

submit its annual report in accordance with § 39.19(c)(3) of this part.

(5) *Recordkeeping.* (i) The derivatives clearing organization shall maintain:

(A) A copy of the compliance policies and procedures, as defined in § 39.1(b), and all other policies and procedures adopted in furtherance of compliance with the Act and Commission regulations;

(B) Copies of materials, including written reports provided to the board of directors or the senior officer in connection with the review of the annual report under paragraph (c)(4)(i) of this section; and

(C) Any records relevant to the annual report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are created, sent, or received in connection with the annual report and contain conclusions, opinions, analyses, or financial data related to the annual report.

(ii) The derivatives clearing organization shall maintain records in accordance with § 1.31 of this chapter and § 39.20 of this part.

8. Add § 39.17 to read as follows:

**§ 39.17 Rule enforcement requirements.**

(a) *In general.* Each derivatives clearing organization shall: (1) Maintain adequate arrangements and resources for the effective monitoring and enforcement of compliance with the rules of the derivatives clearing organization and the resolution of disputes;

(2) Have the authority and ability to discipline, limit, suspend, or terminate the activities of a clearing member due to a violation by the clearing member of any rule of the derivatives clearing organization; and

(3) Report to the Commission regarding rule enforcement activities and sanctions imposed against clearing members as provided in paragraph (a) (2) of this section, in accordance with § 39.19(c)(4)(xiii) of this part.

(b) *Authority to enforce rules.* The board of directors of the derivatives clearing organization may delegate responsibility for compliance with the requirements of paragraph (a) of this section to the Risk Management Committee, unless the responsibilities are otherwise required to be carried out by the chief compliance officer pursuant to the Act or this part.

9. Add § 39.23 to read as follows:

**§ 39.23 Antitrust considerations.**

Unless necessary or appropriate to achieve the purposes of the Act, a derivatives clearing organization shall

not adopt any rule or take any action that results in any unreasonable restraint of trade, or impose any material anticompetitive burden.

10. Add § 39.27 to read as follows:

**§ 39.27 Legal risk considerations.**

(a) *Legal Authorization.* A derivatives clearing organization shall be duly organized, legally authorized to conduct business, and remain in good standing at all times in the relevant jurisdictions. If the derivatives clearing organization provides clearing services outside the United States, it shall be duly organized to conduct business and remain in good standing at all times in the relevant jurisdictions, and be authorized by the appropriate foreign licensing authority.

(b) *Legal framework.* A derivatives clearing organization shall operate pursuant to a well-founded, transparent, and enforceable legal framework that addresses each aspect of the activities of the derivatives clearing organization. As applicable, the framework shall provide for:

(1) The derivatives clearing organization to act as a counterparty, including novation;

(2) Netting arrangements;

(3) The derivatives clearing organization's interest in collateral;

(4) The steps that a derivatives clearing organization would take to address a default of a clearing member, including but not limited to, the unimpeded ability to liquidate collateral and close out or transfer positions in a timely manner;

(5) Finality of settlement and funds transfers that are irrevocable and unconditional when effected (when a derivatives clearing organization's accounts are debited and credited); and

(6) Other significant aspects of the derivatives clearing organization's operations, risk management procedures, and related requirements.

(c) *Conflict of Laws.* If a derivatives clearing organization provides clearing services outside the United States:

(1) The derivatives clearing organization shall identify and address any conflict of law issues. The derivatives clearing organization's contractual agreements shall specify a choice of law.

(2) The derivatives clearing organization shall be able to demonstrate the enforceability of its choice of law in relevant jurisdictions and that its rules, procedures, and contracts are enforceable in all relevant jurisdictions.

Issued in Washington, DC, on December 1, 2010 by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

**Appendices to General Regulations and Derivatives Clearing Organizations—Commission Voting Summary and Statement of Chairman Gary Gensler**

**Note:** The following appendices will not appear in the Code of Federal Regulations.

**Appendix 1—Commission Voting Summary**

On this matter, Chairman Gensler and Commissioners Dunn, Sommers, Chilton and O'Malia voted in the affirmative. No Commissioner voted in the negative.

**Appendix 2—Statement of Chairman Gary Gensler**

I support the proposed rule on legal and compliance matters for clearinghouses, which would revise procedures for derivatives clearing organization (DCO) applications, clarify procedures for the transfer of a DCO registration and add requirements for approval of DCO rules for portfolio margining of futures and securities in a futures account.

The rule is intended to ensure that sufficient resources are devoted to compliance with laws and regulations, which is a core component of sound risk management practices. It would fulfill the Dodd-Frank Act's requirement that each DCO have a chief compliance officer who is responsible for establishing and administering compliance policies, as well as resolving certain conflicts of interest.

Finally, the proposed rulemaking would implement DCO Core Principles for compliance, rule enforcement, antitrust consideration and legal risk, which would promote compliance with the CEA and would enhance the integrity of the clearing and settlement process.

[FR Doc. 2010-31029 Filed 12-10-10; 8:45 am]

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**COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Part 30**

**RIN 3038-AC54**

**Foreign Futures and Options Contracts on a Non-Narrow-Based Security Index; Commission Certification Procedures**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Currently, a security index futures contract traded on, or subject to the rules of, a foreign board of trade may be offered or sold to persons located within the United States pursuant to a

staff no-action letter confirming that the contract satisfies the requirements enumerated in Section 2(a)(1)(C)(ii) of the Commodity Exchange Act (the "CEA" or "Act"). The Commodity Futures Trading Commission ("Commission") is hereby proposing new requirements which would establish a Commission certification procedure applicable to the offer or sale, to persons in the U.S., of a security index futures contract traded on a foreign board of trade; the new certification procedure will replace the existing staff no-action process.

