March 7, 2011

Mr. David Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Via Online Submission

SUBJECT: RIN 3038-AD01

Dear Mr. Secretary:

The Minneapolis Grain Exchange, Inc. ("MGEX" or "Exchange") would like to thank the Commodity Futures Trading Commission ("CFTC" or "Commission") for this opportunity to respond to the Commission's request for comment on the above referenced matter published in the January 6, 2011 Federal Register Vol. 76, No. 4.

MGEX is both a Designated Contract Market ("DCM") and Derivatives Clearing Organization ("DCO"). MGEX appreciates the continued efforts the Commission has put forth to address the requirements placed upon it by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The CFTC is issuing this Governance Notice of Proposed Rulemaking ("NPRM") as a complement to the previously issued Conflicts of Interest NPRM.[1] MGEX provided comments to the latter NPRM. Therefore, MGEX will attempt to not be exhaustively duplicative in its comments to this Governance NPRM.

## Mitigation of Conflicts of Interest

A. Reporting Requirements

1. DCOs, DCMs and SEFs

This proposed rulemaking requires that each DCO, DCM or Swap Execution Facility ("SEF") must notify the CFTC within 30 days after each election of its board of directors: (1) a list of the board of directors, each committee that has a composition requirement, and each committee that has authority to amend or constrain the action of the board of directors; (2) a description of the relationship, if any, between any board member with

[1] 75 FR 63732 (Oct. 18, 2010).

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the registered entity and any member thereof; (3) the reason behind the public directors or customer representative qualifying as such; and (4) a description of how the composition of the board of directors and committees meets the requirements of the core principles, regulations and the registered entities rules. MGEX believes these are reasonable and relevant requests for information that could be provided to the Commission. As such, MGEX is not opposed to this portion of the proposed rulemakings.

2. DCOs

Proposed §39.13 allows DCOs to use a risk management subcommittee that reports to the risk management committee ("RMC"). MGEX supports the additional flexibility provided by CFTC in this regard. However, proposed §39.25 goes on to require the DCO provide the CFTC a written report whenever the board of directors, or RMC if there is a RMC subcommittee, rejects or supersedes an action. This report must provide the recommendation or action made, the rationale for the recommendation or action, the rationale for rejecting the recommendation or superseding the action, and the course of action that was elected to be taken over the recommendation or action.

MGEX believes requiring such a report might chill sound business judgment and it may lead to a strained working relationship between the RMC and board of directors. Most business entities are not always in full agreement all of the time and most do not want their internal disagreements to become public. In order to avoid a public disagreement, either the RMC or board of directors might refrain from taking a course of action either believes is in the best interest of the registered entity. Neither party may be wrong in their recommendation or decision, and a report implies someone is wrong or doing something inappropriate. Therefore, the CFTC should not require a written report whenever the board of directors, or RMC if there is a RMC subcommittee, rejects or supersedes an action.

While MGEX does not believe any reporting is necessary, as an alternative, MGEX suggests the RMC's annual report be used to summarize any rejection of recommendations or superseding of actions instead of an immediate reporting. Should there be topics the Commission believes are time sensitive, the CFTC can require more frequent reporting of those specific issues. These alternatives will lessen the burden on DCOs while still providing the CFTC the information it appears to want. Further, MGEX respectfully suggests that these notifications be kept confidential.

3. DCMs and SEFs

The proposed rulemaking likewise requires that a DCM or SEF report to the CFTC whenever the DCM or SEF's board of directors rejects a recommendation of its regulatory oversight committee ("ROC") or membership or participation committee. MGEX believes the same concerns apply for DCMs and SEFs as detailed above regarding DCOs and the RMC. Therefore, MGEX proposes the same recommendations and alternatives detailed above.

B. Regulatory Requirements

Under the proposed rulemaking, the CFTC is requiring that each DCO, DCM, and SEF "must establish, maintain, and enforce written procedures to:

- Identify, on an ongoing basis, existing and potential conflicts of interest; and
- Make fair and non-biased decisions in the event of a conflict of interest."[2]

First, MGEX again points out that as a combined DCO/DCM one set of rules and regulations should be allowed to meet the requirements of both entities. Second, that if the proposed rulemaking is adopted, a combined entity be permitted to develop a single set of procedures that incorporate the above requirements. The procedures would of course take into account the different roles played as a DCO or DCM.

