



October 12, 2012

Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: ICE Futures U.S., Inc. comments to Notice of Proposed Rulemaking: Ownership and Control Reports, Forms 102/102S, 40/40S, and 71 [RIN: 3038-AD31]

Dear Ladies and Gentlemen:

ICE Futures U.S., Inc. (“IFUS” or “Exchange”) appreciates the opportunity to comment on the Commodity Futures Trading Commission’s (“Commission”) Notice of proposed Rulemaking proposing rules to enhance the Commission’s identification of futures and swap market participants, and collection of ownership and control information (the “NPR” or “Proposal” or “Proposed Rules”).¹ IFUS is a designated contract market (“DCM”) registered with the Commission. IFUS supports the Commission’s efforts to more efficiently and effectively collect ownership and control report (“OCR”) information through an automated system to enhance market surveillance. However, we have concerns with certain aspects of the Proposal, which are discussed below.

First, the Commission’s proposed definition of “direct market access,” used in Form 102A and Form 102B in connection with the identification of Special Accounts and Volume Accounts, respectively, is vague and overbroad and will capture information about every electronic trader, which is far beyond the Commission’s stated objective. The proposed definition is inconsistent with the Commission’s definition of “direct access” used to describe a trader’s connection to the trading system of an FBOT or DCM, and would create confusion by having separate meanings for a similar term. The Exchange recommends that the definition of “direct market access” be amended to mean “a connection that enables a market participant to enter orders directly into the trade matching system of a registered entity without passing through the credit/risk control infrastructure of a clearing member.” To ensure consistent use of the definition for all purposes under the CEA, we suggest that the term be “direct access” and that it be moved to Section 1.3 of the Regulations to be clear that it is applicable throughout the CFTC regulations, not just in Parts 15-20.

¹ Notice of Proposed Rulemaking: Ownership and Control Reports, Forms 102/102S, 40/40S, and 71, 77 Fed. Reg. 43968 (July 26, 2012) (the “Proposing Release”).

In addition, to facilitate a DCM's market surveillance responsibilities, the Commission should leverage the efficiencies created through the automation of the CFTC Form 102 and collection of OCR information under the Proposed Rules by providing DCMs (as well as SEFs and FBOTs) with access to the aggregated Large Trader Reporting ("LTR") and OCR information it would receive via the proposed Form 102 from the firms filing such Form.

Finally, the NPR states that the Reportable Trading Volume Level ("RTVL") that will trigger the OCR reporting via the new Form 102B would be 50 contracts per day across all contracts. IFUS believes that this proposed RTVL should be set significantly higher in order to avoid burdening clearing members with reporting low volume accounts in which the daily volume is unlikely to be significant enough to impact price or trading activity in a contract.

Direct Market Access

In contrast to prior proposed rulemakings regarding the collection of OCR information, the current Proposal would require clearing members to report on Form 102A and Form 102B whether the trading account has been granted direct market access to the trade matching system of the reporting market.² The Commission proposes to define "direct market access" as "a connection method that enables a market participant to transmit orders to a DCM's electronic trade matching system without re-entry by another person or entity."³ The Commission states that direct market access could be provided directly by a DCM or by a third-party platform.⁴ The Commission indicates that enhanced monitoring of direct market access may be beneficial to monitor a perceived transactional risk that arises from the "decreased distance between trade entry and ultimate execution on the exchange."⁵

The Commission's definition of direct market access is vague and overbroad, and as such includes nearly all traders submitting orders to an electronic trade matching system. Traders ranging from a retail trader accessing a futures commission merchant's ("FCM") trading platform through the internet, to a high-frequency proprietary trader with its trading algorithm co-located on a DCM's servers, would have direct market access so long as there is no "re-entry" of an order by another "person or entity." Since the proposed definition is so broad as to essentially capture all traders transmitting orders to an electronic exchange, it begs the question as to how that additional information could be useful. Further, the proposed definition of direct market access is inconsistent with characterizations and descriptions that the Commission has

² See Question 9 of Proposed Form 102A (Proposing Release at 44007) and Question 3 of Proposed Form 102B (Proposing Release at 44011).

³ Proposing Release at 43997

⁴ Proposing Release at 43980.

⁵ Proposing Release at 43990. The Commission also cites to an IOSCO report, noting that a "recent IOSCO report notes that direct market access could implicitly contain any of the following market risks: (1) A user may access markets outside of the infrastructure and/or control of market intermediaries, (2) there may be an incentive for intermediaries/customers to gain execution advantages based on the type and geographic location of their connectivity arrangements, and (3) algorithmic trading through automated systems may imply issues of capacity and the potential need for rationing bandwidth." Id.