Additionally, this proposed rule would establish a procedure for a foreign board of trade to request and receive a Commission certification on an expedited basis. Under this expedited procedure, a security index futures contract of qualifying foreign boards of trade could be offered or sold in the U.S. forty-five (45) days after submission of such request, absent a contrary action (or an extension of time) by the Commission.

**DATES:** Comments must be received on or before January 12, 2011.

**ADDRESSES:** You may submit comments, identified by RIN number, by any of the following methods:

- *Agency Web site, via its Comments Online process:* <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Web site.

- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

- *Hand Delivery/Courier:* Same as mail above.

- *Federal eRulemaking Portal:* <http://www.Regulations.gov>. Follow the instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established in § 145.9 of the Commission's regulations, 7 CFR 145.9.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for

publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:** Harold L. Hardman, Deputy General Counsel (Regulation), (202) 418-5120, [hhardman@cftc.gov](mailto:hhardman@cftc.gov); Carlene S. Kim, Assistant General Counsel, (202) 418-5613, [ckim@cftc.gov](mailto:ckim@cftc.gov), Office of the General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The Commission has exclusive jurisdiction with respect to the offer or sale in the U.S. of futures contracts based on a certain group or index of securities,<sup>1</sup> including those contracts traded on or subject to the rules of a foreign board of trade.<sup>2</sup> Such offer or sale must comply with Section 2(a)(1)(C)(iv) of the Act,<sup>3</sup> which prohibits the offer or sale of a security index contract, except as permitted under Section 2(a)(1)(C)(ii) or Section 2(a)(1)(D).<sup>4</sup>

Section 2(a)(1)(C)(ii) sets forth three criteria that govern the trading of a

<sup>1</sup> Such a contract also is referred to herein as "non-narrow-based security index futures contract" or "broad-based security index futures contract." The proposed rule does not apply to foreign exchange-traded security futures products, including futures or futures options on narrow-based security indices, as defined in Section 1a(25) of the CEA.

<sup>2</sup> See 7 U.S.C. 2(a)(1)(C)(ii); 63 FR 38537 (July 17, 1998). However, the Commission shares jurisdiction with the Securities and Exchange Commission over security futures products. Securities futures products are defined as a security future or any put, call, straddle, option, or privilege on any security future. See Section 1a(32). A security future is defined as a contract of sale for future delivery of a single security or of a narrow-based security index, including any interest therein or based on the value thereof, with certain exceptions. See Section 1a(31) of the CEA.

<sup>3</sup> 7 U.S.C. 2(a)(1)(C)(iv). By its terms, Section 2(a)(1)(C)(iv) applies to security index futures contracts traded on both domestic and foreign boards of trade.

<sup>4</sup> 7 U.S.C. 2(a)(1)(D) (governs the offer and sale of security futures products). Foreign security futures contracts generally may not be offered or sold to customers located in the U.S. until the Commission and the U.S. Securities and Exchange Commission adopt rules governing the offer and sale of such products. See 7 U.S.C. 2(a)(1)(E) and 2(a)(1)(F). The SEC has issued an order permitting certain U.S. persons, consisting primarily of qualified institutional buyers as defined in Rule 144A under the Securities Act of 1933, to purchase and sell foreign security futures contracts, subject to certain conditions. See 74 FR 32200 (July 7, 2009).

security index futures contract on a designated contract market ("DCM") and a registered derivatives transaction execution facility ("DTEF") under the Commission's exclusive jurisdiction. Specifically, Section 2(a)(1)(C)(ii) provides that no DCM or DTEF may trade a security index futures contract unless it demonstrates that: (i) The contract provides for cash settlement; (ii) the contract is not readily susceptible to manipulation or to being used to manipulate any underlying security; and (iii) the group or index of securities is not a "narrow-based security index," as defined in the Act.<sup>5</sup>

While Section 2(a)(1)(C)(ii) provides that no security index futures contract may trade on a U.S. exchange unless it meets the three criteria noted above, it does not explicitly address the standards to be applied to a security index futures contract that is traded on a foreign board of trade. CFTC staff, however, has applied those same three criteria in evaluating requests by a foreign board of trade with regard to the offer or sale of their security index futures contract within the U.S. when the foreign board of trade does not seek designation as a contract market or registration as a DTEF to trade those contracts. In adopting this approach, the staff has been guided by the legislative history relating to Section 2(a)(1)(C)(ii) and Section 4(b).<sup>6</sup> Of particular relevance are statements by the House Committee on Agriculture addressing the listing criteria of new Section 2(a)(1)(C) and their application to a security index futures contract traded on a foreign board of trade.<sup>7</sup>

As the House Committee explained, new Section 4(b) expressly empowers

<sup>5</sup> The first two criteria under CEA Section 2(a)(1)(C)(ii) were unchanged by the Commodity Futures Modernization Act of 2000. With regard to the third criterion, an index is a "narrow-based security index" under both the CEA and the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78a *et seq.*, if it has any one of the following four characteristics: (1) It has nine or fewer component securities; (2) any one of its component securities comprises more than 30% of its weighting; (3) the five highest weighted component securities in the aggregate comprise more than 60% of the index's weighting; or (4) the lowest weighted component securities comprising, in the aggregate, 25% of the index's weighting, have an aggregate dollar value of average daily trading volume of less than \$50 million (or in the case of an index with 15 or more component securities, \$30 million). See CEA Section 1a(25)(A)(i)-(iv); Exchange Act Section 3(a)(55)(B)(i)-(iv). Thus, an index is not a narrow-based security index for purposes of CEA Section 2(a)(1)(C)(ii) unless it has one of these elements. See also CEA Section 1a(25)(B); Exchange Act Section 3(a)(55)(C).

