Atlanta Calgary Chicago Houston London New York Singapore

February 22, 2011

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

RE: *Core Principles and Other Requirements for Designated Contract Markets*
RIN 3038-AD09

Dear Mr. Stawick:

IntercontinentalExchange, Inc.("ICE") appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC" or "Commission") proposed rulemaking (the "Proposal") setting forth new rules and amended guidance and acceptable practices applicable to designated contract markets ("DCMs").

As background, ICE operates four regulated futures exchanges: ICE Futures U.S., ICE Futures Europe, ICE Futures Canada and the Chicago Climate Futures Exchange. ICE also owns and operates five derivatives clearinghouses: ICE Clear U.S., a Derivatives Clearing Organization ("DCO") under the Commodity Exchange Act ("Act"), located in New York and serving the markets of ICE Futures U.S.; ICE Clear Europe, a Recognized Clearing House 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 a diverse set of exchanges and clearinghouses based in three countries, ICE has a practical perspective on the day to day functioning of a DCM and the important roles it serves.

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Executive Summary

In adopting the final rules, the Commission should remember that the DCMs have a well established regulatory regime that worked well during the financial crisis. In this light, the Commission should adopt a less prescriptive approach to the DCM rulemaking.

Specifically, the Commission should:

- Adopt a less restrictive approach to implementing Core Principle 9's centralized trading requirements;
- Have different centralized trading requirements for liquid front months versus less liquid distant months;
- Clarify that Requests for Cross meet the centralized trading requirement;
- Adopt a less prescriptive approach to the pricing of block trades between affiliated parties and the timing of reporting block trades;
- Not adopt requirements on the pricing and time of reporting for exchanges of derivatives for related positions;
- Allow the execution methods for swaps listed on a DCM to be similar to those available on a swaps execution facility ("SEF");
- Not require the real-time monitoring of intraday position limit rules by DCMs until the technology is readily available;
- Allow DCMs to rely on clearing member guarantees when complying with financial integrity standards; and
- Allow DCMs to distinguish between traders with intermediated access and direct access when adopting rules to comply with Core Principle 2.

General Comments on the Proposed Rulemaking

DCMs were one of the few parts of our market structure that worked properly during the financial crisis and did so without prescriptive rules directing their daily conduct. This flexibility to meet the standards of the Core Principles in a variety of ways is supplanted in the Proposal. Instead, the Commission seeks to impose a set of rules that would make the formerly non-exclusive Acceptable Practices under the Core Principles mandatory, and further augments them with additional new rules that

dictate the sole means of achieving compliance with the Core Principles. This fundamental regulatory change could have the long-term, deleterious effect of hindering the market innovation that has fostered the U.S.'s competitive position in the global marketplace. Because the Dodd-Frank Act does not require adoption of the dozens of new DCM regulations set forth in the Proposal, we urge the Commission to exercise restraint and use its rulemaking authority to address only those discrete issues where it believes specific, binding rules are needed, rather than wield its authority in a manner that implements a wholesale transformation of the DCM regulatory environment.

Further, in measuring DCM compliance with applicable Core Principles and CFTC regulations, the Commission should recognize that even the best systems and procedures cannot prevent or necessarily detect every violation or achieve the intended result. Although some of the Core Principles and many of the rules contained in the Proposal require DCMs to "ensure" that certain conduct does or does not occur, or to "prevent" events from arising, the Commission should gauge a DCM's compliance with such obligations by determining whether the DCM has put in place measures that are reasonably designed to achieve compliance with the applicable Core Principle or rule, and not by whether the measures implemented were successful in every instance.

Specific Issues in the Rulemaking

Subpart J - Core Principle 9 – Execution of Transactions

(a) Minimum Centralized Market Trading Requirement

The Dodd-Frank Act expanded Core Principle 9 to require that a DCM's competitive, open and efficient market and mechanism for executing transactions be such that it "protects the price discovery process of trading in the centralized market of the board of trade." To implement this provision the Commission proposes a mathematical test that would require 85% of a contract's volume to be executed in the central market order book. The consequences of not satisfying this test are pervasive, as the DCM would have to delist the contract and consider whether to list it as a swap on a SEF. Listing the contract as a swap on a SEF would restrict market participants to eligible traders and would have adverse tax consequences for market participants. At

the outset, if this requirement is adopted, ICE suggests that the Commission should, at a minimum, allow the DCM to list the contract as a swap on the DCM and avoid the costs of setting up and administering a SEF.

