February 1, 2011

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

Re: *Proposed Regulations on Protection of Collateral of Counterparties to Uncleared Swaps – RIN 3038-AD28*

Dear Mr. Stawick:

IntercontinentalExchange, Inc. ("ICE") appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC" or "Commission") proposed rulemaking addressing the treatment of securities in a portfolio margining account in the event of a commodity broker insolvency.

In summary, ICE proposes that where the Commission has referred to "futures account" in the two proposed modifications to the Part 190 rules, the Commission should also include the other classes of commodity customer accounts under the Part 190 rules, including the 4d(f) "cleared OTC derivative" class. Clarification of the term "futures account" in the proposed rulemaking (the "Proposal") to explicitly refer to the other classes of commodity contract accounts would provide certainty for the treatment in insolvency of portfolio margining arrangements that include both swaps and securities (including security-based swaps), and not simply futures and securities.

Background

ICE operates four regulated futures exchanges: ICE Futures US, ICE Futures Europe, ICE Futures Canada and the Chicago Climate Futures Exchange. ICE also owns and operates five derivatives clearinghouses: ICE Clear US, a Derivatives Clearing Organization ("DCO") registered under the Commodity Exchange Act (the "Act"), located in New York and serving the markets of ICE Futures US; ICE Clear Europe, a Recognized Clearing House and DCO located in London that serves ICE Futures Europe, ICE's OTC energy markets and also operates as ICE's European CDS clearinghouse; ICE Clear Canada, a recognized clearing house located in Winnipeg, Manitoba that serves the markets of ICE Futures Canada; The Clearing Corporation, a U.S.-based DCO; and ICE Trust, a U.S.-based CDS clearing house. As the operator of clearinghouses that clear a diverse set of products, ICE has a practical perspective on the importance and benefit to market participants of portfolio margining arrangements.

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Proposed Rules on Protection of Collateral of Counterparties to Uncleared Swaps

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") contains several provisions intended to facilitate portfolio margining between commodity-based and security-based products, including key clarifications to relevant insolvency laws. Section 713(c) of the Dodd-Frank Act added Section 20(c) of the Act, which specifies that the Commission "shall exercise its authority to ensure that securities held in a portfolio margining account carried as a futures account are customer property and the owners of those accounts are customers for the purposes of" the commodity broker liquidation provisions of Subchapter IV of Chapter VII of the Bankruptcy Code. To implement this provision, the Commission has proposed two changes to Commission Regulations 190.01(k) and 190.08(a)(1)(i).

ICE believes that the revisions to the Commission's Part 190 regulations contained in the Proposal are a necessary step toward realizing the important benefits of portfolio margining for market participants. The proposed amendment to Regulation 190.01(k) would add to the definition of "customer" the sentence "To the extent not otherwise included, customer shall include the owner of a portfolio margining account carried as a ***futures account*** [Emphasis added]." The proposed change in Regulation 190.08(a)(1)(i)(F) would add to the definition of "customer property" the sentence "To the extent not otherwise included, securities held in a portfolio margining account carried as a ***futures account*** [Emphasis added]."

ICE suggests a technical clarification that would further the goal of facilitating portfolio margining and clarify the Commission's authority to approve portfolio margining arrangements that are consistent with other provisions of the Dodd-Frank Act.[1] In particular, where the Commission has referred to "futures account" in the two proposed modifications to the Part 190 rules, the Commission should also include the other classes of commodity customer accounts under the Part 190 rules, notably the 4d(f) "cleared OTC derivative" class.[2] Clarification of the term "futures account" in the Proposal to explicitly refer to the other classes of commodity interest accounts would provide certainty for the treatment in insolvency of portfolio margining arrangements that include both swaps and securities (including security-based swaps), and not simply futures and securities.[3]

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[1] *See, e.g.,* Section 724(a) of the Dodd-Frank Act. That provision establishes new Section 4d(f) of the Act, which requires segregation of margin in connection with cleared swaps. Swap margin is generally required to be segregated from house assets of the carrying FCM and customer futures margin held by the carrying FCM. Section 4d(f)(3)(B) permits the CFTC to allow commingling of swap margin with other margin required by the CFTC to be separately accounted for and dealt with as customer property.

[2] *See* Rule 190.01(a), (oo).

[3] Section 713(a) of the Dodd-Frank Act adds a new Section 15(c)(3)(C) to the Securities Exchange Act of 1934, which allows the Securities and Exchange Commission ("SEC") to permit a joint broker-dealer/FCM to carry security positions in a "futures account subject to Section 4d" of the Act pursuant to a portfolio margining program also approved by the CFTC. Consistent with our comments generally, we suggest that the reference to the term "futures account" in section 713(a) and 713(c) of Dodd Frank should be read to apply to all futures or commodity accounts under CFTC jurisdiction. In other words, the reference to "futures" in this context is intended to distinguish the account from a securities account, rather than to distinguish between the various types of commodity

Clarifying the term "futures account" in the Proposal to explicitly refer to other classes of commodity contract (e.g., the newly created 4d(f) account class) would maximize the flexibility of the Commission and market participants to respond to changes in the financial markets as contemplated by Congress in enacting the Dodd-Frank Act, and not create artificial and unnecessary distinctions between futures and other products regulated by the Commission. The benefits of portfolio margining to the marketplace will become even more important as significantly more products are cleared as a result of the implementation of the Dodd-Frank Act. In particular, the reduction in margin requirements provided to customers as the result of portfolio margining might be the only opportunity for economic relief to the customers who are likely to incur substantial additional costs as a result of mandatory clearing.

We appreciate the opportunity to comment on this rulemaking. Please do not hesitate to contact the undersigned if you have any questions regarding our comments.

Respectfully submitted,

Kevin R. McClear
General Counsel
ICE Trust U.S.

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contract account. At a minimum, the reference to Section 4d should be read to include the new Section 4d(f) accounts for cleared swaps. Given that futures can, in fact, be held in the Section 4d(f) account pursuant to Commission order, it would be an odd result to view the provision as permitting cross-margining of futures, cleared swaps and securities in a single 4d(a) account but not cross-margining of only cleared swaps and securities in a single 4d(f) account.