The Commission notes that it intends to permit DCOs, DCMs, and SEFs, to contract with a third-party, such as the National Futures Association, to provide the required regulatory program. MGEX fully supports allowing the registered entities this flexibility.

However, the Exchange questions how much more extensive a conflicts of interest program must be if a DCO or DCM already has public rules in place addressing potential conflicts of interest and monitors for potential conflicts. These existing precautions seem reasonable and should be sufficient. Creating another formal program means additional costs and another program subject to CFTC review. Each DCO and DCM is unique and will have different conflicts of interest programs. Therefore, MGEX is supportive of rulemaking that leaves significant flexibility to each entity to determine how best to implement the program.

C. Transparency Requirements

The proposed rulemaking seeks to increase transparency by requiring each DCO, DCM and SEF to:

- "Make available certain information to the public and relevant authorities;
- Ensure that the information made available is current, accurate, clear and readily accessible; and
- Disclose summaries of certain significant decisions."[3]

The CFTC goes on to define 'significant decisions' for DCMs and SEFs as those which relate to membership, access and disciplinary procedures. Additionally, the CFTC defines 'significant decisions' for DCOs as those which relate to open access, membership and the determination as to whether or not a product is acceptable for clearing.

While MGEX appreciates the Commission's attempt to protect certain non-public information under proposed §1.3(ggg), such as board meeting minutes, MGEX does not

[2] 76 FR 722, 725 (Jan. 6, 2011).
[3] *Id*.

believe that requiring a summary of significant decisions be reported to the CFTC and publicly disclosed is prudent. Alternatively, the summary of significant decisions should only be sent to the CFTC and not available to the public. Further, the CFTC should limit the requirement to report to involve only those decisions in which there is an actual conflict of interest. Additionally, the definition of what constitutes a 'significant decisions' needs greater clarity.

Assuming a 'significant decision' can be identified, summarized and provided to the CFTC and public, the benefit of doing this is difficult to see. Rather, this appears to be another chilling effect upon the decision making process of the board of directors and management team. A good example is the decision of a DCO whether to clear a product or not. Making such information available could lead to market abuses and competitive advantages/disadvantages. Competitors could use the summaries to subterfuge the ability of a new product to become successful if it is decided to be cleared. Therefore, MGEX believes proposing more than the Dodd-Frank Act requires is unnecessary and even counterproductive. However, should the Commission determine that significant decisions must be reported, 'significant decisions' should be as narrowly construed as possible and limit the reporting to the CFTC.

D. Limits on Use or Disclosure of Non-Public Information

The CFTC follows up its proposal to increase transparency with a proposed mandate that each DCO, DCM and SEF establish and maintain written policies and procedures to ensure the safeguarding of non-public and confidential information. MGEX agrees it is wise keeping certain information non-public. However, it seems that the CFTC has proposed a potential quagmire for registered entities who will have to make a determination between the transparency requirements and the non-disclosure requirements on some topics should the proposed rules become final. However, the Exchange appreciates the Commission permitting a DCO, DCM and SEF to adopt a more expansive definition of "non-public information."

## Regulations Implementing Governance Core Principles

### A. Governance Fitness Standards

The proposed rulemaking addresses the governance fitness standards requirements of §§725(c) and 735(b) of the Dodd-Frank Act. While MGEX supports fitness standards as a core principle for directors, members of disciplinary panels and governing committees, and even perhaps general fitness standards for members, clearing members and 10% owners, the proposed requirements again appear more than is necessary or even practical to address potential conflicts of interest. If a DCM or DCO does not grant direct market access, but a member or clearing member does so, the DCM and DCO cannot directly enforce fitness standards. If the rule is finalized as proposed, the Exchange recommends that the CFTC narrowly define the term "direct access." MGEX suggests that in the context of a combined DCO/DCM, the term should be limited to clearing members and not each individual market participant. Each registered entity should only have liability for market participants or other registered entities directly under them. That means members and clearing members. Should the CFTC want to regulate further down the chain, it can impose those regulations on the FCMs and

clearing members who might have better ability to regulate the market participants. The most control a DCO or DCM reasonably has over a market participant is the ability to bar the market participant from participating in its market. DCMs should not be obligated to vet each market participant since these are FCMs' business decisions. Despite any Commission proposal to the contrary, a DCO and DCM really only has jurisdiction over clearing members and members. Attempting to force all market participants regardless of location, to submit to a DCO or DCM's jurisdiction, or require a DCO and DCM to obtain jurisdiction over or be responsible for all market participants is not practical and maybe not legally possible.