<sup>6</sup> The Futures Trading Act of 1982 added Section 2(a)(1)(B) and Section 4(b) to the Act (Section 2(a)(1)(B), as amended in 2000, is now Section 2(a)(1)(C)). See Pub. L. 97-444, 96 Stat. 2294.

<sup>7</sup> H.R. Rep. No. 565, Part 1, 97th Cong., 2d Sess. (1982) ("House Report").

the Commission to protect U.S. persons against fraudulent or other harmful practices in the offer or sale of foreign futures contracts. It does not, however, authorize the Commission to “regulate the internal affairs of a foreign board of trade \* \* \* or require Commission approval of any action of any such market \* \* \*.”<sup>8</sup> Nevertheless, where the Act establishes minimum requirements for a contract, the Committee stated that “nothing in the provisions prevents a foreign board of trade from applying to the Commission that its contract conforms with the requirements of this Act.”<sup>9</sup> Thus, Congress understood that a foreign exchange might lawfully offer or sell futures contracts on security indexes within the United States, without having to become designated as a DCM or registered as a DTEF. In doing so, the foreign board of trade may seek assurance from the Commission that its futures contract meets the statutory criteria enumerated in Section 2(a)(1)(C)(ii).<sup>10</sup>

The Commission did not adopt a certification procedure for either domestic- or foreign-based security index contracts offered on a foreign board of trade. Instead, foreign boards of trade have been granted confirmation with respect to their broad-based security index futures contracts pursuant to a no-action process, under which the Commission staff has applied the same criteria to evaluate a security index futures contract.<sup>11</sup>

The factors that are considered by the staff in evaluating a request for a no-action letter by a foreign board of trade with respect to its security index futures contract, and the information that the board should submit in its request, are

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* Specifically, the House Committee stated that a foreign board of trade may seek certification from the Commission that a futures contract offered by it that is based upon a group or index of American securities meets the minimum requirements specified in subparagraphs (a) through (c) of section 2(a)(1)(B)(ii) [now known as section 2(a)(1)(C)(ii)] of the Act, without seeking or obtaining designation by the Commission as a contract market. With regard to a futures contract on an index comprised of foreign securities only, the House Committee stated that such contract “could be certified by the Commission under such criteria as the Commission may deem appropriate.” Thus, the Committee made a distinction between contracts on indexes on U.S. securities from indexes on foreign securities.

<sup>11</sup> A no-action letter is a written statement issued by the staff of a Division of the Commission or of OGC 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 or activity is conducted. A no-action letter binds only the issuing division or OGC, as applicable, not the Commission or other Commission staff. See 17 CFR 140.99.

set forth in Appendix D to Part 30 of the Commission’s regulations. Among other things, 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. Another factor that the staff considers with respect to the issue of whether a foreign futures contract based on a security index is not readily susceptible to manipulation or being used to manipulate any underlying security, one preliminary consideration is the requesting board’s ability to access and share information regarding the securities underlying the index.<sup>12</sup>

The scope of the no-action relief is product-specific, is restricted to the subject futures contracts, is based upon the facts and representation thereto, and requires the foreign board of trade to notify OGC staff if the facts underlying the request materially change.<sup>13</sup> Accordingly, a foreign board of trade with prior no-action relief with respect to a particular foreign non-narrow-based security index futures contract must file a new request for no-action relief for each new non-narrow-based security index futures contract it seeks to offer or sell in the United States.

## II. Proposed Rule 30.13: Commission Certification Procedure

The proposed § 30.13 would establish a Commission certification process for confirming that the security index futures contract traded on a foreign

<sup>12</sup> In general, OGC 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 United States government agencies to obtain information regarding the trading of such contracts. The staff reviews this 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 security, as well as share such data with the Commission.

To date, OGC has issued 114 no-action letters involving 25 foreign boards of trade. A complete list of these no-action letters can be found on the Commission Web site: <http://services.cftc.gov/SIRT/SIRT.aspx?Topic=ForeignOrganizationProducts&implicit=true&type=DCM&status=No-Action%20Letter%20Issued&CustomColumnDisplay=TTTTTTTT>.

<sup>13</sup> The no-action letter does not affect or alter the application of Part 30 of the Commission regulations, which governs the offer and sale by financial intermediaries of foreign futures and foreign option contracts to persons located in the United States.

board of trade meets the requirements of the Act and therefore, may lawfully be offered or sold within the U.S. In this respect, the new certification process would be consistent with the original congressional guidance on this topic. In addition, a Commission certification would provide a greater degree of assurance to foreign boards of trade seeking to make available their security index futures contracts offered or sold in the U.S., in comparison to a staff no-action letter, which only represents the views of the issuing staff.

Specifically, § 30.13 would set forth a procedure whereby a foreign board of trade may apply to the Commission for certification that a security index futures contract traded on that board conforms to the criteria enumerated in Section 2(a)(1)(C)(ii) of the Act. The Commission certification procedure would be available to futures contracts based on an index of foreign or U.S. securities.<sup>14</sup> Under the proposed procedure, the foreign board of trade must file with the Commission a written submission requesting certification with respect to their security index futures contract(s). Such submission must include data, information, facts, and statements complying with the form and content requirements set forth in Appendix D to Part 30, as amended.<sup>15</sup> Such data, information, facts, and statements will be the same as that specified in current Appendix D to Part 30. In addition to the information, statements and data specified in Appendix D,<sup>16</sup> the foreign board of trade also would be required to provide a written certification that the subject

<sup>14</sup> See, e.g., CFTC Staff Letter No. 06–22 [2005–2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,366 (Sept. 26, 2006) (no-action relief granted with respect to futures contracts based on the Hang Seng Index and the Hang Seng China Enterprises Index, both of which are indices comprised wholly of foreign securities); CFTC Staff Letter No. 02–81 [2002–2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,094 (June 28, 2002) (no-action relief granted with respect to futures contracts based on the Dow Jones Global Titan Index, which is an index comprised partially of U.S. securities). See also House Report, supra note 10.