The minimum trading threshold set by the Commission would allow only the most liquid contracts to remain as futures. Many current DCM listed contracts would not meet this criterion, including some agricultural contracts. ICE proposes that the Commission take a more flexible approach to the minimum centralized market trading requirement. At the very least, ICE suggests that the Commission lower the threshold for futures to no more than 75% which would allow many less liquid contracts to remain a future. In addition, the Commission should apply the 75% threshold only to the most liquid contract months which are typically the three months closest to expiration. Open interest in these front three months typically account for approximately 70% of all-month open interest for almost any futures contract. All other months should be held to a much lower centralized market volume threshold, such as 50%.

We are particularly concerned with the fact that the Proposal draws no distinction between futures and options. As a result, the same 85% threshold is to be applied separately for an options contract and its underlying futures contract. If the option fails to meet the 85% standard, the futures contract would still be allowed to remain listed on the DCM while the options contract would have to be delisted. In such an instance, users of both contracts – including producers, end users and other commercial market participants who routinely use both to hedge their risk – would no longer be able to execute futures and options on a single market or, as is the case today, in a single transaction. This outcome would likely result in increased trading costs, margin inefficiencies due to the potential inability to cross margin futures and swaps positions, and other administrative burdens for these traders. ICE suggests that the Proposal either incorporate a different and more appropriate lower threshold for options contracts, such as 50%, or some other mechanism to ensure that the Proposal does not result in related futures and options contracts being forced onto different markets.

Additionally, because of its consequences, it is imperative that the Commission clearly specify what types of transactions and trade practices would be deemed to satisfy the central market execution standard. In this regard, ICE requests that the Commission make it clear that cross trades that have been exposed to all market participants through procedures

specified in a DCM's electronic trading rules qualify as competitive transactions under Core Principle 9. Currently, most DCMs require that prior to the electronic execution of a cross trade in a futures contract, the trader must expose the customer order or, if there are two independent accounts, one of the orders, to the centralized market for a minimum of five seconds. Given the speed of electronic trading, five seconds is a significant period of time and gives any other market participant interested in trading the futures contract an opportunity to trade against the order that has been exposed. For cross trades in an options contract, most DCMs require that a crossing order ("CO") or request for quote ("RFQ") must be submitted and, that prior to the execution of the cross, a sufficient amount of time must elapse to give market participants an opportunity to trade opposite the exposed order. These crossing procedures protect the price discovery process by ensuring that all market participants have an opportunity to trade opposite the exposed order. Hence, for the purposes of calculating the percentage of trading on the centralized market, electronic cross trades should be deemed competitive transactions.[1] In addition, the Commission should clarify that transactions should be executed in a single order book in order to meet the centralized trading requirement.

ICE further recommends that transfer trades which are for bookkeeping purposes be excluded from the calculation, i.e. not categorized as either competitive or non-competitive, as these are positions that were previously established in the centralized market and do not establish a new position or offset an existing position.

We believe the Commission also should make provision for a specific exemption related to contracts where the price discovery function is served on other venues. The primary purpose of many contracts listed on DCMs today is not price discovery, but rather risk shifting. For example, indexes are mathematical calculations based on the underlying cash markets, such as stock or currency indexes, or, as in the case of commodity indexes, the underlying futures markets. Currency or foreign exchange futures markets reflect current international bank rates. These markets are used primarily to transfer or hedge the risk that is posed by holding or being obligated to deliver the underlying financial instruments.

[1] We do not discuss cross trades executed by open outcry on a trading floor because it is obvious that the CFTC-approved Exchange rules governing their execution require a competitive process whereby traders in the ring participate.

ICE suggests that the price discovery process could still be protected without sacrificing the functions served by other types of contracts listed on DCMs. Therefore, the Proposal should encompass an exemption process for DCM contracts where the price discovery function is served on other venues.

(b) Block Trades

The Proposal also re-proposes the Commission's guidance and acceptable practices published in September 2008 with respect to block trading and exchange of derivatives for related positions ("EDP"). The Proposal codifies factors that a DCM would have to consider in determining the appropriate block trade size for a contract. We note that the Commission has preserved the ability of a DCM to justify a block size on the basis of additional factors and data. The Proposal thus recognizes this to be an area where one size will not fit all, and we commend the Commission for recognizing that differences among contracts and markets may yield various results for differing contracts that may each be appropriate.

