

**TESTIMONY OF WILLIAM J. BRODSKY
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**CONCERNING THE ADMINISTRATION'S
FINANCIAL REGULATORY REFORM PROPOSAL**

**COMMITTEE ON FINANCIAL SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES**

July 17, 2009

Mr. Chairman and members of the Committee, I am William J. Brodsky, Chairman and Chief Executive Officer of the Chicago Board Options Exchange, Inc. ("CBOE"). For the past 35 years, I have served in leadership roles at major U.S. stock, futures and options exchanges, including 11 years as CEO of the Chicago Mercantile Exchange and 12 years in my current role as CBOE Chairman and CEO.

Exchange-traded options have become a major component of the U.S. -- and the world's -- financial markets. In 2008 over 3.6 billion options contracts traded on the seven U.S. options exchanges, an increase of 25% over 2007. This was the fifth consecutive year that volume growth has exceeded 25%. The annual number of contracts traded has tripled over that five-year period, outstripping the growth in both stock and futures trading. This dramatic growth is a reflection of the expanding use of options as a tool for managing the risk of owning stocks, Exchange Traded Funds (ETFs) and mutual funds and also reflects the highly competitive environment in which exchange-traded options are traded.

In addition to my role at CBOE, I am currently serving as chairman of the World Federation of Exchanges (WFE), a 49-year old organization, which is based in Paris and includes over 50 of the world's major regulated stock, futures and options exchanges. WFE promotes the highest standards of market integrity by working on a global basis with policy makers, regulators and government organizations for fair, transparent and efficient markets. The fact that the CEO of a derivatives exchange has been elected Chairman of the WFE illustrates the heightened role that exchange-traded derivatives now play in the global financial system.

Throughout my career at exchanges, I have witnessed and participated in many meaningful improvements in the efficiency, functionality and value of our exchange markets. Following the 1987 stock market crash, U.S. exchanges made significant enhancements to market infrastructure and resiliency, but very little changed in the way of regulatory oversight despite the Brady Report, the seminal presidential study of the crash, which found that our regulatory system was already sorely outmoded when the markets fell precipitously in 1987.¹

The regulatory system deemed antiquated in 1987 remains in place today, but now labors under the weight of increasingly sophisticated technology and instruments that trade around the world in less than a blink of an eye. The ongoing failure to modernize our regulatory system has resulted in a disjointed,

¹ See attached *The Wall Street Journal* op-ed of October 19, 2007, "A Real Regulatory Redundancy."

overlapping situation that causes bottlenecks in some markets, unregulated gaps in others, and lacks entirely an overarching regulatory perspective.

While reasonable people may disagree on the best ways to create a 21st century system for market regulation, there is clearly a national consensus that retaining the status quo is not an option. Congress should not squander the opportunity afforded by this broad public consensus to design and mandate regulatory reforms that are long overdue.

I am honored to share our perspective in today's testimony on the Administration's proposal for financial regulatory reform ("Reform Proposal"). At the outset, I would like to commend the Administration for the progress made in drafting a proposal that seeks comprehensive regulatory reform. My testimony will focus primarily on the harm caused by the split jurisdiction between securities and futures in the U.S. and the partial, but incomplete, steps the Reform Proposal takes to address this situation. I will touch on certain other aspects of the Reform Proposal of particular interest to CBOE, as well.

Throughout the financial crisis of the past year, regulated exchanges, not only in the U.S. but also around the world, provided important investor safeguards, such as transparency, price discovery, certainty of execution and protection against counterparty risk through centralized clearing. Despite credit failures, bank and brokerage meltdowns, extreme market volatility, and the imposition of emergency short sale rules, exchanges continued to provide transparent, liquid and orderly marketplaces – without interruption – and continued to fulfill the essential functions of capital formation and risk management. In the midst of a financial tsunami when precious few financial institutions "worked," regulated exchanges promised as delivered: no failures, no closures, no taxpayer rescues.

The reliability of regulated exchanges amidst recent market turmoil belies the fact that the ongoing effectiveness of many of our nation's exchanges is severely compromised by the yoke of a cumbersome regulatory system. Indeed, perhaps no area of regulation has longer been in need of a structural fix than that of the bifurcated system of regulating exchange-traded financial products in the U.S. To the extent that we ignore this reality, we place at peril the ongoing ability of the U.S. to operate and compete effectively in an increasingly global and sophisticated marketplace.

We are particularly gratified, therefore, that the Administration's Reform Proposal not only addresses the immediate and urgent issue of under-regulation of OTC derivatives, but also acknowledges the need to address those areas of existing regulation, such as the SEC/CFTC jurisdictional divide, which are dangerously antiquated.