<sup>15</sup> Appendix D to Part 30 will be amended in connection with the adoption of Rule 30.13. Specifically, Appendix D will be revised to retain only the information requirements currently set forth in paragraph G of Appendix D.

<sup>16</sup> Accordingly, the information required to be submitted would include: a copy of the contract’s terms and conditions; relevant rules that may have an effect on trading of the contract such as circuit breakers or position limits or other controls on trading; information and data relating to the index, including the design, computation and maintenance thereof. In addition, the foreign board of trade would be required to provide a copy of the surveillance agreement(s) between the foreign board of trade and the exchange on which the underlying securities are traded and provide assurance of its ability and willingness to share information with the Commission.

contract conforms to Section 2(a)(1)(C)(ii) of the Act. Finally, the foreign board of trade would be required to describe the manner in which U.S. persons legally may access these products on that board of trade (e.g., access through omnibus accounts, through an intermediary, which is registered in the U.S. and also is an authorized member of the foreign board of trade, or through an entity that has relief from registration under part 30).<sup>17</sup>

The substantive review would remain the same under the new § 30.13 as it is under the current no-action process. Further, consistent with the existing staff no-action review process, the Commission's review of the subject contract would not be subject to any specific time frame, except as noted below. If a contract is determined to conform to the applicable requirements of the Act, the Commission will so notify the foreign board of trade.<sup>18</sup>

Finally, OGC no-action letters respecting foreign non-narrow-based security index futures contracts issued prior to the effective date of new § 30.13 would be grandfathered, provided that underlying conditions continue to be met.<sup>19</sup> Accordingly, a foreign board of trade that has received from Commission staff such a no-action letter would not be required to obtain Commission relief (for the contract that is the subject of that letter) under this proposed rule, if adopted.

### III. Expedited Review for Qualifying Foreign Boards of Trade

#### A. Eurex's Petition for Expedited Review

Eurex Deutschland ("Eurex") petitioned the Commission to establish a fast-track procedure for Commission review of requests by a foreign board of trade to offer or sell foreign security index futures contracts traded on that board to persons located in the United States.<sup>20</sup> Specifically, Eurex seeks a new

<sup>17</sup> While an index product may meet the statutory standard and is therefore eligible to be offered or sold in the U.S., U.S. customers' access to such product may be restricted due to legal restrictions in the subject foreign jurisdiction.

<sup>18</sup> Additionally, once the Commission has certified the subject futures contracts, no further action is required by the Commission or staff in order for options on such futures contract to be offered and sold in the United States. See 61 FR 10891 (March 18, 1996).

<sup>19</sup> The Commission staff previously determined that such non-narrow-based foreign index contracts conformed to Section 2(a)(1)(C)(ii) of the Act. Given that the substance of the review under the proposed Commission certification process would remain unchanged, the Commission believes it would be appropriate to "grandfather" these contracts.

<sup>20</sup> See Letter from Paul M. Architzel, Alston & Bird, LLP, to David Stawick, Secretary, Commodity Futures Trading Commission (March 28, 2008). A

rule, or in the alternative, an amendment to Appendix D to Part 30, which would establish an expedited procedure for the consideration of whether a foreign security index futures contract that a foreign board of trade lists for trading, or plans to list for trading, meets the requirements enumerated in Section 2(a)(1)(C)(ii) of the Act. Eurex proposes that the expedited review be available to a foreign board of trade that has received either: (i) A prior OGC no-action letter with respect to the offer or sale of a foreign futures contract on a security index or (ii) a prior DMO no-action letter permitting the foreign board of trade to provide direct electronic access to persons in the U.S. This expedited procedure requested would be an alternative, or an addition, to the existing staff no-action procedure, which has no explicit time-frame.

B. Under Eurex's proposal, a foreign security index futures contract would be deemed to conform to Section 2(a)(1)(C)(ii) of the Act, and therefore may be offered or sold to persons located in the U.S., forty-five (45) days after filing with the Commission, unless the Commission determines that an additional forty-five day extension is necessary to address complex or novel issues. The information that a foreign board of trade must submit under the expedited procedure would be identical to the information required under the current no-action process as prescribed in Appendix D to Part 30.

#### Proposed Expedited Review

In light of the Eurex Petition and the staff's experience with the process governing the offer and sale in the U.S. of foreign non-narrow based security index futures contracts traded on a foreign board of trade, the Commission is proposing to establish an expedited review procedure available to qualifying foreign boards of trade.<sup>21</sup> As further described below, the proposed expedited review process generally conforms to the Commission's process for prior-approval review of contracts to be listed and traded on domestic contract markets. This expedited procedure would be an alternative to the

copy of the petition (hereinafter referred to as "Eurex Petition") is available through the Commission's Office of the Secretariat. To inquire with the Office of the Secretariat send an e-mail to [secretary@cftc.gov](mailto:secretary@cftc.gov).

<sup>21</sup> Under this expedited process, a FBOT would be required to submit information that is substantively similar to that required under the full, non-expedited process, including a description of the manner in which U.S. persons may trade the subject products on the board.

regular review procedure described in Section II herein.