In other respects, we continue to have the same concerns with the Proposal that we had with the Commission's 2008 proposal. Specifically, Section 38.503(d) of the Proposal requires that block trades executed between affiliated parties must be transacted at arm's length and be priced within the current bid-ask on the centralized market or a contemporaneous market price in a related cash market. All transactions executed between affiliated parties are required by ICE Futures U.S. to be done at arm's length, irrespective of the specific trade type. For example, ICE Futures U.S. Rule 4.19 concerning cross trades and market surveillance procedures for reviewing EDPs specifically require that each affiliated party has separate business operations, separate decision makers and separate trading accounts which are not aggregated for position limit purposes. Once those standards are met, the transaction itself must meet the requirements applicable to the particular trade type under the rules.

The stated purpose of the Commission's proposed pricing restriction is to establish objective criteria that will guard against affiliated parties engaging in potential trading abuses and collusive activity. ICE does not believe that an objective pricing standard is essential to the legitimacy of a block trade transacted between affiliated parties. Rather, we believe that, so long as the affiliated parties meet all of the criteria of

the DCM's rules and procedures establishing the independence of the parties with respect to the transaction - separate operations, separate business purposes, separate decision makers and separate trading accounts - they should not be limited in pricing the transaction, other than to use a price that is fair and reasonable. Using the contemporaneous price from the centralized market is certainly one way to establish a fair and reasonable price for a block trade, but it is not the only way to do so, nor does it ensure that the transaction does not contravene applicable rules or law for reasons other than price alone.

The pricing standard could also prove to be an impediment for transacting parties because block trades are not necessarily executed at times when the centralized market has a bid/ask price, the cash market is active or there is a readily identifiable cash price. This is particularly true for global agricultural commodities, in contrast to stock indexes and foreign exchange. Consequently, it may be difficult to say with any level of objectivity what the prevailing market price is at a particular time on a given day. In addition, the bid/ask in electronic markets can change in fractions of a second, making it difficult to determine the appropriate bid/ask that existed at the time the block trade was agreed upon between the parties. Moreover, it may not be economically feasible for either party to execute at a price that would fall within the contemporaneous bid/ask spread or cash market price, but would be feasible to execute at a price that is considered fair and reasonable under all the circumstances. Finally, the number of contracts bid or offered in connection with the contemporaneous bid/ask spread may not be, and in fact is probably not, as high as the number of contracts that comprise a block trade. Therefore, the contemporaneous bid/ask spread may only be a representative price for a small portion of the entire block trade.

Trading among affiliated parties has always been subject to a higher level of scrutiny because of the relationship between the parties and the opportunity for abuse that exists in connection with such trading. In light of the heightened scrutiny already applied to transactions between affiliated parties in general, the Commission's proposal to limit the prices at which affiliated parties can execute block trades unnecessarily limits potentially legitimate trading activity while injecting a level of prescriptive detail that is inconsistent with the agency's oversight role and the purpose of having flexible core principles. For that reason, we believe block trades between affiliated entities should be subject to the standard of "fair and reasonable" pricing, as are block trades between non-affiliates.

(c) Exchange of Derivatives for Related Position

Section 38.505(a)(2)(iii) of the Proposal requires that "the price differential between the futures leg and the commodities leg or derivatives position should reflect commercial realities, and *at least one leg of the transaction should be priced at the prevailing market price*." As in the Commission's 2008 proposal, the Commission has set out this pricing requirement for EDPs without any discussion or explanation regarding the purpose for such a requirement. We disagree that the pricing of EDP transactions should have such a limitation, and note that no such requirement exists under any DCM's rules today.

EDP transactions have a long history in the futures industry. Traditionally, they were executed when the physical commodity being delivered didn't meet the standards for delivery under the terms of the futures contract being exchanged. The commercial entity, which owned the physical and a short futures position, would arrange with another commercial entity that wanted the physical and had a long futures position, to exchange ownership of the physical and their respective futures positions. In essence, it was a delivery off of the exchange. Pricing of the physical would take into consideration various factors, including the inability to meet the standards for exchange delivery, which by its very nature meant that the price would be different than the prevailing market price.

