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May 17, 2011

Mr. David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581

RE: Antidisruptive Practices Authority Proposed Interpretive Order

Dear Mr. Stawick:

IntercontinentalExchange, Inc. (“ICE”) submits these comments in response to the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) Proposed Interpretive Order regarding Antidisruptive Practices Authority (the “Proposed Order”), appearing in 76 Federal Register 14943 on March 18, 2011. The Proposed Order provides interpretive guidance regarding the three statutory disruptive practices set forth in the new Section 4c(a)(5) of the Commodity Exchange Act (“CEA”) pursuant to Section 747 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), which authorizes the Commission to expressly prohibit certain trading practices deemed disruptive to fair and equitable trading. ICE appreciates the opportunity to comment on the Proposed Order.

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.

ICE continues to support the Commission’s efforts to promote open and competitive markets while improving the ability to deter improper trading practices that are disruptive to legitimate trading and orderly markets. ICE recognizes that in issuing the Proposed Order the Commission has taken steps to address many of the comments received from industry

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participants in response to the Commission’s earlier Advance Notice of Proposed Rulemaking (“ANPR”) regarding the Antidisruptive Practices authority under Section 747 of Dodd-Frank. Specifically, ICE commends the Commission for clarifying the following in its guidance with respect to Section 4c(a)(5) of the CEA:

- Section 4c(a)(5) does not apply to block trades or exchange for related positions (“EFRPs”) transacted in accordance with the rules of a DCM, SEF or bilateral swap transaction.<sup>1</sup>
- Section 4c(a)(5)(A) – Violates Bids or Offers – **does** not (1) apply to electronic trading systems where algorithms automatically match the best bid and offer, (2) create a best execution standard across multiple trading venues and markets, or (3) apply to “buying the board” if done in accordance with the rules of the market on which the trades were executed.<sup>2</sup>
- Inclusion of the *Scienter* requirement means that accidental or negligent trading conduct with not suffice for a claim under this Section 4c(a)(5)(B), and furthermore, Section 4c(a)(5)(B) will not capture legitimate trading behavior for those who act in good faith.<sup>3</sup>
- A violation of Section 4c(a)(5)(C) – requires that a market participant must act with intent or scienter to engage in a trading practice that is of the character of or commonly known as spoofing, including the intention to cancel a bid or offer before execution. However, cancellations would not be considered as “spoofing” if they were submitted with a legitimate, good faith intent to trade. This includes cancellations of the balance of partially filled orders.<sup>4</sup>

ICE, however, believes that additional clarity is required with respect to the Commission’s interpretation and guidance regarding paragraphs (A) through (C) of Section 747. ICE urges the Commission to avoid vaguely worded rulemakings, guidance and interpretations that could deter legitimate market participants and practices, because they do not clearly define the trading activity that is intended to be prohibited. If market participants are unclear as to what practices are prohibited, they will be reluctant to trade, thereby reducing market liquidity and increasing the likelihood of larger price movements and volatility resulting from legitimate trading by large market participants.

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<sup>1</sup> CFTC– Antidisruptive Practices Authority - Proposed Interpretive Order , 76 Federal Register 14945, March 18, 2011

<sup>2</sup> Id. at 14946,

<sup>3</sup> Id

<sup>4</sup> Id. at 14947

In this regard ICE provides the following recommendations with respect to parts (A) – (C) of Section 747 of Dodd-Frank and new Sections 4c(a)(5) (A)-(C) of the CEA.

*(A) Violating Bids and Offers*

ICE recommends that this provision require creating a fictitious or misleading price with a demonstrated intent to violate a prevailing bid or offer in order to manipulate or improperly influence the price or mislead other participants. Otherwise, legitimate trading activity conducted in good faith may be suppressed for fear of an unintentional and inadvertent breach of this provision.

Further, because the provisions of Section 747 are intended to apply to all registered entities including SEFs, the Commission must clarify how the prohibition against violating bids and offers would apply to cleared and non-cleared swap transactions. In these markets it may be difficult to determine the value of the instrument or where the market is trading when the bid/ask spread is extremely wide or the existing quotes are stale and unreflective of current market value. Since the SEF and corresponding proposed request for quote (RFQ) rules have yet to be finalized, ICE recommends that the Commission wait until those relevant rules are finalized before prescribing further guidance with respect to this Section as it applies to swaps and SEFs.

*(B) Orderly execution of transactions during the closing period*

The Commission should not attempt to define what constitutes an orderly market or orderly execution. Instead, it should focus on identifying and clarifying activity that is intentionally or recklessly disruptive and activity where orders are entered and/ or trades are executed with the intention of improperly influencing the bid, offer, or market price and that result in misleading, unfair and/or non-transparent pricing. Intentionally or recklessly disruptive trading behavior should be prohibited at all times throughout a trading session including during the closing/ settlement period. However, any conduct that is viewed as disruptive or manipulative must require proof of intent or recklessness on the part of the trader.