The expedited review would be available to a foreign board of trade that has previously been granted no-action relief by OGC, or Commission certification, with respect to a non-narrow-based security index futures contract traded on that board.<sup>22</sup> In connection with the grant of such prior relief or certification, the staff will have worked closely with the foreign board of trade and its regulators, and as a result of having obtained prior relief or certification, both the board and the regulators will be familiar with the substantive and procedural requirements that must be met to obtain Commission certification, as they are the same as what is required for obtaining an OGC no-action letter. Moreover, in connection with prior relief or certification, the board of trade will have confirmed that it is willing and able to share with the Commission information concerning the subject contract and the securities underlying the index. Under these circumstances, and provided that the board of trade has been in compliance with the terms and conditions of the prior no-action letter(s), the Commission believes that subsequent requests for certification from such foreign boards of trade with regard to the offer or sale of new broad-based foreign security index futures contracts in the U.S. should be considered on an expedited basis.

The expedited review also would be available to a foreign board of trade that has received, and is compliant with the requirements of, DMO's Foreign Trading System No-Action Letter.<sup>23</sup> The Commission believes that an expedited review is appropriate for such boards in light of the fact that the Commission staff will have already had conducted a comprehensive review of the foreign board of trade. Pursuant to such review, the staff will have determined that the foreign board of trade is a bona fide board of trade subject to a bona fide regulatory regime, including appropriate mechanisms for market oversight and customer protection, and that enabling

<sup>22</sup> Prospectively, following the adoption of new Rule 30.13, a foreign board of trade that has previously been granted Commission certification with respect to a foreign security index futures contract would also be eligible for a fast-track review.

<sup>23</sup> Since 1996, the Commission staff has issued no-action letters to foreign boards of trade stating, subject to compliance with certain conditions, that it will not recommend that the Commission take enforcement action if the foreign board of trade provides its members or participants in the U.S. access to its electronic trading system without seeking designation as a DCM or registration as a DTEF ("Foreign Trading System No-Action Letters").

U.S. persons to have direct trading access to that board would not be contrary to the public interest.<sup>24</sup> In connection with such relief, the staff also will have considered the existence of adequate information-sharing mechanism to ensure the Commission's ability to carry out its surveillance responsibilities. Under these circumstances, the Commission believes that such foreign board of trade will have demonstrated its ability to comply with the substantive and procedural requirements for Commission certification. Accordingly, the Commission believes that a foreign board of trade that is the subject of an existing Foreign Trading System No-Action Letter should be eligible for an expedited review, provided that the board of trade remains in full compliance with the terms and conditions of the letter. The Commission also notes that the recently-enacted Dodd-Frank Wall Street Reform and Consumer Protection Act authorizes the Commission to register foreign boards of trade that provide U.S. persons with "direct access" to their trading systems.<sup>25</sup> The Commission anticipates that at such time as the Commission may promulgate such registration requirements, the expedited review procedure would be extended to recipients of an FBOT registration license.

Under the proposed expedited review procedure, a qualifying foreign board of trade may request that the Commission make its certification as to whether a futures contract on a security index that it lists for trading or plans to list for trading on that board satisfies the requirements enumerated in Section 2(a)(1)(C)(ii) of the Act within 45 days after the submission of such request. As proposed, the review period could be extended by the Commission for an additional 45 days if the foreign security index futures contract raises novel or complex issues that require additional

time for review, or if the foreign board of trade requests an extension of time.

If the foreign board of trade's request to the Commission for expedited consideration does not comply in form or content with the requirements of proposed Rule 30.13, the Commission may notify the requesting foreign board of trade and treat the request for expedited review as withdrawn. However, the foreign board of trade would not be precluded from filing a new expedited request, provided that such submission satisfies the content and form requirements applicable to such process specified in § 30.13.

Unless the Commission notifies the foreign board of trade that the request has been deemed withdrawn, the subject contract will be deemed to be in conformance with the requirements of Section 2(a)(1)(C)(ii) and, therefore may be offered or sold within the U.S., at the expiration of the applicable review period. In contrast to the regular, non-expedited review, the Commission will not issue a certification letter to the foreign board of trade upon completion of its review.

If the Commission will not, or is unable to, deem that the foreign security index futures contract or the underlying security index conforms to the requirements of the Act, it would so notify the foreign board of trade within the 45 day time period or such extended time frame, with a brief statement of the reasons therefore. Upon such notification, the foreign board of trade's request for Commission certification will be treated as having been withdrawn. The foreign board of trade, however, would not be precluded from filing a new submission, provided that such submission sufficiently addresses the deficiencies or issues identified in the Commission notification.<sup>26</sup> The new streamlined process is intended to reduce the time frame within which a foreign board of trade can request, and obtain, Commission certification with respect to the qualification of its broad-based security index futures contracts prior to the offer or sale to persons located in the U.S. In addition, by affixing a definite timeline to the review process, it would provide foreign boards of trade with greater certainty concerning the time necessary to obtain regulatory clearance in order to market

its broad-based security index products within the U.S. Further, because the substantive review would remain the same under the expedited procedure as is under the regular procedure, the new expedited review process would not curtail, or in any way compromise, the regulatory safeguards protecting the public and market users.