referred to as constituting direct access in reference to DCM Rule 38.607⁶. There, the Commission recognized that traders who place their orders directly to the matching engine of an exchange should not be deemed to have direct access where the orders passed through credit filters of the carrying FCM before reaching the matching engine. There was no suggestion that such orders would have to be re-entered by another person or entity in order to not be considered direct access. The vagueness of the term “direct market access” also raises significant concerns for DCMs who are required by CFTC Rule 38.607 to implement direct access controls and procedures in order to provide member FCMs with tools to manage their financial risk. In the adopting release for CFTC Rule 38.607, the Commission stated that “the DCM would be required to establish an automated risk management system permitting an FCM to set appropriate risk limits for each customer with direct access to the contract market.”⁷ Read together, the definition of “direct market access” and CFTC Rule 38.607 would require DCMs to provide an FCM with a mechanism to set appropriate risk limits for each customer who trades electronically--whether an individual retail investor or a high-frequency proprietary trader. This type of risk management is the responsibility of FCMs and is far beyond the scope of what was intended by CFTC Rule 38.607.

The Commission also has proposed to replace the term “member of a contract market” in CFTC Rule 1.3(q) with a new defined term “member.” The new definition of “member” will include any “individual, association, partnership, corporation, or trust...having trading privileges on a registered entity.”⁸ Registered entities include DCMs and SEFs. If the term direct market access is construed as broadly as it is written, then any person with direct market access could be said to have trading privileges on a DCM or SEF, and thus would be a member of the DCM or SEF. This too is beyond the scope of what is intended by the amendment to CFTC Rule 1.3(q).

Finally, Core Principle 15 requires DCMs to establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other persons with direct access to the facility (including any parties affiliated with any of the persons described in this core principle).⁹ Again, requiring a DCM to establish and enforce fitness standards for all persons with direct access to the DCM’s trading platform, when direct access is broadened to include the full spectrum of electronic traders, is far beyond the scope of what Congress intended in adopting Core Principle 15.

The CFTC has previously used the term “direct access” to describe a trader’s connection to the trading system of an FBOT or DCM. In connection with an FBOT, the term “direct access” is used to refer to “an explicit grant of authority by a foreign board of trade to an identified member or other participant located in the United States to enter trades directly into

⁶ FR Doc N0: 2012-12746, Vol.77, No. 118, at 36648 (June 19, 2012). “As stated in the proposed rule, these controls would not be required for a DCM that permits only intermediated transactions and does not permit direct access.”

⁷ See Core Principles and Other Requirements for Designated Contract Markets 77 Fed. Reg. 36612, 48 (June 19, 2012) (“DCM Adopting Release”).

⁸ See Adaptation of Regulations to Incorporate Swaps, 76 Fed. Reg. 33066 (June 7, 2011).

⁹ DCM Adopting Release at 36665.

the trade matching system of the foreign board of trade.”¹⁰ In connection with a DCM, the Commission characterizes direct access as “allowing customers of futures commission merchants to enter orders directly into a designated contract market’s trade matching system for execution.”¹¹ The understanding of the distinction between direct access and intermediated access historically has been whether the orders are routed through the pre-trade credit/risk control filters that are part of the clearing member’s infrastructure prior to reaching the exchange’s order book, not whether there has been “reentry” of the order. Following these historical principles, ICE recommends that the definition of “direct market access” be amended to mean “a connection that enables a market participant to enter orders directly into the trade matching system of a registered entity without passing through the credit/risk control infrastructure of a clearing member.” This would provide a bright line between intermediated access and direct access.

Intermediated access (i.e., sponsored access, order routing) occurs when a participant enters orders through a system operated by the participant’s clearing member or through a third-party system (such as an ISV), in each case that routes the participant’s orders through credit/risk filters that are part of the clearing member’s infrastructure prior to reaching the exchange’s order book. The orders are not re-entered by the clearing member or third-party system, but the credit/risk filters provide a mechanism for the clearing member to manage the risk of the trader’s order and prevent it from reaching the exchange’s order book. This would include, for example, a clearing member’s proprietary web-based order-entry system, which passes the order through the clearing member’s credit or risk control infrastructure prior to the order reaching the exchange’s order book. This would be typical of the electronic trading systems provided to retail investors by FCMs.

In contrast to intermediated access, direct access occurs when a participant enters orders directly into the exchange’s order book for execution, without passing through the credit/risk control infrastructure of a clearing member. This would include proprietary or third party order-entry software that allows the participant to enter orders directly into the exchange’s order book, which are the systems typically used by larger proprietary or high frequency traders. This interpretation of direct market access is consistent with the risk management principles established in Rule 38.607, which was designed to ensure that all orders that are entered into an exchange’s order book pass through a pre-trade credit/risk filter containing limits set by the exchange or guaranteeing clearing member. Rule 38.607 requires a DCM that allows customers direct market access to its order book to implement certain direct access controls and procedures in order to provide clearing members with tools to manage their financial risk. Clearing members have primary responsibility for overall risk management, but the DCM is required to establish an automated risk management system permitting a clearing member to set appropriate risk limits for each customer with direct access to the order book.¹²

¹⁰ Section 4(b)(1)(A) of the Act and Rule 48.2(c).