Furthermore, requiring each DCO and DCM to collect and verify compliance with the fitness standards for anyone other than directors, disciplinary panel members and clearing members and then report annually to the Commission is not practical. The Exchange does not support having to conduct annual verification and reporting for members, direct market access participants or any non-members.

B. Transparency Requirements

The proposed rulemaking requires DCOs to make publically available "a description of the manner in which its governance arrangements permit the consideration of the views of its owners … and its participants."[4] Such description shall include, at a minimum, the general method by which the DCO learns of the views of its owners and participants, outside of voting and board or committee representation, and the manner in which the DCO considers such views. The Commission requests comment as to whether this proposal is necessary to implement Core Principle O. While Core Principle O states that each DCO shall establish governance arrangements that are transparent so as to fulfill public interest requirements and to permit the consideration of the view of owners and participants, it does not call for making public the method of how a DCO learns of views of participants or the manner in which a DCO considers such views. Therefore, MGEX believes that this proposal is not necessary for implementation of Core Principle O.

It is inherently beneficial for each DCO to listen to all market participants because failure to do so might lead to a loss of business. As such, MGEX already allows comments from members, owners, market participants and the public via a plethora of means such as through email, annual meetings, and contacting Exchange representatives. Further, MGEX does not believe it beneficial to be self-constrained in the method it acknowledges and addresses potential issues. As such, as long as the DCO is satisfying the core principle, MGEX believes it should not be restricted in the method of gathering views or the manner in which it considers them. Neither should a DCO be dictated as to how it both gathers and considers views.

[4] *Id*. at 7 28.

## C. Composition of the Board of Directors

### 1. DCMs

Core Principle 17, as amended by the Dodd-Frank Act, requires that the governance arrangements of a DCM shall be designed to allow consideration of the market participants' views. Given the requirement of the Dodd-Frank Act, MGEX supports the Commission's intent to permit flexibility for the DCM as to how to address Core Principle 17. MGEX believes this is the most effective model for how the Commission should issue conforming regulations that implement the Dodd-Frank Act. Furthermore, as a combined DCM/DCO, MGEX requests the CFTC ensure that any final rules make it feasible for the Exchange to have one board of directors.

### 2. DCOs

Proposed §39.26(b) requires that at least ten percent of a DCO's board of directors must be representatives of customers. However, §39.26(a) requires that each DCO must ensure that the composition of the governing board or committee includes market participants. The Exchange supports the flexibility to have customer representatives on the board of directors or RMC rather than dictating which they must be on. Therefore, the CFTC should not have to choose one composition method over the other. Rather, MGEX recommends offering both options.

## D. Diversity of DCM Board of Directors

Proposed Rule §38.1151 requires each publicly traded DCM to draft standards by which the DCM's board of directors could be considered broad and culturally diverse as well as how the DCM will meet that standard. Further, such publicly traded DCM will have to make public its diversity standards and provide a certification to the CFTC annually that its board of directors meets its diversity standards. The Exchange already strives for diversity in all aspects of its business. Even though not a publicly traded DCM, MGEX believes the CFTC is extending into areas which should not be under CFTC jurisdiction and believes it simply is not the place of the CFTC to go beyond the expressed language of the Dodd-Frank Act in this instance.

## **Related Matters/ Burden**

The CFTC estimates the total hours for the proposed collection of information under this NPRM to be 85 hours per respondent should they have to comply with each new burden. The CFTC further estimates that respondents could expend up to an additional $10,093.75 annually based on an hourly wage rate of $118.75 (85 hours × $118.75) to comply with the proposed rules. MGEX believes these estimates – both in hours and cost – are extremely low considering the CFTC does not appear to account for the costs of the set up, enforcement, documentation and CFTC review of compliance for the proposed rulemaking. Clearly the costs are not limited to reporting to the CFTC for many of the proposed rulemaking and, in fact, reporting may be the least expensive facet. Further, MGEX requests that as a combined DCO/DCM the Commission grant as much latitude as possible in allowing the Exchange to not file duplicative information to satisfy requirements for its DCO and DCM sides.

## Conclusion

The Exchange thanks the Commission for the opportunity to comment on the notice of proposed rulemaking. If there are any questions regarding these comments, please contact me at (612) 321-7169 or lcarlson@mgex.com. Thank you for your attention to this matter.

Regards,

Layne G. Carlson
Corporate Secretary

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