Differences between Proposed Rulemaking and Final Rulemaking

In July of 2006, the Commission proposed and sought public comment on new acceptable practices for section 5(d)(15) ("Core Principle 15") of the Commodity Exchange Act.[1] The Commission proposed that at least 50% of the directors on designated contract market ("DCM") boards and executive committees (or similarly empowered bodies) be public directors. It also proposed that day-to-day regulatory operations be overseen and insulated through a Chief Regulatory Officer reporting directly to a board-level Regulatory Oversight Committee consisting exclusively of public directors. The proposed acceptable practices also defined "public" for persons serving on boards and disciplinary panels. To qualify as "public" under the proposal, the director in question would require an affirmative determination that he or she had no material relationship with the DCM. In addition, directors and members of disciplinary committees would have been required to meet a series of "bright-line" tests, the failure of which would automatically preclude him or her from serving as a public director. Finally, the proposed acceptable practices called for DCM disciplinary panels that were not dominated by any group or class of self-regulatory organization participants, and that include at least one public member.

After carefully considering the 36 comment letters submitted to the Commission in response to the proposal, the final acceptable practices include two significant modifications from the proposal: (1) a reduction in the required number of public directors on DCM boards and executive committees from at least 50% public to at least 35% public; and (2) although the acceptable practices are effective immediately upon publication in the *Federal Register* (as stated in the proposal), DCM's will have a phase-in period of three years or three regularly scheduled

[1] 71 FR 38740 (July 7, 2006).

board elections, whichever is less, to implement the new acceptable practices or otherwise come into full compliance with Core Principle 15.

The final acceptable practices also include confirmations and clarifications consistent with the Commission's original intent, and made in response to specific comments received by the Commission. These confirmations and clarifications include the following: (1) DCMs may select their public directors in the manner most appropriate to them-- compliance with the final acceptable practices does not require the use of nominating committees, the "election" of public directors, or the selection of public directors by any pre-specified means; (2) public directors may receive deferred compensation for prior services in excess of $100,000, such compensation will not count towards the $100,000 payment limit for public directors; (3) the same person may serve as a public director at a parent company and its subsidiary DCM; (4) disciplinary panels considering cases involving the timely submission of accurate records for clearing or verifying each day's transactions need not include a public member; (5) public disciplinary committee members need only meet the "bright-line" tests for public directors and are not subject to the "no material relationship" test; (6) a DCM director is considered "affiliated" with a member if he or she has any relationship with the member such that his or her impartiality could be called in question in matters concerning the member; and (7) Regulatory Oversight Committees are not required to prepare periodic reports for the board of directors.