In many of the agricultural markets traded at ICE Futures U.S., commercial users enter into long-term forward contracts that slowly unwind as monthly deliveries of the underlying physical commodity occur. As a result of such deliveries, there is no longer a need to hedge that delivery month. EDPs are often the mechanism through which these long-term forward contracts are unwound. The pricing terms of the forward contracts may be agreed to long before the EDPs are transacted and reflect the needs of the parties, not necessarily the prevailing market price on a date in the future.
Currently, ICE Futures U.S. rules require that an EDP consist of two separate, bona fide transactions in which the seller of the futures is the buyer of the physical or derivative product, and the buyer of the futures is the seller of the physical or derivative product. To our knowledge, no exchange has a rule limiting the pricing of EDPs. EDP surveillance is, and always has been, based upon a review of the legitimacy of the two transactions rather than an analysis of the price at which the EDP is transacted. It is

unclear why a currently legitimate EDP should no longer qualify as such if it does not meet a new and arbitrarily imposed pricing standard. For commercial users that have long-term forward contracts currently in place, the pricing requirement may interfere with their ability to unwind existing positions. We urge the Commission to reconsider this position.

Finally, the Commission should consider affirmatively banning EFS trades that are contingent on clearing. The Dodd-Frank Act requires that most transactions be cleared and exchange traded. In light of these requirements, an EFS that is contingent upon acceptance to clearing is unnecessary.

(d) Reporting of Block Trades and EDPs

Sections 38.503(g) and 38.505(d) require that a block trade and an EDP must be reported within five minutes after execution.

With respect to block trades, the five minute reporting requirement has been the traditional reporting parameter. However, ICE Futures U.S. submitted an amendment to its block trade procedures that allows traders an additional five minutes, i.e. a total of ten minutes, to report block trades that are comprised of three or more legs. It has been the experience of ICE Futures U.S. that additional time is necessary to facilitate accurate reporting of multiple leg block trades. Hence, requiring a five minute report time for all block trades is unreasonable, and the Commission should consider setting a parameter of no more than fifteen minutes. This would allow DCMs the flexibility to adopt specific requirements (with 15 minutes being the limit for blocks) that achieve the goals of Core Principle 9 in a manner appropriate to market conditions and practices.

With respect to EDPs, the five minute reporting requirement is not consistent with current DCM practice. EDPs are transacted throughout the trading day and, very often, overnight. Their pricing may be contingent on the settlement price which may not be forthcoming until later in the day. It is unclear what concern the Commission is attempting to address by imposing such an additional requirement when the EDP reporting process currently works well.

(e) Listing of Swaps on a DCM

Section 723 of the Dodd-Frank Act allows a swap to be executed on a SEF or on a DCM. This is beneficial for the swaps markets as it allows participants to execute swaps transactions on the most regulated platform. Section 38.9 prescribes how a DCM can list swaps. While the Proposal outlines the data reporting and listing standards for swaps, it does not describe how the core principles, written for futures contracts, apply to a DCM listing swaps.

Congress, through the Dodd-Frank Act, and the Commission, through its Proposal implementing it, , recognize a separate regulatory structure for swaps and futures transactions. In prescribing rules for swaps listed on a DCM, the Commission should make a similar distinction. In particular, the Commission should clarify that a swap executed on a DCM can use the same execution methods as a SEF, such as a Request for Quote mechanism. In addition, the centralized market trading requirements of Core Principle 9 should not apply. Finally, like a SEF, a DCM should be able to allow the bilateral execution of swaps where there is no clearing mandate. Without these clarifications, it is likely that trading of swaps would be biased away from DCMs and toward SEFs. This would have the unintended consequence of frustrating, through rulemaking, the clearly stated intention of Congress that swaps trade on a DCM.

<u>Subpart E - Core Principle 4 – Prevention of Market Disruption</u>

Core Principle 4 requires a DCM to have the capacity to prevent "manipulation, price distortion and disruptions of the delivery or cash-settlement process through market surveillance, compliance and enforcement practices and procedures" which include real-time monitoring of trading and accurate trade reconstruction capabilities. The Proposal specifies methods and procedures DCMs must employ in monitoring trading activities within their markets, including General Requirements that apply to all contract markets (§38.251) and Additional Requirements that apply to physical delivery contracts only (§38.252). In this regard we note that while our Market Regulation function utilizes both manual processes and automatic alerts to identify potential trading abuses, such processes and alerts cannot prevent *all* such abuse from occurring.

