March 7, 2011

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

RE: *Proposed Rules on Governance Requirements and Additional Requirements Regarding Conflicts of Interest*
RIN 3038-AD01

Dear Mr. Stawick:

The IntercontinentalExchange, Inc. ("ICE") appreciates the opportunity to comment on the Commodity Futures Trading Commission ("CFTC" or "Commission") proposed rulemaking addressing conflicts of interest in the derivatives industry. As background, ICE operates four regulated futures exchanges: ICE Futures U.S., Inc., 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 under the Commodity Exchange Act, located in New York and serving the markets of ICE Futures US; ICE Clear Europe, a Recognized Clearing House located in London that serves ICE Futures Europe, ICE's OTC energy markets and 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. Derivatives Clearing Organization and ICE Trust, a U.S.-based CDS clearinghouse. As the operator of a diverse set of exchanges and clearinghouses based in three countries, ICE has a unique perspective on the conflicts of interest rulemaking proposed by the Commission ("Proposal"). By reference, ICE incorporates all of its comments contained in its November 17, 2010 comment letter to the Commission.

ICE supports strong, independent corporate governance of exchanges, SEFs and clearinghouses. However, ICE submits the Commission should

IntercontinentalExchange
2100 RiverEdge Parkway
Suite 500
Atlanta, GA 30328
phone 770 857 4700
fax 770 951 1307
online www.theice.com

consider whether addressing the concerns outlined in the proposed rulemaking could be accomplished with a more flexible approach.

Executive Summary

In adopting the final rules, the Commission should remember that Designated Contract Markets ("DCMs") and Derivatives Clearing Organizations ("DCOs") have operated well under the existing conflict of interest and governance Core Principles and Commission regulations for over a decade.

Accordingly, the Commission should:

- defer implementing any public disclosure requirement regarding board decisions to supersede Risk Management Committee ("RMC") decisions, until the Commission has studied the interaction between DCO governing boards and their RMCs;

- delete the reference to "affiliates" in proposed §§38.801(b) and (c) and 39.24(b);

- allow DCMs to distinguish between traders with intermediated access and direct access when adopting proposed §38.801(e);

- delete the requirement that a DCO obtain a consent to jurisdiction from persons with direct access to a DCO's settlement and clearing activities when adopting proposed §39.24(b)(5); and

- delete the prohibition that legal staff of a swaps execution facility ("SEF"), DCM or DCO may not be designated to address conflict of interest issues.

Specific Comments

Transparency

In May 2003, the Commission began a nearly year- long study to review Designated Contract Markets ("DCMs") and Derivatives Clearing Organizations

("DCOs") to identify any conflicts of interest in the governance process for self regulatory organizations.[1] In the exhaustive study, the Commission interviewed a broad set of market participants, including futures commission merchants, DCMs, DCOs, market participants, and various financial industry groups. The meetings were "off the record "and thus allowed the Commission to gain great insight into how DCMs and DCOs carried out their self regulatory functions. Only after completing the study did the Commission propose its rulemaking. Unfortunately, the Commission's current Proposal does not benefit from such a study and consequently seeks to address issues that have not manifested themselves to date.

For example, the Proposal requires DCOs to report to the Commission and the public when the governing board disagrees with a recommendation made by a DCO's RMC. Requiring such disclosure will make overturning a RMC decision very unlikely because directors may be hesitant to take action that could lead to public disclosure and second-guessing of their decisions. This in turn could result in the RMCs, which has a narrower, delegated responsibility, asserting greater authority over the affairs of the company than intended by the Commission, or necessarily in the best interests of the company.[2] The Commission's Proposal could lead to an unchecked committee dominating the company. In addition, the Proposal implies that the only explanation for the reversal of a RMC decision by a board of directors would be due to the improper influence caused by a conflict of interest. This contradicts corporate reality where there are many legitimate reasons for a board of directors to reverse or amend a ruling of a committee, just as there are many legitimate reasons why the Commission may at times exercise its oversight authority to reverse or modify a decision of one of the Commission's divisions.

Therefore, the Commission should reach this issue after it has had an opportunity to review the interaction between RMCs and their governing boards over time to determine whether such disclosures to the public would be appropriate. In the interim the Commission should speak to current DCO

[1] 71 Fed. Register 38740 (July 7, 2006)
[2] ICE continues to believe that DCOs should have the flexibility to have a risk committee that serves in an advisory capacity.

directors to determine the impact, if any, that such a disclosure requirement would have on how they exercised their decision-making authority.

Fitness Standards

Proposed §§38.801(b) and (c) and 39.24(b) require each DCM and DCO to specify and enforce fitness standards for "(i) its members and affiliates thereof, . . . and (v) parties affiliated with (A) directors, (B) members of any Disciplinary Panel and (C) members of the Disciplinary Committee." (Emphasis added). The term "Affiliate" as defined in proposed §1.3(aaa) "means a person that directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, another person."

