on or subject to the rules of a foreign board of trade, exchange, or market to the same extent such person may be authorized to purchase or carry other securities traded on a foreign board of trade, exchange, or market so long as any underlying security for such security futures products is traded principally on, by, or through any exchange or market located outside the United States.<sup>31</sup>

As discussed above, the SEC Order generally limits the category of U.S. persons that may trade foreign security futures to QIBs (who own and invest \$100 million or more). This is a narrower class of investors than ECPs. The group of persons that satisfy the ECP definition but may not be QIBs includes registered investment companies, commodity pools, pension plans, corporations and high net worth individuals. These persons may have a real need for risk management based upon exposures in foreign financial markets or to economic conditions in other countries, or they may want to gain exposure to those markets as part of the asset allocation in their investment portfolio.

If the relief requested in HEF's Petition is granted, an ECP that is a QIB and trades a foreign futures contract on a foreign security index that moves from broad to narrow-based can continue to trade that contract as a foreign security future, provided the contract otherwise meets the requirements of the SEC Order. An ECP that is not a QIB, however, would have to exit its position in the foreign futures contract within the applicable grace period or be in violation of the Exchange Act. Given this difference in legal status, should an order issued by the Commission granting the relief requested in HEF's Petition be limited to QIBs?

U.S. underlying narrow-based security indexes, paragraph (1)(a)(ii) of the SEC Order permits debt securities issued or guaranteed by a foreign government as defined in Rule 405 of the Securities Act, 17 CFR 230.405, that are eligible to be registered with the SEC under Schedule B of the Securities Act, 15 U.S.C. 77aa. Further, paragraph (1)(a)(ii) requires that at the time of the transaction, at least 90% of the index, both in terms of the number of underlying securities and their weight, must meet these eligibility requirements. No more than 10% of the securities in the index, both in terms of their number and their weight, at the time of the transaction, that do not meet the requirements, must be from issuers that are required to file reports with the SEC pursuant to Section 13 or Section 15(d) of the Exchange Act, 15 U.S.C. 78m and 78o.

<sup>31</sup> 7 U.S.C. 2(a)(1)(F)(ii).

With respect to access to foreign security futures by U.S. persons, are the conditions contained in the SEC Order consistent with Section 2(a)(1)(F)(ii) of the CEA? Should ECPs that are not QIBs be permitted to trade foreign security futures? What conditions, if any, should be imposed on such trading by ECPs that are QIBs, and ECPs that are not QIBs? How should an order permitting ECPs to trade foreign security futures take into account, as mandated by Section 2(a)(1)(E) of the CEA, "the nature and size of the markets that the securities underlying the security futures product reflects?"

(9) *Nature of Foreign Security Indexes*: Lying at the core of the complex interplay between HEF's Petition on the one hand, and the CEA and the federal securities laws on the other hand, is the application of the statutory definition of a "narrow-based security index" to foreign security indexes. To the extent that a foreign security index falls squarely on the broad-based side of the line, distinctions between ECPs that are QIBs and those that are not, and the prospect of an ECP that is relying on the relief requested by HEF violating the securities laws, may be of less concern.

Congress has recognized that "[t]he detailed statutory test of a narrow-based security index was tailored to fit the U.S. equity markets, which are by far the largest, deepest and most liquid securities markets in the world."<sup>32</sup> In the CFMA in 2000, Congress directed that the CFTC and the SEC, within one year, jointly adopt rules or regulations that set forth requirements for broad-based foreign security indexes traded on a foreign board of trade.<sup>33</sup> And shortly thereafter, the CFTC and SEC promised to consider amending the rules regarding security index futures trading on or subject to the rules of a foreign board of trade.<sup>34</sup>

Should the CFTC and the SEC establish criteria to exclude appropriate foreign security indexes from the definition of a "narrow-based security index?" If so, on what basis? How should it be determined whether a foreign security index is appropriately treated as a broad-based security index so that foreign futures on such an index

<sup>32</sup> H.R. Rep. No. 110-627 at 983 (2009) (Conference Report on the CFTC Reauthorization Act of 2008, Title XIII of the 2008 "Farm Bill," Public Law No. 110-246, 122 Stat. 1651 (June 18, 2008)).

<sup>33</sup> See 7 U.S.C. 1a(25)(B)(iv) and 1a(25)(C); 15 U.S.C. 3(a)(55)(C)(iv) and 3(a)(55)(D).

<sup>34</sup> See Method for Determining Market Capitalization and Dollar Value of Average Daily Trading Volume; Application of the Definition of Narrow-Based Security Index, 66 FR 44490, 44501-44502 (August 23, 2001).

would trade subject to the exclusive jurisdiction of the CFTC, or as a narrow-based security index so that foreign futures on such an index would trade as foreign security futures? The Commission encourages commenters to submit any quantitative data and analysis to support any proposed distinctions between broad and narrow-based foreign security indexes.

(10) *CEA Section 4(c) Requirements*:

- Is the exemption requested in HEF's Petition consistent with the requirements for relief set forth in Section 4(c) of the CEA?
- Would granting the exemption requested in HEF's Petition be consistent with the public interest and purposes of the CEA?
- Would granting the relief requested in HEF's Petition have any material adverse effects upon derivatives clearing organizations, exchanges, or other Commission registrants from a competitive or other perspective?

(11) *Other Issues*: The Commission welcomes comment on any other issues relevant to HEF's Petition for an exemption.

\* \* \* \* \*

Issued in Washington, DC, on June 11, 2010 by the Commission.

**Sauntia S. Warfield,**

*Assistant Secretary of the Commission.*

[FR Doc. 2010-14680 Filed 6-16-10; 8:45 am]

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## COMMODITY FUTURES TRADING COMMISSION

### Request To Amend an Existing Order Under Section 4(c) of the Commodity Exchange Act Permitting Eligible Swap Participants To Submit for Clearing, and ICE Clear U.S., Inc. and Futures Commission Merchants To Clear, Certain-Over-The-Counter Agricultural Swaps

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of Request for Comment on an Amendment to an Exemption Order.

**SUMMARY:** The Commodity Futures Trading Commission ("CFTC" or "Commission") is requesting comment on whether to amend an existing order to extend the exemption granted to ICE Clear U.S., Inc. ("ICE Clear") under Section 4(c) of the Commodity Exchange Act ("Act")<sup>1</sup> to certain over-the-counter ("OTC") agricultural swaps for which there is no corresponding futures contract listed for trading on ICE

<sup>1</sup> 7 U.S.C. 6(c).