The General Requirements largely describe methods and procedures already in use by DCMs. However, proposed regulation 38.251 would impose a new requirement that real-time monitoring of trading be conducted to identify intra-day position limit violations. DCM officials previously have made Commission staff aware of the difficulties inherent in trying to monitor positions on a real-time basis, at least in the context of futures trading. These include, among other things, the fact that a position snapshot at any point in time other than end-of-day may be flawed and inaccurate because of the delay between the time an open outcry trade (for example, in options) makes its way into the system and can be included in a position calculation; the fact that option deltas change throughout the day, the destination of allocated and give-up transactions are not immediately known, and EDP transactions, which may not be reported in real-time, can significantly change the position of a commercial market participant compared to an intraday position calculation. Although DCMs can attempt to develop systems to monitor positions on a real-time basis, the limitations identified above would impair the accuracy of the resulting position data for a participant at any point in time during the trading day. We believe that currently, the only way to accurately determine whether an intra-day position limit violation has occurred is on the basis of information available on a trade date plus one (T+1) basis. On such date, information regarding the actual positions carried and cleared by the trader the previous day can be accessed to determine if applicable limits were exceeded at a particular time of the day. This is not to say that in the rare case where a trader enters an order or builds an intraday position of such magnitude that it unquestionably breaches applicable limits, the DCM should ignore it. In such a case, enforcement action can be taken by the DCM under its existing rules.

The proposed rule also would require that real-time monitoring of trading be conducted to detect "impairments to market liquidity". There is no reference to such "impairments" in the Core Principle, and the Commission provides no explanation or example of what it intends by the use of the phrase. The Commission should delete this phrase from the proposed rule as it is vague and has no foundation in the Core Principle itself.

The Additional Requirements also largely describe monitoring and assessment of contract terms and conditions for convergence with the underlying cash market, market fundamentals, estimates of deliverable supplies and delivery terms and procedures that are already performed by exchanges for each of the physical delivery contracts. We

note that for certain products it is inherently more difficult to statistically determine convergence of futures to cash market prices. For example, for the ICE Futures U.S. Sugar No. 11® contract, the cash price of sugar of deliverable quality can be (and usually is) different in different geographic locations, and there is no available resource that reflects the cash price at each/any of these locations at a given point in time. Frequently, cash contracts refer to the futures price as the proxy for a cash price in the sugar trade. Similar conditions exist for the ICE Futures U.S. Coffee "C"® contract, which prices delivery of 19 origins in four U.S. and three European delivery points, and for other agricultural products as well. Thus, we believe that for these and similar products, monitoring of the convergence of expiring contracts will continue to be best performed through active discussions between our Market Surveillance staff and individual market participants active in the delivery process, as part of our current monitoring of the orderly expiration of each contract. Feedback from our various product committees also helps to ensure that contract terms and conditions continue to meet the needs of the evolving commercial marketplaces they serve.

Finally, in Section §38.255, the Commission proposes requiring that DCMs adopt trading pauses and halts in order to comply with Core Principle 4. While ICE agrees that trading pauses or halts can be an effective way to prevent a market disruption, they are not the only effective mechanism for achieving this goal. For example, a temporary price floor or ceiling can work better than a pause or halt since trading can continue uninterrupted at the ceiling or floor price, thereby offering the earliest opportunity for price reversal should the market deem a sudden large move to be an overreaction or error. By being prescriptive, the Commission is freezing innovation in preventing market disruptions. The Commission should retain a flexible approach to compliance with Core Principle 4.

Subpart L-Core Principle 11-Financial Integrity of Transactions

Core Principle 11 establishes the requirement that DCMs set and enforce rules to ensure the financial integrity of transactions executed on their facilities, the financial integrity of futures commission merchants ("FCMs") and introducing brokers ("IBs") and the protection of customer funds. In the Proposal, the Commission has expanded these standards in §38.602 to require DCMs to establish minimum financial standards for their members and non-intermediated market participants, whether or not they are

FCMs/IBs. As the Commission is aware, many DCMs eliminated specific financial standards for their non-FCM members and replace this requirement with rules requiring that a member's transactions be guaranteed by a clearing member. Indeed, in the discussion of market access requirements under Core Principle 2, the Commission recognized this by expressly stating that "any participant should be able to demonstrate financial soundness…by showing that it has clearing arrangements in place". Thus, the Commission clearly acknowledged that separate financial requirements are not necessary so long as a market participant is either a clearing member or has a guarantee arrangement in place with a clearing member. We assume, therefore, that a DCM rule requiring such clearing arrangements to be in place would satisfy the requirements of proposed regulation 38.602. Likewise, we would expect that a DCM rule requiring an FCM to maintain capital in accordance with applicable CFTC regulations would satisfy the DCM's duty to set financial requirements for its FCM members. We ask the Commission to confirm these assumptions, as any other interpretation of the proposed rule would amount to a significant departure from current practice.

