April 11, 2011

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

RE: *Requirements for Processing, Clearing, and Transfer of Customer Positions*
RIN 3038-AC98

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 the requirements for processing, clearing and transfer of customer positions for derivatives clearing organizations ("DCOs").

As background, ICE operates five clearinghouses: (1) ICE Clear U.S., a CFTC registered Derivatives Clearing Organization ("DCO"), located in New York and serving the markets of ICE Futures U.S.; (2) ICE Clear Europe, a Recognized Clearing House (and CFTC registered DCO) located in London that serves ICE Futures Europe, ICE's OTC energy markets effected through its exempt commercial market under Section 2(h)(3) of the Commodity Exchange Act ("Act") and also operates as ICE's European DCO for OTC credit default swaps ("CDS"); (3) ICE Clear Canada, a recognized clearing house located in Winnipeg, Manitoba that serves the markets of ICE Futures Canada; (4) The Clearing Corporation, a CFTC registered DCO; and (5) ICE Trust, a U.S.-based clearing house for OTC CDS. As the operator of a diverse set of DCOs based in three countries, ICE has a practical perspective of the operation of DCOs and the important risk mitigation roles that they serve.

Executive Summary

In adopting final rules, the Commission should:

- Give DCOs the ability to assess risk before clearing an illiquid or off-market transaction; and
- Mandate pre-trade risk checks for Swap Execution Facilities ("SEFs")

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General Comments on the Proposal

Clearing is the cornerstone of U.S. and global regulators financial reform efforts as a properly structured DCO can potentially reduce counter party and systemic risk in the derivatives markets for standardized contracts. In addition, clearing brings transparency, and transparency is a prerequisite for greater liquidity, better price discovery, more efficient markets and effective regulation. Increased liquidity results in lower transaction costs and tighter bid/ask spreads, reducing the cost of hedging price risk and lowering operating costs for businesses. Companies operating DCOs, like ICE, have led this effort and have been very successful. A key contributor to this success has been the Commission's flexible core principles regime, which is now to be replaced by the prescriptive rules proposed in the Proposal.

The Commission should ask itself whether there should be only one way to comply with the core principles and whether this single method of compliance should apply to all asset classes in the same way, without regard for their inherent differences. As ICE knows from operating in many markets, rules that apply to one asset class do not necessarily transfer to other asset classes.

Finally, the Commission should note that this rulemaking may be premature. The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") changes the over the counter derivatives markets by mandating that almost all derivatives transactions be exchange traded and cleared. As the Proposal notes, the Commission is attempting to solve perceived problems in the present market and not taking into account the impact of Dodd-Frank.[1] However, many of these issues may be moot if the transaction is traded on a SEF or DCM before being cleared. For example, the proposed rules prohibit a DCO from requiring that a clearing member execute a trade before accepting the transaction for clearing. While this requirement is a laudatory goal, if the contract is traded on a SEF or DCM, this requirement does not make sense. This could be the case for many of the rules in the Proposal, thus, the Commission should wait until the mandatory trading and clearing requirements take effect before implementing these rules.

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[1] For example, proposed rule § 39.12(b)(5) requires the DCOs to select contract sizes that "maximize liquidity, facilitate transparency in pricing, promote open access, and allow for effective risk management." Obviously, DCOs have every interest to have highly liquid (and therefore profitable markets), however, the Commission assumes that DCOs will drive contract size, when in fact, the trading platform may determine the appropriate contract size.

Specific Issues in the Proposal

*Acceptance and Clearing Standards*

Proposed rule § 39.12 prescribes the acceptance and clearing standards for DCO offering swap clearing services. Specifically, proposed rule § 39.12(b)(7) requires DCOs to have rules that the DCO "will accept for clearing immediately upon execution, all contracts...that are listed for clearing by the [DCO]" if such transactions are executed on a SEF or DCM. ICE is generally supportive of "open offer" models where when a transaction is executed a contract automatically arises between the clearing member and DCO. As ICE has commented previously on the Commission's Core Principles for Risk Management proposed rules[2], straight through processing of exchange (SEF or DCM) executed swaps through an "open offer" model is more efficient than the traditional novation method of clearing.

However, ICE cautions that the Commission should note that not all contracts and SEFs are equal and that mandating acceptance for clearing immediately upon execution just because a contract is executed on a SEF or DCM (regardless of its liquidity) might not always be appropriate. Post Dodd-Frank, DCOs, SEFs and DCMs are likely to list numerous types of instruments and many of the instruments are likely to be relatively illiquid. Moreover, the trading of the relatively illiquid contracts might be spread across multiple SEFs and any individual SEF might have relatively limited trade. Illiquid contracts are much more likely to trade at prices that are "off the market." Mandating the immediate clearing of "off the market" transactions just because they are executed on a SEF or DCM would impose significant risk on a DCO. Historically, DCOs have been allowed to manage their risk by maintaining rules that provide that certain transactions are not accepted/guaranteed until the DCO has had time to assess the risk of the transaction and/or collect the transaction's associated payments (i.e., variation and initial margin).

*Pre-trade Risk Management*

In its release entitled Risk Management Requirements for Derivatives Clearing Organizations, the Commission has proposed Rule 39.13(h)(1) that would require a derivatives clearing organization to "impose limits on each clearing member, by customer origin and house origin, in order to prevent a clearing member from carrying positions for which the risk exposure exceeds a specified threshold relative to the clearing member's

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[2] 76 Fed. Reg 3698, 3706 (January 20, 2011).

and/or the derivative clearing organization's financial resources." If the Commission adopts proposed Rule § 39.12(b)(7) requiring acceptance immediately upon execution, then the risk filter proposed by Rule 39.13(h)(1) will necessary need to be implemented by the SEF or DCM prior to execution at the SEF and/or DCM level. Moreover, if a DCO has a clearing relationship with multiple SEFs and/or DCMs, then the multiple SEFs and/or DCMs will need to coordinate with respect to implementing the risk filters. Otherwise, a DCO will be exposed to the scenario where individually the SEFs and/or DCMs do not execute transactions that exceed a DCO's risk limits but when aggregated the executed transactions exceed the risk limits. As ICE explained in its comment letter on the Core Principles for Swap Execution Facilities proposed rules, it is essential to the DCO for SEFs to have adequate pre-trade risk checks in order for the DCO to accept the transaction. This requirement has been adopted by the Pre-trade Functionality Subcommittee of the Commission's Technology Advisory Committee, which recommended that all trading platforms (SEFs or DCMs) adopt pre-trade risk checks or controls. For SEFs, it is critically important given that a SEF can use an RFQ as a permitted method of execution. For example, on January 18, the U.S. Treasury markets moved from 3.298% to 3.378% in twelve minutes when a trader "fat fingered" an RFQ to sell $6 billion instead of $6 million. This type of error could have been prevented by an adequate pre-trade risk control. This is especially important in thinly traded markets where RFQs are more common. If the Commission determines not to require pre-trade risk controls for SEFs, it should prohibit SEFs that do not have these risk controls from offering direct access to their markets. A firm with direct access to a SEF that does not have adequate pre-trade risk controls could significantly disrupt a market.

Conclusion

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

Sincerely,

R. Trabue Bland
Vice President and Assistant General Counsel
IntercontinentalExchange, Inc.