Disorderly markets can occur in reaction to a number of factors external to the market itself, including severe weather conditions, unexpected changes in the national or world economy, concerns over economic instability, acts of terrorism or threats of war. When reviewing the causes of disorderly markets, the Commission should focus on trading activity that is conducted with intent to manipulate or distort the markets or with reckless disregard for the impact that the trading activity may have on the markets. Legitimate trading activity

occurring in reaction to outside factors that can create a disorderly market should not be considered disruptive nor prohibited.

*(C) Spoofing*

In its Proposed Order the Commission has provided guidance that it believes a “spoofing” violation under Section 4c(a)(5)(C) would require that a person intended to cancel a bid or offer before execution and therefore, reckless, accidental or negligent trading, conduct, or practices will not result in violations of that Section. Furthermore, the Proposed order states that order, “modifications, or cancellations will not be classified as “spoofing” if they were submitted as part of a legitimate, good faith attempt to consummate a trade. Thus, the legitimate, good-faith cancellation of partially filled orders would not violate Section 4c(a)(5)(C). Accordingly, under this interpretation, Section 4c(a)(5)(C) will not capture legitimate trading.”<sup>5</sup>

The Commission should provide additional guidance as to what specific types of improper trading practices or activity would be broadly characterized as being spoofing and “of the character of” spoofing. ICE agrees that the Commission should focus on intent when reviewing for any potential disruptive trading practice. Any description or definition of improper activity involving the entry of a bid or offer followed by a cancellation and or replacement of such bid or offer must include evidence of intent to improperly influence the price or mislead other participants. Submitting or canceling multiple bids or offers should only be deemed unlawful if it can be demonstrated that it was done with specific intent to cause the market to trade at artificial price levels that are not reflective of prevailing market value or to mislead other market participants. Other factors to be considered should include the size, timing and proximity of the bids and offers to one another, subsequent cancellation of either the bid or the offer and whether the conduct was isolated, or reflects a pattern of similar activity. Any pattern should include evidence of bids and offers placed on both sides of the market in a short time span followed by the cancellation of either the bid or the offer.

Additionally, ICE notes that the Proposed Order is silent on the topic of High Frequency Traders (“HFTs”), a topic on which the Commission had specifically requested comment in its ANPR. As mentioned in our comments submitted in response to the ANPR, ICE believes that all market participants should be subject to the same standards when determining what trading activity would be disruptive and should be held accountable if they have acted to intentionally disrupt a market. Commission guidance and or rules should not discriminate between individuals and automated algorithmic trading systems. The Commission should not promulgate rules to regulate the design of algorithmic trading or automated trading systems. Developers and programmers of automated trading systems should be cognizant of those trading practices that

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<sup>5</sup> Id.

are prohibited by Commission Regulations and exchange rules, and use them as a guide when designing their systems in order to avoid engaging in prohibited trading practices.

The entity or individual primarily responsible for the programming and operation of the automated algorithmic system should be held responsible for any violation of applicable Commission regulations or exchange rules.

Lastly, in its Proposed Order, the Commission acknowledges the important role and unique position of exchanges and self-regulatory organizations in policing their own markets and ensuring they operate in a fair and equitable manner.<sup>6</sup> As in the comments ICE submitted on January 3, 2011 in response to the ANPR, ICE has numerous rules that prohibit improper trading practices, including but not limited to market manipulation, wash trading, entry of fictitious or misleading bids or offers, misuse of the electronic trading platform and conduct that may be detrimental to its markets or inconsistent with just and equitable principles of trade. ICE enforces those rules through trade practice surveillance programs that employ real-time and trade date plus one (“T+1”) automated surveillance systems, tools, and exception reports to monitor, detect, investigate and punish improper and abusive trading practices. We believe that many of these rules could also be used to redress trading activity deemed to be disruptive to fair and equitable trading. Therefore, ICE respectfully suggests that the Commission continue to rely on exchange SRO authority to identify and pursue trading practices that are determined to be manipulative or detrimental to the exchange’s markets, including practices that are of the character of spoofing.

ICE appreciates the opportunity to comment on the Commission’s Proposed Order. We would be happy to further discuss any of the views contained herein with Commission staff. If you have any questions regarding this letter, please contact me at [mark.fabian@theice.com](mailto:mark.fabian@theice.com) or Trabue Bland at [trabue.bland@theice.com](mailto:trabue.bland@theice.com).

Very Truly Yours,



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<sup>6</sup> Id. at 14945