May 15, 2020

Via Electronic Submission

Christopher Kirkpatrick
Secretary of the Commission
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

Re: Position Limits for Derivatives, RIN 3038-AD99

Dear Mr. Kirkpatrick:

Intercontinental Exchange Inc. ("ICE") is submitting comments and recommendations to the Commodity Futures Trading Commission ("CFTC" or "Commission") for consideration regarding its proposed position limits rulemaking[1] ("Proposal or Proposed Rule"). As the position limit rule is complicated, lengthy and has undergone multiple iterations over the course of eight-plus years, ICE supports and agrees with the Commission's decision to propose a new rule for public comment and additionally supports the Commission's commitment to ensuring well-functioning, efficient markets. Markets can and have functioned efficiently when position limits are set appropriately and calculated using accurate and current data. Position limits have been and must continue to be: (1) transparent, efficient and principled; (2) flexible to allow for the development and use of hedging practices and to allow for growth in the market; and (3) reflective of unique, underlying market conditions and trading characteristics.

I. Executive Summary

ICE supports position limits if properly applied but has certain concerns about the implementation of such limits as set out below. The Proposed Rule reflects consideration by the Commission and Staff of prior industry comments and is an improvement over the 2016 re-proposed position limits rule.[2] The Proposed Rule responds to many of the industry concerns raised in prior Commission proposals and we appreciate that the Commission has taken these views into consideration. While ICE is supportive of the Proposed Rule, there are several provisions that in our view warrant change and/or clarification before the Commission adopts final rules in order to avoid harm to both markets and market participants. Certain aspects of the Proposal, if adopted as part of a final rule, would result in disruption, via contractions in liquidity and increased volatility that would ultimately impose new costs on end-users, hedgers and consumers without any corresponding benefit. Below we summarize ICE's comments for ease of reference.

[1] *Position Limits for Derivatives*, 81 Fed. Reg. 11596 (Feb. 27 2020)
[2] *Position Limits for Derivatives*, 81 Fed. Reg. 96704 (Dec. 30, 2016) ("2016 Reproposal").

A. ICE Supports the Following Provisions of the Proposed Rule

- The decision not to impose position limits outside of the spot month for the energy core referenced contracts (and related referenced contracts);
- The expanded list of enumerated *bona fide* hedge transactions;
- The expanded term available for anticipatory hedging categories and elimination of the 12-month rule;
- The delegation to exchanges of the authority to grant non-enumerated hedge exemptions;
- The permitting of higher position limits for financially settled contracts, as exists today for the well-functioning Henry Hub natural gas contract;
- The elimination of the 5-Day Rule that would have restricted enumerated *bona fide* hedge transactions during the shorter of the last five days of trading or the spot period;
- For contracts that are not subject to federal limits, providing exchanges with the continued discretion to set hard limits or accountability levels for contracts traded on the exchange; and
- The exclusion from the referenced contract definition of location basis contracts and certain contracts based on an index published by a price reporting agency.

B. ICE Urges the Commission to Adopt the Following Changes Prior to Completing a Final Rule

- Expand the list of enumerated hedge exemptions;
- For penultimate natural gas options, permit a separate spot month position limit or position accountability regime, as is the case on futures exchanges today;
- Modify the enumerated hedge exemption for unfixed-price purchases and sales to include unfixed-price purchases **or** sales;
- Include risk management and arbitrage exemptions in the list of enumerated spread hedge transactions;
- Expand the cross-commodity hedging and inter-market spread definitions;
- For non-enumerated hedge exemptions, eliminate or reduce the need for Commission review of exchange-granted exemptions;
- Clarify the referenced contract definition and related examples in the Staff Workbook, including removing from the Staff Workbook certain contracts described

as referenced contracts but are based on an index published by a price reporting agency or are locational basis contracts and thus properly excluded;

- Allow cash settled contract limits to be assessed on a per exchange basis, where look-alike contracts are listed at multiple DCMs, rather than aggregated across exchanges;
- Clarify whether a participant can put on additional positions during the ten-day period while the CFTC reviews a non- enumerated hedge exemption;
- Provide for a phase-in approach to position limits and exemptions from position limits;
- Expand the definition of unforeseen hedging to include incidental and operational overages, as well as, other, permitted, self-effectuating exemptions, including spread;
- Provide clarification on documentation required for pass-through swap exemptions; and
- Provide clarification that the list of common spreads included in the Proposed Rule is non-exhaustive in nature and does not encompass all spread strategies that may be permitted under the exemption type.

II. Non-Spot Month Limits

The Proposal would not establish position limits outside of the spot month for the energy, metals, and certain agricultural core referenced contracts (and related referenced contracts) but would establish non-spot limits applicable to legacy agricultural core referenced contracts. ICE supports the Commission's decision to not impose limits outside of the spot month for the energy, metals and certain agricultural products. The Commission in this rulemaking recognizes that it has the statutory authority under various provisions of the CEA to implement and administer a position accountability regime versus hard limits outside of the spot month.