#### IV. Related Matters

##### A. Cost Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its actions before issuing new regulations under the Act. Section 15(a) does not require the Commission to quantify the costs and benefits of new regulations or to determine whether the benefits of adopted regulations outweigh their costs. Rather, Section 15(a) requires the Commission to consider the cost and benefits of the subject regulations. Section 15(a) further specifies that the costs and benefits of new regulations shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of the market for listed derivatives; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may, in its discretion, determine that, notwithstanding its costs, a particular regulation is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Commission has determined that there are no apparent costs associated with proposed § 30.13. The proposed rule would codify and streamline the current review process, without substantive changes to the review standards and information required to be filed with respect to a broad-based security index. Accordingly, the Commission believes that the proposed review procedures would not compromise customer protection safeguards provided by the Act or in any way be contrary to the public interest. Additionally, foreign boards of trade and U.S. market participants will benefit from proposed § 30.13. The certification process being proposed will provide a foreign board of trade with greater certainty with respect to the contracts it offers in the U.S., which until now have only been subject to staff no-action relief that is not binding on the Commission. Moreover, the

<sup>24</sup> In the foreign direct access no-action context, the Commission staff reviews information and representations provided by the foreign board of trade that relate to, among other things, the rules and structure of the applicant (with an emphasis on the exchange's financial integrity, market surveillance, trade practice and rule enforcement regime), various system integrity protections that govern the foreign board of trade's electronic trading system, the system's related clearing and customer default protections, and information concerning the regulatory structure in the applicant's jurisdiction, with a specific emphasis on market regulation. See 71 FR 64443 (Nov. 2, 2006) (describing the staff review in connection with the issuance of foreign direct access no-action letters).

<sup>25</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

<sup>26</sup> Requests for staff no-action letters respecting foreign security index futures contracts that are currently pending or submitted prior to adoption of a final rule would be considered as a request for Commission certification following the adoption of § 30.13. Any foreign board of trade eligible for expedited review under any final rule adopted by the Commission would have to submit a request for such treatment.

proposed expedited review process would enhance market efficiency by providing foreign boards of trade with greater certainty concerning the time necessary to obtain regulatory clearance in order to market broad-based security index products within the United States. Finally, streamlining the review process would make additional hedging instruments available to U.S. persons without unnecessary delay, and in turn, may foster price discovery in the futures market.

#### B. The Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 et seq., requires that agencies consider the impact of their regulations on small businesses. The Commission has previously determined that designated contract markets are not small entities for purposes of the RFA.<sup>27</sup> The Commission's determination was based on considerations relating to the central role played by contract markets in the futures market, as well as the high volume of transactions conducted on such markets.

To the extent that the RFA may apply to the action proposed to be taken herein, the Commission does not believe that a foreign board of trade falls within the definition of "small entity" for purposes of the RFA. Rather, the Commission is of the view that the rationale that guided its finding with respect to U.S. contract markets apply equally to foreign boards of trade. Moreover, with regard to foreign firms, the RFA defines a "small entity" as a "business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or uses American products, materials or labor."<sup>28</sup> A foreign board of trade that may seek Commission certification pursuant to the proposed rule is not likely to meet such criteria. The Commission is soliciting comments on this matter.

#### C. Paperwork Reduction Act

When publicizing proposed regulations, the Paperwork Reduction Act ("PRA") of 1995 (44 U.S.C. 3501 et seq.) imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA.

The information collection requirements associated with the proposed regulations are administered under Office of Management and Budget control numbers 3038-0022 and 3038-0054. These proposed amendments to parts 30 of the Commission's regulations would not impose any new or additional recordkeeping or information collection requirement that would require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq. Accordingly, the PRA is inapplicable.

#### List of Subjects in 17 CFR Part 30

Foreign board of trade, Foreign security index futures, Designated contract market, Derivatives transaction execution facility, Advertising, No-action letter, Fast-track, Non-narrow foreign security index future, Reporting and recordkeeping requirements.

For the reasons set forth in the Preamble, the Commission hereby proposes to amend Chapter I of Title 17 of the Code of Federal Regulations as follows:

#### PART 30—FOREIGN FUTURES AND FOREIGN OPTIONS TRANSACTIONS

1. The authority citation for part 30 continues to read as follows:

**Authority:** 17 U.S.C. 1a, 2, 4, 6, 6c and 12a, unless otherwise noted.

2. Section 30.13 is added to read as follows:

##### § 30.13 Commission certification.

With respect to foreign futures and options contracts on a non-narrow-based security index:

(a) *Request for Certification.* A foreign board of trade may request that the Commission certify that a futures contract on a non-narrow-based security index that trades, or is proposed to be traded thereon, conforms to the requirements of Section 2(a)(1)(C)(ii) of this Act and therefore, that futures contract may be offered or sold to persons located within the United States in accordance with Section 2(a)(1)(C)(iv) of this Act. A submission requesting such certification must:

- (1) Be filed electronically with the Secretary of the Commission;
- (2) Include a copy of the submission cover sheet in accordance with the instructions in appendix D to part 30 of this chapter;
- (3) Include the following information in English:

(i) The terms and conditions of the contract and all other relevant rules of the exchange and, if applicable, of the foreign board of trade on which the underlying securities are traded, which

have an effect on the over-all trading of the contract, including circuit breakers, price limits, position limits or other controls on trading;

(ii) Surveillance agreements between the foreign board of trade and the exchange(s) on which the underlying securities are traded;

(iii) Assurances from the foreign board of trade of its ability and willingness to share information with the Commission, either directly or indirectly;

(iv) When applicable, information regarding foreign blocking statutes and their impact on the ability of United States Government agencies to obtain information concerning the trading of such contracts;

(v) Information and data denoted in U.S. dollars where appropriate (and the conversion date and rate used) relating to:

(A) The method of computation, availability, and timeliness of the index;

(B) The total capitalization, number of stocks (including the number of unaffiliated issuers if different from the number of stocks), and weighting of the stocks by capitalization and, if applicable, by price in the index as well as the combined weighting of the five highest-weighted stocks in the index;

(C) Procedures and criteria for selection of individual securities for inclusion in, or removal from, the index, how often the index is regularly reviewed, and any procedures for changes in the index between regularly scheduled reviews;

(D) Method of calculation of the cash-settlement price and the timing of its public release;

(E) Average daily volume of trading, measured by share turnover and dollar value, in each of the underlying securities for a six-month period of time and, separately, the dollar value of the average daily trading volume of the securities comprising the lowest weighted 25% of the index for the past six calendar months, calculated pursuant to § 41.11 of this chapter; and

(vi) A written statement that the contract conforms to the criteria enumerated in Section 2(a)(1)(c)(ii) of the Act, including:

(A) A statement that the contract is cash-settled;

(B) An explanation of why the contract is not readily subject to manipulation or to be used to manipulate the underlying security;

(C) A statement that the index is not a narrow-based security index as defined in Section 1a(25) of the Act and the analysis supporting that statement;

(vii) A written representation that the foreign board of trade will notify the

<sup>27</sup> See 47 FR 18618 (April 30, 1982).