It has become increasingly clear over the past two decades that our system of regulating securities and futures under two distinctly different statutory structures -- with separate regulatory agencies and different congressional committees -- causes needless legal uncertainty and delay, impedes innovation and competition, and imposes unnecessary costs on our financial markets.

Since the enactment in 1974 of amendments to the Commodity Exchange Act, which gave the Commodity Futures Trading Commission ("CFTC") jurisdiction over all futures, there have been conflicts between the CFTC and the Securities and Exchange Commission ("SEC") as to their respective jurisdictions, particularly involving financial instruments that have elements of both securities and futures. This is a result of divided jurisdiction in which the SEC has oversight of "securities," including stocks, bonds, mutual funds and options on these instruments or an index of such instruments, and the CFTC has jurisdiction over "commodities," which is very broadly defined and includes futures on securities indexes or government securities.

The vesting of jurisdiction over futures and commodity options in the CFTC was developed at a time when the futures markets traded contracts almost exclusively on traditional commodities, such as agricultural products and metals, so that a separate agency sprung from the Department of Agriculture was deemed appropriate for this specialized segment of the market. However, the bifurcated system was already outmoded by the 1980s, when the "commodities" markets began trading contracts on a variety of financial instruments, including stock indexes, foreign currencies, and government securities. Attempts to clarify the jurisdictional boundaries of the SEC and CFTC, such as the Shad-Johnson Accord in 1982, merely addressed the then existing issues but in no way resolved the ongoing philosophical differences between the two agencies.

As the Reform Proposal clearly outlines, the differing missions of the SEC and CFTC, as well as the separate statutes under which they operate, mean that futures and comparable securities products are not regulated in a consistent manner. This has led to conflict between the agencies when both are involved in a default or malfeasance by a large market participant, as evidenced by the different approach the two agencies took two years ago with respect to the problems surrounding the failure of Sentinel Management Group, Inc.² In

² Sentinel was both an investment adviser registered with the SEC and a futures commission merchant registered with the National Futures Association. When questions arose as to the disposition of certain funds held by Sentinel on behalf of various futures commission merchants ("FCMs") and other clients, the SEC and the CFTC took very different positions. While the SEC sought to freeze the proceeds in all Sentinel accounts (which it asserted had been improperly commingled) for the ultimate benefit of injured investors (including, but not limited to, the affected FCMs), the CFTC sought to ensure that

addition, the lack of an insider trading prohibition for CFTC products potentially enables a miscreant to use such instruments to engage in transactions using inside information when otherwise prohibited from doing so using securities. This disparity will take on increasing importance with the growth of credit-related instruments. On an ongoing basis, the bifurcated regulatory system has led to persistent negative consequences for our markets -- it creates regulatory inefficiencies, hampers competitiveness, and impedes innovation. No other major country with well-developed derivatives markets uses a system of two different government agencies regulating equivalent financial products.

New Products

CBOE is known throughout the world as a wellspring of options innovation and has engineered virtually every major options innovation since launching the options industry in 1973. It is not surprising, therefore, that the most vexing aspect of the U.S. regulatory structure to CBOE is that the split jurisdiction and different governing statutes has led to delays in bringing new products to market. Legal uncertainties frequently arise because a novel aspect of a new securities derivative product could cause the CFTC to claim that the product has elements of a futures contract, and a novel aspect of a new futures product could cause the SEC to claim the product is a security. This can result in an interminable delay in bringing a new product to market while the two agencies try to decide who has jurisdiction over the instrument.

Product delays have occurred repeatedly over the past 20 years when CBOE attempted to introduce a novel product. For example, CBOE had two new product proposals -- one involving an option on an exchange traded fund that holds investments involving gold and one involving an option on a credit default product -- both placed on hold for an extremely long period of time (3½ years in the case of Gold ETFs and 7 months for the credit default product) because the two agencies could not agree on jurisdiction. In contrast, Eurex (Europe's largest derivatives exchange) was able to introduce a credit default product in Europe within weeks of announcing its intention to do so, and well before the U.S. exchanges had approval to introduce their credit default products in the U.S. due to the disagreement between the two agencies.

Clearing

Legal uncertainties caused by duplicative regulation also impede the clearing of new products. The Options Clearing Corporation (OCC), the clearing agency

the FCMs were given access to their (or their customers') funds that had been in a segregated account in order to preserve the integrity of the futures markets and prevent a potentially broader, market-wide collapse.

for the seven U.S. options markets and the world's largest derivatives clearing house, clears exchange-traded derivative products and is registered with both the SEC and the CFTC. OCC clears securities options, which are under the jurisdiction of the SEC, security futures, which are jointly regulated by the SEC and CFTC, and futures, which are under the jurisdiction of the CFTC. OCC is the only U.S. clearing organization with the ability to clear all of these products within a single clearing organization, which provides for greater operational efficiency and, hence, reduces systemic risk in the clearing and settlement process. However, because of its dual registration, the OCC is subject to the jurisdiction of the CFTC, as well as that of the SEC, every time it introduces a new securities option product.