The purpose of a position limits regime is to diminish, eliminate, or prevent "excessive speculation." ICE has previously commented on and explained during a CFTC Energy & Environmental Markets Advisory Committee ("EEMAC") meeting[3] that its non-spot month accountability regime has a proven track record of successfully deterring excessive speculation and manipulation. Because liquidity tends to decrease farther out the curve, Designated Contract Markets ("DCMs") have employed accountability regimes to monitor positions in deferred months, which serves to preserve liquidity for bona fide hedgers, protect the price discovery function of the derivatives markets, and also restrict speculative activity where the DCM identifies the potential for excessive speculation based on a dynamic review of a trader's position. In contrast, hard limits outside of the spot month restrict all positions that do not qualify as bona fide hedging positions, including legitimate and non-speculative activity such as risk management positions. In energy contracts, positions out the curve are particularly important as they

[3] During a February 25, 2015 EEMAC meeting Erik Haas (ICE Futures U.S.) and Tom LaSala (CME) discussed the current exchange accountability levels and process.

provide vital price signals for the long-term outlook of energy. ICE appreciates the Commission recognizing the importance of long-term hedging and strongly supports the Commission in establishing a spot-month only position limit regime.

III. The Commission Should Expand and Modify the List of Proposed Enumerated Bona Fide Hedges

(A) General Definition of Bona Fide Hedging Transaction or Position

The general definition of a bona fide hedge requires that the hedge: (1) represent a substitute for transactions made or to be made, or positions taken or to be taken, at a later time in a physical marketing channel ("Temporary Substitute Test"); (2) be economically appropriate to the reduction of price risks in the conduct and management of a commercial enterprise ("Economically Appropriate Test"); and (3) arise from the potential change in value of (a) assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising; (b) liabilities which a person owes or anticipates incurring; or (c) services that a person provides or purchases, or anticipates providing or purchasing.

ICE supports the general definition of bona fide hedge for contracts subject to federal limits. However, ICE believes: 1) the inclusion of "always" in the "Temporary Substitute Test" has the unintended consequence of restricting legitimate hedging opportunities, as noted above, and 2) the CFTC should retain some discretion to recognize bona fide hedges that reduce risks other than price risk. ICE notes that the list of enumerated hedges relate to the reduction of price risk, so a market participant would need to apply for a non-enumerated hedge in order to hedge risk other than price risk. The CFTC would have the opportunity to review and determine whether the hedge was appropriate under the facts and circumstances. For example, the CFTC could consider the facts and circumstances of a particular hedge of transportation, supply, or political risk.

(B) <u>Expansion of List of Enumerated Hedges</u>

ICE generally supports the Commission's proposals to expand the list of enumerated hedges and make enumerated hedges self-effectuating. ICE however recommends further refining and expanding the list of enumerated hedges to include commonly accepted bona fide hedge practices. To that end, ICE strongly supports the addition of the risk management exemption. Each of the enumerated bona fide hedging transactions that ICE recommends adding meets the requirements of Commodity Exchange Act ("CEA") section 4a(c). In addition, ICE recommends that the Commission add to the enumerated list hedging activity that reduces the risk of an unpriced (single-sided) sale or purchase and a non-exhaustive list of commonly used cross-commodity hedges.

(C) <u>Unfixed Price Purchases and Sales</u>

ICE recommends that the Commission should include hedges of unpriced purchases **<u>or</u>** sales in the list of enumerated bona fide hedges. In the energy markets, many transactions are entered into at unfixed prices and, as such, it is natural to hedge at unfixed prices. The Proposed Rule, however, currently excludes this commonly accepted practice. It is ICE's view that this hedging strategy should be included in the definition of an enumerated bona fide hedge and recommends that the Commission revise any final rule to include this common practice in the list of enumerated bona fide hedges.

If the Commission does not include unpriced purchases or sales in the list of enumerated bona fide hedges, the Commission should make clear that the hedging strategy may fall within another enumerated hedge, such as unfilled anticipated requirements, unsold anticipated production, and/or anticipated merchandising. In this regard, discussions with Commission staff have indicated that an unfixed price purchase or sale contract could be eligible for treatment as a hedge of anticipatory merchandising if the trader meets the qualifications for merchandising set forth in that exemption If the Commission intends that the anticipatory merchandising exemption not be limited to anticipated future purchases and sales and that existing unfixed price contracts are eligible, the Commission should provide certainty to that effect in the final rule.[4]

Additionally, ICE requests that the Commission clarify whether a market participant could request an unfixed price purchase or sale as a non-enumerated exemption and clarify what information a market participant would need to provide to the exchange and Commission in order to apply for such a non-enumerated exemption without the Commission delaying approval beyond the 10-day review period.