<sup>28</sup> See 5 U.S.C. 601(6) (defining "small entity" to have the same term as the term "small business" as used under section 3 of the Small Business Act, 13 CFR 121.201).

Commission of any material changes in any of the above information;

(viii) When applicable, a request to make the futures contract available for trading in accordance with the terms and conditions of, and through the electronic trading devices identified in, a Commission staff no-action letter stating, subject to compliance with certain conditions, that it will not recommend that the Commission take enforcement action if the foreign board of trade provides its members or participants in the U.S. access to its electronic trading system without seeking designation as a designated contract market or registration as a derivatives transaction execution facility ("Foreign Trading System No-Action Letter") and a certification from the foreign board of trade that it is in compliance with the terms and conditions of that no-action letter; and

(xii) An explanation of the means by which U.S. persons may access these products on the foreign board of trade.

(b) *Termination of Review.* The Commission, at any time during its review, may notify the requesting foreign board of trade that it is terminating its review under this section if it appears to the Commission that the submission is materially incomplete or fails in form or content to meet the requirements of this section.

(1) Such termination shall not prejudice the foreign board of trade from resubmitting a revised version of the contract, which addresses the deficiencies or issues identified by the Commission.

(2) The Commission shall also terminate review under this section if requested in writing to do so by the foreign board of trade.

(c) *Notice of Denial of Certification.* The Commission, at any time during its review under paragraph (a) of this section, may notify the requesting foreign board of trade that it has determined that the security index futures contract or underlying index does not conform with the requirements of Section 2(a)(1)(C)(ii) of the Act.

(1) This notification will briefly specify the nature of the issues raised and the specific requirement of Subsections 2(a)(1)(C)(ii)(I)–(III) of the Act with which the security index futures contract does not conform or to which it appears not to conform or the conformance to which cannot be ascertained from the submission.

(2) Such notification shall not prejudice the foreign board of trade from resubmitting a revised version of the contract, which addresses the deficiencies or issues identified by the Commission.

(d) *Notice of Certification.* Upon review, if the Commission determines that the futures contract and the underlying index meet the requirements enumerated in Section 2(a)(1)(C)(ii), the Commission will issue a letter to the foreign board of trade certifying that the security index contract traded on that board conforms to the requirements of Section 2(a)(1)(C)(ii) of the Act and therefore, that futures contract may be offered or sold to persons located within the U.S. in accordance with Section 2(a)(1)(C)(iv) of the Act and, if applicable, may be made available for trading in accordance with the terms and conditions of, and through the electronic trading devices identified in, the Foreign Trading System No-Action Letter.

(e) *Expedited Review.* A foreign board of trade may request an expedited Commission review and determination of whether a futures contract on a security index that trades, or is proposed to be traded thereon, conforms to the requirements of Section 2(a)(1)(C)(ii) of the Act and therefore, may be offered or sold to persons in the U.S. under Section 2(a)(1)(C)(iv) of the Act. A submission requesting such expedited consideration should be filed in English with the Commission and should include: Information, statements and data complying with the form and content requirements in paragraph (a) of this section.

(f) *Eligibility for Expedited Review.* In order to qualify for expedited review under paragraph (e) of this section, the foreign board of trade must either:

(1) Have previously requested, and received, at least one no-action letter from the Office of General Counsel or Commission certification regarding a non-narrow based security index futures contract traded on that foreign board of trade offered and sold to persons located in the United States and remains fully compliant with the terms and conditions of such letter or certification; or

(2) Have received a Foreign Trading System No-Action Letter from the Division of Market Oversight and remains fully compliant with the terms and conditions of such letter.

(g) *Deemed To Be in Conformance.* Unless notified pursuant to paragraph (h) or (i) of this section, any non-narrow-based foreign security index futures contract submitted for expedited review under paragraph (e) of this section shall be deemed to be in conformance with the requirements of Section 2(a)(1)(C)(ii) of the Act and therefore, such futures contract may be offered or sold to persons located in the U.S. in accordance with Section

2(a)(1)(C)(iv) forty-five days after receipt by the Commission, or at the conclusion of such extended period as described under paragraph (h) of this section, provided that the foreign board of trade does not amend the terms or conditions of the contract or supplement the request for expedited consideration, except as requested by the Commission or for correction of typographical errors. Any voluntary substantive amendment by the foreign board of trade will be treated as a new submission under this section.

(h) *Extension of Review.* The Commission may extend the forty-five day review period set forth in paragraph (g) of this section for:

(1) An additional period up to forty-five days, if the request raises novel or complex issues that require additional time for review, in which case, the Commission will notify the foreign board of trade within the initial forty-five day review period and will briefly describe the nature of the specific issues for which additional time for review will be required; or

(2) Such extended period as the requesting foreign board of trade requests of the Commission in writing.

(i) *Termination of Review.* The Commission, at any time during its review under paragraph (e) of this section or extension thereof as described under paragraph (h) of this section, may notify the requesting foreign board of trade that it is terminating its review under paragraph (e) of this section if it appears to the Commission that the submission is materially incomplete or fails in form or substance to meet the requirements of this section.