Although the CFTC operates under a self-certification process by which OCC could certify that a particular new product does not fall within the jurisdiction of the CEA, there are cases where there is genuine ambiguity as to where the jurisdictional line lies. In such cases, OCC has felt compelled to ask for prior approval of both agencies in order to avoid the risk of litigation after trading has begun. Split jurisdiction forces OCC to operate under this cumbersome process, thus inhibiting common clearing by a third party guarantor even though the benefits of centralized clearing were dramatically highlighted by the recent crisis. By contrast, futures exchanges and their captive clearing houses have no concomitant need to pre clear their new products with the SEC.

Margins

The problems from divided jurisdiction go beyond our pressing concerns about legal uncertainty for new products. U.S. financial firms are subject to duplicative and disjointed oversight from separate agencies when trading virtually equivalent products. Key investor protection and market soundness provisions, such as margin levels, are handled very differently by the two agencies for similar products. A concrete example of the harm this causes to our markets involves portfolio margining.

In 2007, the availability of portfolio margining was greatly enhanced for securities customers, including those who trade security futures, through expansion of an existing portfolio margin pilot program approved by the SEC. This expanded pilot includes equity options, security futures and individual stocks as instruments eligible for portfolio margining. The pilot enhances U.S. competitiveness by bringing the benefits of risk-based margining employed in the futures markets, and in most non-U.S. securities markets, to U.S. securities customers. The exchange rules adopting this pilot also authorized the inclusion of related futures positions in securities customer portfolio margining accounts.

The ability to margin all related instruments in one account would allow customers to fully realize the risk management potential of these instruments in a way that is operationally and economically efficient. However, legal impediments that prevent putting those futures positions in a securities customer portfolio margining account significantly undercut the ability of customers to fully realize the capital efficiencies of portfolio margining. For over four years, the SEC and CFTC have been unable to agree on how to permit futures to be included in a securities portfolio margin account. Because the two agencies continue to disagree on the most appropriate approach to implementing portfolio margining, the ability of many customers to employ portfolio margining between futures and securities has been stymied. Unless this deadlock is broken, portfolio margining will not reach its full potential in the United States, even though it is used in many jurisdictions abroad.

Financial Regulatory Oversight Council

We support the Reform Proposal's recommendation for the creation of a Financial Regulatory Oversight Council (FSOC), chaired by Treasury, to resolve potential disputes between the two agencies.

The FSOC would replace the President's Working Group on Financial Markets and maintain a permanent staff at Treasury. Among its responsibilities, the FSOC would help facilitate coordination of policy and resolution of disputes among the agencies. Currently, there is no real dispute mechanism in place other than sporadic dialogue between the two agencies. This has led to long delays in the decision-making process, which hinders competitiveness to the detriment of investors and our markets. This is not intended to imply that, when disputes do arise, either agency is not putting forth a good-faith effort to resolve them. Instead, each earnestly believes that it is properly applying its statute when analyzing a particular jurisdictional issue. The impasses that frequently arise may be the natural result of the differing, and sometime conflicting, philosophies of the securities laws and commodities laws. No matter how well intentioned the cause, a neutral arbiter is needed to resolve an impasse.³

We believe that the Treasury Department is well versed in the issues typically presented in jurisdictional disputes and is thus ideally suited to resolve them. Prompt resolution of jurisdictional disputes is extremely important to be able to bring new products to market quickly or to facilitate approval of new market mechanisms so that the U.S. capital markets can maintain their global

³ Last year the SEC and CFTC entered into a Memorandum of Understanding ("MOU") on the review of products that raise jurisdictional issues. We believe that the MOU is not an effective mechanism to resolve jurisdictional disputes where the two agencies have strongly differing views on an issue.

competitiveness. In addition, we strongly recommend that the Exchanges, as self-regulatory organizations (SROs), be authorized to bring issues directly before the Council for resolution.

Harmonization

The Reform Proposal recognizes that split regulation is outmoded and harmful, and for this reason offers constructive steps toward addressing the situation. Specifically, the Reform Proposal recommends that the statutory and regulatory regimes for futures and securities be harmonized.⁴ Harmonization may reduce the disparities between regulation of securities and futures, and we commend the Administration for recommending this important initiative and urge Congress to adopt it. While harmonization of the securities and futures statutes would represent a vast improvement, we believe it is only the first step -- albeit a critically necessary one -- toward ending bifurcated jurisdiction.