¹¹ CFTC Rule 38.607

¹² See Core Principles and Other Requirements for Designated Contract Markets 77 Fed. Reg. 36612, 48 (June 19, 2012).

ICE's proposed definition of direct market access would satisfy the Commission's desire to monitor the perceived transactional risk that may arise from direct market access, without the ambiguity and potential consequences that arise from the definition proposed by the Commission.

Efficient Use of TCR and OCR Data

In the Proposed Rules, the Commission seeks to more efficiently and effectively collect OCR and LTR information through an automated system to enhance market surveillance and aggregate the LTR and OCR information with Trade Capture Report ("TCR") information provided by DCMs. Presently, DCMs provide the Commission with TCRs which contain the data regarding the trade date, product, contract month, trade time, price, quantity, trader type, executing broker, clearing member, opposite broker and opposite clearing member, trading account number and other data points. The OCR information would include, amongst other data, the trading account number, which would allow it to be linked to the TCR information and the names, addresses and other relevant information about the account controllers. The Exchange agrees with the Commission's statement that, "[e]ffective market surveillance requires that surveillance sets...be sufficiently comprehensive and contain sufficient identified reference points to uncover relationships where none appear to exist and to analyze information based on flexible criteria". IFUS also recognizes the value in collecting this OCR information for accounts that actively trade on DCMs, and integrating it with existing market surveillance and trade practice surveillance data to bridge gaps that may exist between individual transaction data contained in the trade register and position data contained in LTRs. Having such data readily available in Commission and DCM surveillance systems would improve the efficiency of the investigative process by saving the additional work and time required to manually request such information from clearing members.

Under the Proposed Rules, the Commission will receive OCR information directly from clearing members. Originally, the Commission had contemplated requiring that this information be provided by the DCMs but agreed with commenters that it would be more efficient and less burdensome for FCMs and introducing brokers ("IBs") to provide that information directly to the Commission, rather than to each reporting DCM, and then having the DCM forward the information on to the Commission. On the whole, this process is workable because it provides the Commission with the information it needs in an efficient and logical manner.

However, since the OCR information is provided directly to the Commission, the automated trade surveillance systems of DCMs are not able to benefit from the OCR information, and are not able to aggregate it with their TCR and LTR data. CFTC Rule 38.156 requires a DCM to maintain an automated trade surveillance system capable of detecting and investigating potential trade practice violations.¹³ Incorporating the OCR information into this automated trade surveillance system would make the system more robust and would assist DCMs in detecting potential trade practice violations. Therefore, IFUS believes that the Commission should share the OCR information it receives with DCMs for the limited purpose of assisting them in fulfilling their surveillance responsibilities. Reporting firms should not be

¹³ DCM Adopting Release at 36629.

burdened with separately providing the same information to the Commission and to multiple DCMs. Requiring DCMs to separately collect the same OCR information from these firms would be extraordinarily inefficient because each DCM would have to construct a mechanism for the reporting firms to file the information, resulting in duplicative filing burdens for clearing members whose customers actively trade on multiple DCMs. The Commission therefore should either provide a feed or separate file differentiated by exchange code(s) to each DCM containing information only for those accounts actively trading on the DCM, or permit DCMs to access and download the LTR and OCR data specific to the DCM. Once the data is aggregated by the Commission, it should be relatively simple and efficient to sort and segregate the data by DCM. This approach would be significantly more cost effective than creating parallel systems, and, importantly, could be implemented on a more expeditious basis. It would therefore provide for greater overall trade surveillance, which is the intended purpose of obtaining the OCR information.

Reportable Trading Volume Level (“RTVL”)

The Exchange supports a minimum contract volume threshold that would identify actively traded accounts, including automated trading systems and other day traders that are not otherwise captured through the large trader (Form 102) reporting process, but which based on the volume and frequency of trading, are considered significantly active market participants on a DCM. However, ICE believes that the RTVL that will trigger the OCR reporting via the new Form 102B should be set higher than the proposed 50 contract daily threshold in order to avoid requiring clearing members to report low volume accounts whose daily trading volumes are unlikely to be significant enough to impact price or trading activity in a contract. IFUS suggests that the Commission consider starting with a higher initial daily account RTVL, e.g. at least several hundred contracts per day, evaluate the percentage of the trading activity it is capturing at that initial level and then consider reducing the level gradually in specific cases if necessary. The RTVL should be similar in size to Large Trader reporting levels, that is, it should be a level that would identify any market participants that may trade sufficient volume on a daily basis to potentially adversely impact market direction or price. If necessary, the CFTC and DCMs could always use traditional channels to obtain OCR information from clearing members for the small number of infrequently traded accounts.

IFUS appreciates the opportunity to provide comments on the Proposed Rules. If you have any questions regarding our comments, please contact Mark Fabian, Vice President of Market Regulation at 212-748-4010 (mark.fabian@theice.com) or me at 212-748-4083 (audrey.hirschfeld@theice.com).

Sincerely,



Audrey R. Hirschfeld
SVP and General Counsel