<u>Subpart C –Compliance with Rules- Core Principle 2</u>

Core Principle 2 requires, among other things, that a DCM establish, monitor and enforce its rules, including those relating to access requirements, and have the capacity to detect and investigate potential rule violations and sanction any person that violates its rules. The Proposal includes a new requirement (proposed § 38.151) that would require every market participant to consent to the jurisdiction of the DCM and to participate in the investigatory and disciplinary process. The Commission states that this is necessary because "DCMs do not view themselves as having the jurisdiction needed to compel these market participants to participate in the investigation and disciplinary process". To rectify this, the Proposal would require DCMs to amend their rules and/or connection agreements and clearing members to amend their existing customer agreements to secure such consent from every one of their customers. We disagree with this aspect of the Proposal because it fails to distinguish between trades that are intermediated and those in which the customer has "direct access" to the DCM's trading system –that is—where the trades do not go through the clearing member's trading desk or trade-input system but go directly to the exchange's electronic system without the clearing member seeing the trade first.

At ICE Futures U.S., direct access is granted to a customer if the clearing member authorizes such direct access and an agreement is entered into directly between the customer and ICE Futures U.S. binding the customer to the Exchange's rules and procedures, including those relating to investigations and discipline. In contrast, where the clearing member only authorizes the customer to order route through the clearing member's connection, the clearing member – not ICE Futures U.S. - grants the customer access to trade and the customer's trades become part of the transaction flow of the clearing member to the exchange. In these circumstances, the clearing member is responsible to the exchange for the trades, including any resulting violations, in the same way it is responsible for its own proprietary trades. Moreover, the clearing member is subject to disciplinary action by the exchange, is obligated to obtain information from its customer at the request of the exchange and to follow any instructions with respect to granting or terminating the customer's access to trade. It has been our experience that clearing members are fully cooperative with the exchange and responsive to both investigative needs as well as instructions from the intermediated customers. In light of this experience and considering the burden it would impose on clearing members to obtain consents to jurisdiction from each of their customers, we do not see the need or clear benefit that would result from such a requirement. If, in a particular case, a DCM concludes that specific legal action against a customer is warranted—beyond instructing the clearing member to terminate access--the CFTC has the authority to pursue such legal action. We therefore believe that only when the privilege of trading on a DCM is specifically granted by the DCM should the trader be specifically subject to the jurisdiction and the disciplinary process of the DCM.

The distinction between customers with direct access to the trading platform and those who are intermediated is ignored in other proposed regulations interpreting Core Principle 2. For example, §38.151(b) requires the DCM to provide "market participants" with impartial access to its markets and services by, among other things, establishing and applying access criteria. The Commission states that this proposed requirement is intended to prevent DCMs from using discriminatory access requirements as a competitive tool against certain participants. As a threshold matter, the Commission has not indicated that there have been any problems with DCMs denying access to their markets by discriminating against particular individuals or firms. We note that such discriminatory conduct would be subject to review by the Commission as an "access denial" under Part 9 of its regulations, but are not aware of any review being conducted

by the Commission in the last decade or any pattern of denied access suggesting that a regulation is warranted.

In addition, the rule as written should not require that access requirements be established for traders who do not apply for, and are not granted access to, the trading platform by the DCM. That is—traders who are intermediated and are protected by regulations applicable to FCMs who carry their accounts—are not specifically granted access by the DCM. Therefore, if the Commission determines to require specific access requirements under Core Principle 2, they should be applicable only to traders that seek the grant of direct access trading privileges by the relevant DCM.

Finally, proposed regulation 38.158 would require investigative reports that are presented to disciplinary panels to include the respondent's entire disciplinary history at the DCM. Unless the rule violations that are the subject of the investigative report involve pervasive record-keeping violations, we would suggest that only substantive violations in the respondent's history would be relevant to the panel's deliberations and that burdening the record with a history of recordkeeping infractions is not necessary.

Conclusion

We appreciate the opportunity to comment on the Proposal. Please do not hesitate to contact the undersigned at (212) 748-4083 or Audrey.Hirschfeld@theice.com if you have any questions regarding our comments.

Sincerely,

Audrey R. Hirschfeld
Senior Vice President and General Counsel
ICE Futures US