REGISTRATION OF FOREIGN BOARDS OF TRADE

A response paper by the Futures and Options Association

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1. Introduction

1.1 The Futures and Options Association ("the FOA") is the principal European industry association for over 170 firms and organisations engaged in the carrying on of business in futures, options and other derivatives. Its international membership includes banks, financial institutions, brokers, commodity trade houses, energy and power market participants, exchanges, clearing houses, IT providers, lawyers, accountants and consultants.

1.2 We welcome the opportunity to comment on the Commodity Futures Trading Commission's Notice of Proposed Rulemaking (the "Proposal"), issued November 19, 2010, requiring the registration of Foreign Boards of Trade ("FBOTs").

1.3 The key lesson of the financial crisis has been to remind EU, US and other transatlantic governments of the deep integration of their economies and the consequential mutuality of interest in each of them recovering from the effects of the crisis as soon as possible. Notwithstanding the impact of the crisis, the EU-US transatlantic marketplace has maintained its position as the largest and most liquid financial centre worldwide. The manifest failure of nationally-bound regulatory frameworks to deal with the consequences of that market integration has strengthened, not reduced, the need for (a) significantly higher levels of regulatory cooperation and convergence; and (b) the kind of greater regulatory efficiency that can be achieved through comparability or recognition regimes like the CFTC's no-action letter process.

1.4 The FOA believes that:

(a) the current market turmoil situation highlights the increasing interconnectivity of the markets and therefore the need for policymakers, regulators, and industry to continue and even increase their engagement in dialogue on issues of mutual interest; and

(b) the growing risk of differentiated and more national solutions to regulatory repair regulation are becoming more evident, particularly in the context of areas of mutual and cross-border concern (e.g. credit-rating agencies, CCP clearing of standardised OTC transactions, hedge funds) is making progress on convergence even more urgent.

1.5 The FOA believes that the CFTC's existing no-action letter process provides tangible and significant benefits to global market participants in enabling the provision of direct access to the trading systems of FBOTs. In particular, these arrangements have substantially benefited US-domiciled market participants by facilitating direct access to non-US products and an increased number of centrally traded, liquid, transparent financial instruments, allowing these participants to hedge their overall risk exposure more efficiently and forensically in a cost-effective manner.

1.6 We support the CFTC in seeking to provide greater legal certainty for FBOTs through a new registration system. A registration system, such as that in place in the UK, would appear to provide a more transparent and standardised process, and is consistent with methods used by other non-US regulators.

1.7 However, we believe strongly that in, moving to a registration system for FBOTs, the CFTC should continue to accord full recognition to non-US regulatory regimes that support comparable regulatory outcomes and standards and enforce substantially equivalent regulatory objectives. We are concerned that the new rules will narrow the existing

discretion and flexibility the CFTC currently has in making this comparability assessment, among other impacts. Further, there should be no introduction of burdensome or duplicative US rules (i.e. the regulatory burden imposed on FBOTs under a new licensing regime should be no greater than is currently the case under the existing "no action" procedure).

1.8 The FOA would note that standards set in the US for recognition will impact on the EU approach to, for example, the recognition of US market infrastructures.

1.9 The FOA suggests that going forward, the CFTC will need to be aware of a proposal made by the European Commission in its recent "Review of the Markets in Financial Instruments Directive (MiFID)" consultation to create various sub-regimes within a new broad category of "organised trading facility" ("OTF"). These sub-regimes would sit outside of the categories of trading venues currently recognised by MiFID (regulated markets and multilateral trading facilities), and would capture all forms of organised execution venues that bring together buying and selling interests, whether bilateral or multilateral, discretionary or non-discretionary and whether, by way of voice and/or hybrid voice / electronic execution. It is foreseeable that operators of OTFs would seek registration with the CFTC in order to provide US participants with direct access to products traded on their facilities.

2. Retaining the CFTC's current approach of determining whether the FBOT is subject to a comparable regulatory regime in its home jurisdiction.

2.1 The FOA is strongly supportive of the current policy of the CFTC, which enables a FBOT to make its products available for trading in the US by permitting direct access to its electronic trading system from the US through the process of regulatory recognition. The current framework of no action letters is conditional upon the provision of certain critical information by the FBOT regarding its membership criteria, its automated trading and order-matching systems, its settlement and clearing arrangements, the applicable regulatory regime and on the range and extent of information-sharing agreements in force that cover its market; and on continued compliance with any conditions that may be attached to the letter.

2.2 The FOA believes the existing no-action relief regime has worked well (with no evidence of any consequential market failure), is consistent with the evolution of an increasingly international marketplace and has worked to the general good of market participants and their customers in the US and elsewhere.

2.3 The FOA is concerned that the CFTC's existing approach to comparability may change into what is effectively a rules' equivalence approach under the registration system proposal. For example, in Part IV of the Notice of Proposed Rulemaking, the Commission requests comment on whether, to the extent a FBOT is permitted to list swaps on a trading system to which the FBOT has granted direct access to members and other participants in the US, *"the Commission should examine the oversight of relevant market participants (e.g., the functional equivalents of swap dealers and major swap participants, as those terms are defined by the Dodd-Frank Act) in the applicable home country jurisdictions when making a determination as to the comparability and comprehensiveness of the supervision and regulation of the relevant regulatory regime. For example, the Commission may wish to consider whether swap dealers are permitted to provide counterparties with the right to segregate collateral."*

2.4 The FOA is concerned that this type of analysis could easily lead to a 'line by line' examination of the EU's approach to the regulation of derivatives transactions, central counterparties and trade repositories, perhaps extending to whether ownership restrictions have been imposed on market participants with respect to trading platforms or central

counterparties, which have not been included in current EU proposals. Such an approach would preserve regional rules' differentiation and, by enhancing compliance with host-state rules rather than affording general recognition (where appropriate) of home-state rules, will complicate cross-border business and increase the risk of inadvertent breaches.