We have serious concerns about how much harmonization can truly occur between two separate agencies.⁵ Even in the most hopeful of outcomes, with optimal harmonization of the securities and futures laws, the existence of two separate agencies, with differing philosophies, will continue to foster conflicting interpretations and enforcement of the same laws, perpetuating disjointed regulation, duplication of efforts, regulatory uncertainty, and delay.

Consolidation

While there are interim steps that can be taken to dampen some of the ill effects of divided jurisdiction, consolidation of the agencies is the only truly comprehensive solution. Any rational, unbiased, assessment of the bifurcated regulatory system would lead to this conclusion. In calling for a merger, we do not want to suggest that the securities system of regulation is preferable to the futures system, or vice versa, or that the SEC should take over the CFTC. Each

⁴ Pursuant to the Reform Proposal, the SEC and the CFTC would retain their current responsibilities and authorities as market regulators, although the Administration proposes to "harmonize the statutory and regulatory frameworks for futures and securities." In that regard, the Reform Proposal notes that "[w]hile differences exist between securities and futures markets, many differences in regulation between the markets may no longer be justified," suggesting that there are gaps and inconsistencies in the regulation of derivative instruments by these two regulators that should be rectified.

⁵ For example, the securities and futures markets use very different models for clearance and settlement. The securities options markets employ a common clearing structure that facilitates the development of competing exchanges. In contrast, the futures markets use a captive clearinghouse model where a product traded on an exchange must be cleared through an affiliated clearinghouse. It is unlikely that separate securities and futures regulators could reach an agreement to harmonize these two clearing models.

system has its pluses and minuses and CBOE has, and could continue to, operate under either. What we should not continue to tolerate is the inefficient and ineffective dual structure currently in place.

Other Issues

Aside from the jurisdictional issues, we would like to touch upon several other issues discussed in the Reform Proposal. First, we agree with the Reform Proposal's recommendation that a single authority, such as the Federal Reserve Board, should supervise all firms that could pose a risk to financial stability. The events in our financial markets over the past two years underscore the need for a single body to have ultimate oversight over the broad risks in our financial system. In creating such an oversight role, however, we need to be careful not to drain away the existing and important role that the SEC, CFTC, and Treasury play in monitoring for risk issues in their respective areas.

Second, we agree with the Reform Proposal that greater regulatory oversight is needed for OTC derivatives. These products serve many useful functions, but will continue to introduce significant risks into the financial system if left unregulated. The determination of which agency should be responsible for regulation of these products will be a key issue. The split jurisdiction between the SEC and CFTC may introduce an unnecessary complication in creating efficient regulation of these products, once again highlighting the compelling need for a merger of the two agencies. In order to avoid some of the harm of split jurisdiction, the most sensible path, at a minimum, would be to vest jurisdiction over all OTC derivatives involving *securities* (including corporate events) with the SEC.⁶

Third, given the very real competitive disadvantages to securities exchanges caused by unnecessary delays in bringing a new product to market or in making adjustments to trading systems, we applaud the Proposal's recommendation that the SEC should overhaul its process for reviewing proposed rule changes by self-regulatory organizations to allow more SRO rule filings to become effective on filing.

Conclusion

CBOE believes that review of the Reform Proposal provides an opportunity to bring needed changes to the U.S. regulatory landscape in order to promote the competitiveness of U.S. financial markets. Congress should promptly adopt the

⁶ Our concerns regarding the need for regulating OTC derivatives date to my testimony in April of 1997. See attached testimony.


harmonization and FSOC recommendations of the Reform Proposal, as well the proposal's call for the SEC to streamline its SRO rule approval process. Taking these steps will at least help our markets remain competitive in the global marketplace until we are able to complete a more comprehensive reform.

CBOE, WFE, and I, personally, stand ready to work with the Committee and its staff as it considers these important issues. Thank you again for the opportunity to testify at this important hearing. I would be happy to answer any questions you may have.

United States House of Representatives
Committee on Financial Services

“TRUTH IN TESTIMONY” DISCLOSURE FORM

Clause 2(g) of rule XI of the Rules of the House of Representatives and the Rules of the Committee on Financial Services require the disclosure of the following information. A copy of this form should be attached to your written testimony.

1. Name: William J. Brodsky	2. Organization or organizations you are representing: Chicago Board Options Exchange
3. Business Address and telephone number: 400 South LaSalle Street Chicago, Illinois 60605 Telephone #: (312) 786-5600	
4. Have <u>you</u> received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2006, related to the subject on which you have been invited to testify? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	5. Have any of the <u>organizations you are representing</u> received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2006, related to the subject on which you have been invited to testify? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
6. If you answered “yes” to either item 4 or 5, please list the source and amount of each grant or contract, and indicate whether the recipient of such grant was you or the organization(s) you are representing. You may list additional grants or contracts on additional sheets.	
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