



August 4, 2011

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

RE: *Adaptation of Regulations to Incorporate Swaps, RIN Number 3038-AD53*

Dear Mr. Stawick:

The IntercontinentalExchange, Inc. (ICE) appreciates the opportunity to comment on the Commodity Futures Trading Commission's (CFTC or Commission) proposed rulemaking on the adaptation of regulations to incorporate swaps. As background, ICE operates four regulated futures exchanges: ICE Futures Europe; ICE Futures Canada, the Chicago Climate Exchange and ICE Futures US. 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 clearing house. As the operator a diverse set of exchanges and clearinghouses based in three countries, ICE welcomes the opportunity to comment on this rulemaking.

Executive Summary

- The Commission's proposal to require all participants on a SEF or DCM to record all pre-execution trade information is unnecessary and duplicative
- The requirement will serve as a large surtax on exchange transactions and will cause end users to take transactions away from Swap Execution Facilities or Designated Contract Markets, defeating the Dodd/Frank Wall Street Financial Reform and Consumer Protection Act's ("Dodd/Frank") transparency objectives

Proposed changes to Part 1.35, records of cash commodity, futures and options transactions

The proposal makes a number of conforming changes to Part 1.35 to require recordkeeping for swaps transactions. While most of these changes conform to Dodd-Frank, one change goes beyond the remit of a technical rule change. In proposed part



1.35, the Commission requires all members of Designated Contract Markets (DCM) and Swap Execution Facilities (SEFs) to keep records of all oral communications that lead to the execution of a commodity interest (i.e., all agreements, contracts and transactions within the Commission’s jurisdiction) or cash commodity transaction.

The proposed regulation covers “all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of transactions in a commodity interest or cash commodity, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media.” These transaction records must be separately maintained and identifiable by counterparty. The proposal would require this level of documentation whether the transaction is executed by a swap dealer, major swap participant or an end user. Indeed, the proposal would cover all non-intermediated traders with direct access to a trading platform, whether a SEF or DCM, whether the instrument is a futures contract or a swap, because they are “participants” and thus within the meaning of the term “member”.

According to the Commission, the proposed rule is intended to promote “regulatory parity,” as the Commission proposed a similar rule for swap dealers (“SDs”) and major swap participants (“MSPs”).¹ However, it is worth noting that the Commission in its proposed rule regarding reporting and recordkeeping requirements for SDs and MSPs states that the rule “would not establish an affirmative new requirement to create recordings of all telephone conversations if the complete audit trail requirement can be met through other means, such as electronic messaging or trading.”² In contrast, this rule would create new obligations on almost all market participants. As the Commission states: “[t]he proposed regulation is primarily a recordkeeping requirement, which will obligate those firms that do not already do so to tape the telephone lines of their traders and sales forces.”³ This increased obligation will have a large impact on the current market.

For example, if an end user decides to trade on a SEF, the end user, as a participant on the SEF (defined by the CFTC as a member) would have to record all oral and written communications. It is not clear what conversations would be excluded from the recording requirements. For example, would conversations in the ordinary course of business regarding the markets be subject to taping if a transaction happened to be

¹ 75 Fed. Reg. 76,666 (Dec. 9, 2010) (Proposed regulation 23.202(a)(1) would require “[e]ach swap dealer and major swap participant [to] make and keep pre-execution trade information, including, at a minimum, records of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a swap, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media”)

² Id. at 76,668.

³ 76 Fed. Reg. 33066 at 33079 (June 7, 2011).



undertaken at some later point in the day?⁴ Using the Commission's estimates, the cost to the firm would be \$230,930 to \$275,930 for the first year of operation and roughly \$220,450 a year for ongoing costs. Taking one ICE participant, a municipality that hedges its power production using financial power swaps, this new regulation would have added a \$671 to \$726 surtax *per trade* to this participant's transactions over the past three years. This regulation would have increased the participants trading cost 47 times. Note that this end user will not incur this cost if it negotiates a bilateral deal with a swap dealer or major swap participant. In that case, the recordkeeping obligation falls upon the swap dealer or major swap participant.

Thus, by adding this obligation to SEF participants, the Commission's proposed regulations have created a clear bias against trading on a SEF. Given that SEFs are the cornerstone to the Commission's efforts to increase transparency in the swaps markets, adding this surtax directly contradicts the Commission's goals. In addition, every transaction on a SEF is electronically recorded and kept for at least five years. Therefore, placing these requirements on a firm that is not intermediating customer transactions is duplicative and unnecessary. Indeed, the Commission seems to have acknowledged as much when it asked for comments on "the potential costs and benefits of requiring **registrants** to record and maintain oral communications as provided in the proposed rules". Balancing the increased trading cost, the decreased transparency, and duplicative burdens against the Commission's stated benefit of an easier enforcement action; the Commission's cost/benefit analysis is lacking.

Finally, adding the recordkeeping requirements to all SEF participants is a substantial change to existing practices and massive increase in costs to current swaps participants. Thus, this change should be the subject of a separate rulemaking, not added to a rule ostensibly covering conforming changes. As noted by Commissioner Sommers:

Finally, I also have strong objections to including two important substantive provisions within the conforming amendments, one governing bunched orders, and the other requiring new duties with respect to creating and maintaining audio files of all oral communications leading to the execution of a transaction in a commodity interest or cash commodity. I believe these significant issues should be addressed separately and do not belong in a conforming amendments document. I encourage the public to read these conforming amendments very closely and to comment as appropriate.

⁴ The Commission does not discuss the expanse of this rulemaking. Some participants may have trouble legally meeting the recording requirements in the proposal, as some states require all parties to consent to being recorded. For example, California, Illinois, Massachusetts, Michigan and Washington require all parties to the conversation to consent to recording.



In conclusion, ICE requests that the Commission eliminate the tape recording requirement or re-propose it as a separate rulemaking. Thank you for the opportunity to comment on this rulemaking.

Sincerely,

A handwritten signature in black ink that reads "Trabue Bland". The signature is written in a cursive style with a large, sweeping initial "T".

R. Trabue Bland
Vice President of Regulatory Affairs and
Assistant General Counsel.