3. A new licensing regime should not impose a regulatory burden on FBOTs that is greater than currently imposed under the existing "no action" procedure.

3.1 The proposed application process for FBOTs appears to impose an excessive documentation burden on FBOTs. Under the proposed rules, an FBOT with an existing no-action relief letter must submit a completed limited application for registration within 120 days of the effective date of the Proposal. This application must include information and data that was previously provided to the Commission. This is a time-consuming and expensive exercise for FBOTs that previously invested considerable resources to receive and maintain no-action relief letters.

3.2 Under the no-action process, after an FBOT's original submission for a no-action relief letter, Commission staff would have conducted an extensive examination of the applicant and the jurisdiction in which it is based. Prior to granting an approval, the Commission would have concluded that the FBOT's home regulatory authority supports and enforces regulatory objectives in its oversight of the FBOT that are comparable to the regulatory objectives supported and enforced by the CFTC in its oversight of a US market operator, and that the necessary agreements were in place between the Commission and domestic regulator of the FBOT to facilitate an efficient sharing of information regarding market activity on the FBOT. Subsequent to issuance of a letter, there would have been regular contact with the FBOT and its domestic regulator, and any material developments would have been notified to the Commission. Furthermore, the FBOT's home regulator would have provided the Commission with information about the day-to-day operations on the relevant markets. Given the significant amount of information attained through the no-action approval process and subsequent reporting process, the FOA believes that the Commission should principally rely on previous warranties from the FBOT and its domestic regulator to satisfy the requirements set forth in the Proposal.

3.3 The FOA does not believe that an FBOT should be required to demonstrate for a second time that it is subject to comprehensive, comparable regulation. In this regard, we note footnote 24 of the Federal Register Notice of Proposed Rulemaking. This footnote says the Dodd-Frank Act mandates that the Commission *"consider any previous Commission findings that the FBOT is subject to comprehensive supervision and regulation by the appropriate government authorities in their home country. Such previous Commission findings would include staff conclusions drawn previously during the course of reviewing an application for direct access no-action relief."*

3.4 That said, while there is likely to be a major restructuring in the UK of the FSA and, in the EU, of the regulatory infrastructure, the core supervisory requirements are likely to be unchanged. However, there may be different approaches to achieving common objectives as a result of EU/US programmes for regulatory repair (e.g. position management vs. position limits and conflicts of interest management).

3.5 Given the significant due diligence process associated with the granting of the no-action relief to a FBOT, as well as requirements that a FBOT must adhere to once no-action relief has been granted, we do not believe that FBOTs should have to re-apply for approval to allow direct access to their markets. The FOA suggests that, for each FBOT currently operating under a no-action relief letter, the CFTC identify the specific additional information it requires in order to complete its understanding of the operations of the FBOT. This would

be a more efficient approach than requiring the FBOT to resubmit all information that the Commission has already received.

4. The timeframes imposed on FBOTs by new rules must be realistic and not create uncertainty and/or disruption of access for market participants.

4.1 As noted above, the FOA is supportive of the Commission's objective of providing more legal certainty to FBOT's through a registration system. However, the FOA is concerned that the proposed rules may not be realistic in terms of the timeframe for CFTC staff in judging if an application is complete. This will be a resource-intensive exercise for Commission staff, requiring a review of each draft application and a determination of whether all required information has been submitted within the prescribed 120 day timeframe. We expect that the Commission will receive applications from most, if not all, twenty of the FBOTs with no-action relief letters currently in effect. The Commission may have difficulty deeming these applications complete prior to the expiration of the 120 day period. The Commission may also not have sufficient resources to process these applications within a reasonable period after submission.

4.2 Consequently, we are concerned that the proposed rules could lead to an extended period of regulatory uncertainty in which neither an FBOT nor the US market participants benefiting from direct access to the FBOT would have any assurance that the no-action relief will continue. The revocation of no-action relief would have serious adverse consequences for US participants with open positions, and will affect the liquidity available within the markets operated by the FBOT – thereby affecting global market participants.

4.3 To give CFTC staff sufficient time to review the FBOT application, the FOA suggests that the registration rules provide that a FBOT is permitted to continue to provide direct access as long as it submits an application within the 120-day period, which is determined in good faith by the applicant to be complete. Under this approach, the Commission would be able to ask for additional information after the end of the 120-day period and would reserve the power to terminate direct access of an applicant. In such a case, we recommend that the termination be effective only after a fixed period of time, in order to give US participants sufficient time to adjust their trading activities.

5. Conclusion

5.1 The FOA believes that the CFTC should continue to accord full recognition to non-US regulatory regimes that support and enforce substantially equivalent regulatory objectives. We are concerned that the new rules will narrow the existing discretion and flexibility the CFTC currently has in making this comparability assessment, among other impacts. Any modification to the CFTC's existing no-action relief regime should not increase the regulatory burden on FBOTs, and the timeframes imposed on FBOTs by new rules must be realistic and not create uncertainty and/or disruption of access for market participants.