Currently, DCM Core Principle 14 and DCO Core Principle C require DCMs and DCOs to establish and enforce eligibility criteria for their members, and Core Principle 14 further requires DCMs to establish and enforce eligibility criteria for directors and members of disciplinary panels. Historically, DCMs and DCOs have always had membership or fitness standards that its members (both individuals and firms) must meet. These membership standards always included the absence of a significant and serious disciplinary history and no refusal to register by the Commission under section 8a(2) of the Act. In addition, each DCM has been enforcing the standards under CFTC Regulation 1.63 for members of its Board of Directors and disciplinary panels and committees. But under proposed §§38.801(b) and (c) and 39.24(b), each DCM and DCO would have to determine if the affiliates of each of its members, directors and members of disciplinary committees and panels ("Prospective Members") also meet the specified fitness standards. There is no explanation of why this is necessary, how DCMs or DCOs have failed in this regard to date or how far up or down the affiliated chain the Commission would expect a DCM or DCO to inquire when making the determination.

By adding affiliates to the determination of whether an individual or firm meets the fitness standards, the Proposal creates an absurd burden on both the Prospective Member and the registered entity. Prospective Members will have to compile information and complete paperwork for themselves and all their affiliates. Some of the information required could extend to multinational

corporations, causing delay and possibly deterring a Prospective Member from even serving on the board or committee.

ICE urges the Commission to delete the provisions referencing affiliates from proposed §§38.801(b) and (c) and 39.24(b) as there does not seem to be any apparent reason why the fitness standards should be applied to affiliates.

Jurisdiction over Non-members

In proposed §§38.801(e) and 39.24(b)(5), the Commission iterates the provisions of proposed §38.151 (see Core Principles and Other Requirements for Designated Contract Markets (RIN 3038-AD09)) to which ICE submitted a comment letter dated February 22, 2011. Proposed §38.801(e) requires a DCM to have as a condition of access a consent by members and non-members to the jurisdiction of the DCM. Proposed §39.24(b)(5) requires a DCO to have as a condition of access a consent by clearing members and others with direct access to the settlement and clearing activities to the jurisdiction of the DCO.

With respect to the DCO proposed requirement, ICE submits that the jurisdictional requirement is unnecessary as only clearing members participate in the settlement and clearing activities of a DCO. It is not apparent who else the Commission envisions, other than staff, that would have direct access to a DCOs settlement or clearing system and not be either a clearing member or third-party contractual agent.

With respect to the DCM proposed requirement, the Commission has stated 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.

Chief Compliance Officers

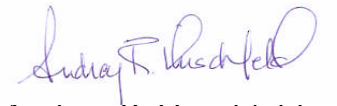
The Proposal gives the Chief Compliance Officer ("CCO") of a SEF or DCO the power to address conflicts of interest at the board and committee level. In the case of a DCM, the Commission asserts that the Chief Regulatory Officer ("CRO") make such determinations. We disagree with the Commission's conclusion that the General Counsel or other legal staff of a registered entity not

be involved in determining and resolving the existence of conflicts of interest. Indeed, the Commission's assertion is totally at odds with how DCMs have been successfully dealing with conflicts of interests for decades. In many organizations the CRO is not a lawyer and may not even participate at meetings of the governing board or committees, other than those committees that are directly involved in regulatory functions, such as a business conduct committee. Moreover, DCMs, like ICE Futures, have detailed, CFTC-approved rules addressing how various types of conflicts of interest are to be handled, and have been enforcing those rules effectively for many years. The Commission gives no credible reason why this must change or why a non-lawyer CRO or CCO would be better-equipped to interpret and enforce such rules. Legal staff have the duty to ensure that the company they represent complies with applicable law, including those laws codified in the Commodity Exchange Act and the regulations promulgated by the Commission. The rules for CCOs, and related interpretations for CROs, should be tailored by the Commission to give these officials the responsibility for addressing conflicts of interest arising only from market regulation and compliance functions, such as those performed by disciplinary committees. In all other respects a registered entity should be free to use its legal staff to handle questions surrounding potential conflicts of interest arising at the board or committee level.

Conclusion

Again, ICE believes in strong, independent corporate governance. However, we ask the Commission to consider whether the conflicts of interest identified on the Proposal are actual conflicts and whether the Commission's prescriptive approach is the right answer to these perceived conflicts. We appreciate the opportunity to comment on this rulemaking.

Sincerely,



Audrey K. Hirschfeld
Senior Vice President and General Counsel
ICE Futures U.S.