

July 29, 2016

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: ICE Amendments to Block Trade FAQ - Submission Pursuant to Section 5c(c)(1) of the Act and Regulation 40.6

Dear Mr. Kirkpatrick:

On behalf of The Commercial Energy Working Group (the “**Working Group**”), Sutherland Asbill & Brennan LLP writes to urge the Commodity Futures Trading Commission (the “**Commission**” or “**CFTC**”) to allow ICE Futures U.S., Inc.’s (“**ICE**”) amendments to its Block Trade Frequently Asked Questions (the “**FAQ**”) to become effective as submitted.¹

The Working Group is a diverse group of commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of the Working Group are producers, processors, merchandisers, and owners of energy commodities. Among the members of the Working Group are some of the largest users of energy derivatives in the United States and globally. The Working Group advocates regarding regulatory, legislative, and market developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

Members of the Working Group are active participants on ICE. It is in the Working Group’s members’ individual and collective interest that ICE’s rules and guidance support robust liquidity and open competition. As such, the Working Group supports ICE’s amendments to the FAQ. These amendments will promote efficient and fair markets while also providing proper protections for market participants with respect to the use of non-public information.

¹ See ICE Submission 16-67, Amendments to Block Trade FAQ - Submission Pursuant to Section 5c(c)(1) of the Act and Regulation 40.6 (June 1, 2016), available at https://www.theice.com/publicdocs/regulatory_filings/16-67_Amendments_to_Block_Trade_FAQ.pdf.

I. THE SCOPE OF PERMITTED PRE-HEDGING IS APPROPRIATE.

ICE's amendments to the FAQ make clear that counterparties to a potential block trade "may engage in pre-hedging or anticipatory hedging of the position that they believe in good faith will result from the consummation of the block trade, except for an intermediary that takes the opposite side of its own Customer order."² This approach provides market participants with regulatory certainty for trading and allows them to efficiently manage and hedge risk.

ICE's approach to pre-hedging is consistent with the Commission's own approach in the swaps context. Specifically, the CFTC permits a swap dealer to "disclose or use material confidential information provided by ... a counterparty to the swap dealer ... if such disclosure or use ... is necessary ... to hedge or mitigate any exposure created by [a] swap."³ The ISDA protocol designed to allow swap dealers to comply with this regulation, among others, expands on this and states "the disclosure or use of Material Confidential Information to 'hedge or mitigate any exposure,' as such language is used in CFTC Rule 23.410(c)(2)(ii), includes ... its disclosure or use, for the purpose of ... establishing or adjusting one or more anticipatory hedges."⁴

The CFTC's rules thus recognize the inherent value of anticipatory hedging. A common risk-mitigating practice – anticipatory hedging – encourages more active market participation, better price discovery, and lower prices. Without it, market participants are forced to quote higher prices and wider spreads to protect against the inherent risk of price slippage post-solicitation. A general inability to pre-hedge thus harms all market participants over time.

Furthermore, certain block trade solicitation information is generally made available to numerous market participants in the ordinary course. It is common practice in block trade markets for brokers to solicit interest in a potential block trade by sending out messages to multiple market participants at the same time.⁵ Brokers typically send out solicitations to a large swath of the market using email, instant messaging, or broker boxes. Typically, any market participant can receive such information from a broker by merely requesting it.⁶

Consistent with the amendments to the FAQ, information that is widely distributed by a broker should not be treated as material non-public information as its wide distribution precludes

² FAQ Amendments at Response to Question 24.

³ CFTC Regulation 23.410(c)(2).

⁴ See ISDA August 2012 DF Supplement at Section 2.15(b) (Aug. 13, 2012), available at http://www2.isda.org/attachment/Ndc5Mg==/ISDA%20August%202012%20DF%20Supplement_Publication.pdf.

⁵ This practice minimizes time decay in the bid/offer process, allowing the soliciting party or broker a better opportunity to compare the bids/offers that it receives.

⁶ It is likely that the brokers that solicit potential block trades with multiple recipient communications would welcome the inclusion of additional recipients, thus improving their ability to meet the trading needs of their customers. Accordingly, market participants would generally have the ability to access available information about widely solicited block trades.

it from being considered confidential. To treat such information as material non-public information would serve no substantial policy objective and would significantly restrict the ability of market participants to access liquidity, engage in price discovery, and optimize execution.

Absent the clarity provided by the amendments to the FAQ, significant uncertainty would remain as to when and how block trade solicitations can be shared and acted on. Worse still, screen trades executed in the wake of widespread block trade solicitations may be perceived as prohibited pre-hedging. This has a chilling effect on *bona fide* execution across futures platforms and precludes traders from confidently utilizing both the central limit order book market and the related block trade market concurrently. The approach taken by ICE in its amendments to the FAQ constructively addresses these concerns.

II. THE AMENDMENTS PROVIDE PROPER PROTECTIONS.

ICE's amendments to the FAQ strike an appropriate balance between protecting individual market participants and allowing the markets to function efficiently. The proposed amendment to the FAQ would not disadvantage a party that solicits a block trade should its counterparty pre-hedge the trade to manage risk. Nor would such pre-hedging harm other market participants.

The amendments to the FAQ provide appropriate protections for market participants from front-running and the misuse of material non-public information. Specifically, the proposed amendments state that it is a violation of ICE's rules "for a Person to engage in the front running of a block trade when acting on material non-public information regarding an impending transaction by another person, acting on non-public information obtained through a confidential employee/employer relationship, broker/customer relationship, or in breach of a fiduciary responsibility."⁷ Such an approach properly balances the need for appropriate information sharing and the need to protect against the misuse of non-public information.

Importantly, ICE and the CFTC will continue to have the ability to review block transactions and related pre-hedging transactions. Thus, the proposed amendments to the ICE FAQ do not lessen effective oversight of the block futures market.

⁷ FAQ Amendments at Response to Question 24.

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III. CONCLUSION.

The Working Group appreciates this opportunity to provide comments on ICE's amendments to the FAQ and respectfully requests that the Commission allow such amendments to become effective as submitted.

If you have any questions, please contact the undersigned.

Respectfully submitted,

/s/ David T. McIndoe

David T. McIndoe

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