(1) Such termination shall not prejudice the foreign board of trade from resubmitting a revised version of the contract, which addresses the deficiencies or issues identified by the Commission.

(2) The Commission shall also terminate review under this section if requested in writing to do so by the foreign board of trade.

(j) *Notice of Denial of Certification.* The Commission, at any time during its review, may notify the requesting foreign board of trade that it has determined that the security index futures contracts or underlying index does not conform with the requirements of Section 2(a)(1)(C)(ii) of the Act.

(1) This notification will briefly specify the nature of the issues raised and the specific requirement of subsections 2(a)(1)(C)(ii)(I)–(III) of the Act with which the security index futures contract does not conform or to which it appears not to conform or the

conformance to which cannot be ascertained from the submission.

(2) Such notification shall not prejudice the foreign board of trade from resubmitting a revised version of the contract, which addresses the deficiencies or issues identified by the Commission.

(k) *Foreign Trading Systems.* A foreign board of trade, who is a recipient of a Foreign Trading System No-Action Letter (and is compliant with the requirements of such letter) and is requesting Commission certification of its non-narrow-based security index futures contract, may request that such contract submitted under paragraph (e) of this section be made available for trading under that Letter upon expiration of the applicable review period provided for under either paragraph (g) or (h) of this section. Absent Commission notification to the contrary, the foreign board of trade may make that contract available for trading on the Foreign Trading System upon expiration of the review period provided under paragraph (g) or (h) of this section.

(l) *Changes in Facts and Circumstances.* Any certification of a non-narrow based security index futures contract submitted under paragraph (a) or (e) of this section shall be considered to be based on the facts and representations contained in the foreign board of trade's submissions to the Commission. Accordingly, the foreign board of trade shall promptly notify the Commission of any changes in material facts or representations.

(m) *Grandfathered No-Action Letters.* Any non-narrow-based security index futures contract that is the subject of an existing no-action letter issued by the Office of General Counsel, as of the date of the adoption of Rule 30.13, shall be deemed to be in conformance with the criteria of Section 2(a)(1)(C)(ii) of the Act, provided that the contract remains fully compliant with the requirements of such letter.

\* \* \* \* \*

3. Appendix D to Part 30 is revised to read as follows:

**Appendix D to Part 30—Commission Certification with Respect to Foreign Futures and Options Contracts on a Non-Narrow-Based Security Index**

In its analysis of a request for certification by a foreign board of trade relating to a security index futures contract traded on that foreign board of trade pursuant to Regulation 30.13, the Commission will evaluate the contract to ensure that it complies with the three criteria of Section 2(a)(1)(C)(ii) of the Act.

(1) Because security index futures contracts are cash settled, the Commission also

evaluates the contract terms and conditions relating to cash settlement. In that regard, the Commission examines, among other things, whether the cash price series is reliable, acceptable, publicly available and timely; that the cash settlement price is reflective of the underlying cash market; and that the cash settlement price is not readily susceptible to manipulation. In making its determination, the Commission 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 any other relevant factors.

(2) In considering the susceptibility of an index to manipulation, the Commission examines several factors, including the structure of the primary and secondary markets for the component equities, the liquidity of the component stocks, the method of index calculation, the total capitalization of stocks underlying the index, the number, weighting and capitalization of individual stocks in the index, and the existence of surveillance sharing agreements between the board of trade and the securities exchange(s) on which the underlying securities are traded.

(3) To verify that the index is not narrow-based, the Commission considers the number and weighting of the component securities and the aggregate value of average daily trading volume of the lowest weighted quartile of securities. Under the Act, a security index is narrow-based if it meets any one of the following criteria:

(i) The index is composed of fewer than 10 securities;

(ii) Any single security comprises more than 30% of the total index weight;

(iii) The five largest securities comprise more than 60% of the total index weight; or

(iv) The lowest-weighted securities that together account for 25% of the total weight of the index have an aggregate dollar value of average daily trading volume of less than US\$30 million (or US\$50 million if the index includes fewer than 15 securities).

Issued in Washington, DC, on November 30, 2010 by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

[FR Doc. 2010-31014 Filed 12-10-10; 8:45 am]

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R04-OAR-2010-0798-201048; FRL-9237-7]**

**Approval and Promulgation of Implementation Plans and Designations of Areas for Air Quality Planning Purposes; Georgia: Rome; Determination of Attaining Data for the 1997 Annual Fine Particulate Standards**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to determine that the Rome, Georgia, fine particulate (PM<sub>2.5</sub>) nonattainment area (hereafter referred to as “the Rome Area”) has attained the 1997 annual average PM<sub>2.5</sub> National Ambient Air Quality Standards (NAAQS). The Rome Area is comprised of Floyd County in its entirety. This proposed clean data determination is based upon complete, quality-assured and certified ambient air monitoring data for the 2007–2009 period showing that the Area has monitored attainment of the 1997 annual PM<sub>2.5</sub> NAAQS. If EPA finalizes this proposed clean data determination, the requirements for the Area to submit an attainment demonstration and associated reasonably available control measures (RACM), a reasonable further progress (RFP) plan, contingency measures, and other planning State Implementation Plan (SIP) revisions related to attainment of the standard shall be suspended so long as the Area continues to attain the annual PM<sub>2.5</sub> NAAQS.

**DATES:** Comments must be received on or before January 12, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R04-OAR-2010-0798, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *E-mail:* [benjamin.lynorae@epa.gov](mailto:benjamin.lynorae@epa.gov).

3. *Fax:* (404) 562-9040.

4. *Mail:* EPA-R04-OAR-2010-0798, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960.

5. *Hand Delivery:* Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

*Instructions:* Direct your comments to Docket ID No. EPA-R04-OAR-2010-0798. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>.