(D) <u>Risk- Management Exemption</u>

The Commission proposes that exchanges no longer be permitted to grant risk management exemptions and previously granted risk-management exemptions would no longer apply after the effective date of a final rule. ICE does not believe this change is mandated by the statute and does not support the removal of the risk management exemption. Rather, ICE believes there is no reason that exchanges should not be permitted to continue granting risk management exemptions from spot month limits for appropriate risk-reducing transactions. Currently, risk management exemptions granted by exchanges enable dealers to provide important and cost-effective risk management services to commercial end-users that incur basis risk or any other risk arising out of their commercial operations which are not directly covered by standardized futures contracts. They also reduce costs for end-users as exchange-granted risk management exemptions have promoted market liquidity and have not disrupted the price discovery function of the futures markets. The positions held as a result of existing risk management exemptions are non-speculative in nature and are intended to offset the price risk undertaken in the provision of this liquidity to commercial end-users.

By proposing to eliminate the risk management exemption from the list of enumerated exemptions, the Commission is restricting the ability of commercial end-users and non-futures market participants to hedge their own price risks or any other risks arising out of their commercial operations. As discussed in more detail below, the Commission is proposing to modify the definition of a *bona fide* hedge by eliminating the term "normally" and in effect replacing it with "always" in the "Temporary Substitution Test." The statutory definition does not require that a hedge "always" represent a substitute for positions taken or to be taken in a physical marketing channel. As such, ICE recommends that the Commission define of *bona fide* hedging in such a way that it allows for risk management positions because they increase market liquidity, enhance price discovery and are not speculative.

Furthermore, eliminating the risk management exemption is inconsistent with Congress' directive to the Commission to ensure sufficient market liquidity for bona fide hedgers and to avoid disruption of the

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[4] For this purpose, clause (a)(11)(A) of Appendix A could be revised as follows: (A) The position in the commodity derivative contract does not exceed in quantity twelve months of current or anticipated purchase or sale requirements **<u>(inclusive of unfixed-price contract requirements)</u>** of the same cash commodity that is anticipated to be purchased or sold.

price discovery function of the futures markets.[5] In the Proposed Rule, the Commission concedes that "by excluding risk management positions from the bona fide hedge definition (other than those positions that would meet the pass-through/swap offset requirement in the proposed bona fide hedge definition, discussed further below), the proposed definition may affect the overall level of liquidity in the market since dealers who approach or exceed the federal position limit may decide to pull back on providing liquidity, including to bona fide hedgers."[6] There is no evidence of any trading problem or manipulative practice that has arisen as a result of the existing risk management exemptions granted by exchanges. Further, given that risk management positions are not speculative, the decision to eliminate the risk management exemption does not curb excessive speculation. As a result, there is no regulatory benefit to outweigh the potential reduction in liquidity.

Eliminating risk management exemptions could also have unintended adverse consequences for key derivatives market participants by impeding a dealer's ability to hedge its exposure. Thus, a potential consequence of eliminating the risk management exemption is to make it less efficient and potentially more expensive for commercial end-users to hedge against their risks. Furthermore, if dealers are precluded from using futures contracts to hedge their exposure to financial positions or to hedge their exposure outside of the futures markets, it would expose dealers to greater risk and likely incentivize them to reduce rather than promote market liquidity for bona fide hedgers.

As such, ICE suggests that the Commission retain the flexibility to grant risk management exemptions for itself and the exchanges for appropriate risk-reducing transactions or qualifies risk management positions as a self-effectuating intra- or inter-market spread position. At a minimum, ICE strongly supports preserving the ability of the exchanges to grant risk management exemptions from speculative position limits for all futures contracts that are not subject to federal position limits. In this regard, the Commission has acknowledged that "restrictions on risk management exemptions that apply to physical commodities subject to federal limits do not apply to excluded commodities."[7]

(E) Pass Through Exemption

The Proposed Rule provides that a dealer or other market participant can avail itself of the pass-through exemption if the dealer executes a pass-through swap with a bona fide hedging counterparty, and then hedges the risk associated with that pass-through swap with a pass-through swap offset. ICE supports the inclusion of the pass-through swap as an enumerated exemption but notes that the requirements imposed on market participants seeking to rely on this exemption are burdensome and not commercially practicable.

First, the Commission should clarify the documentation and disclosure requirements a pass-through swap counterparty (a dealer) would be required to obtain in order to demonstrate that the pass-through swap qualifies as a *bona fide* hedging transaction or position for its counterparty. The dealer or market participant seeking to rely on the exemption will likely not have direct access to information concerning its counterparty's hedging strategies and situation. In addition, end-users may, for commercial reasons, be concerned about disclosing their intended hedging strategy to the dealer at the time of execution of the swap (and it should not be necessary for an end-user to do so in order to take advantage of a bona fide hedge exemption). As a result, dealers will necessarily have to rely on the assurances, or lack thereof, received from the counterparties as to the intent of the swaps transacted. The Commission should clarify that this is

[5] CEA section 4a(a)(3)(B).
[6] Proposed Rule at 11683.
[7] Proposed Rule at 11606, n. 58.

permissible, such that a market participant claiming the pass-through exemption may reasonably rely on a representation from its counterparty as to its bona fide hedging status.

ICE notes that even if the Commission modifies the conditions to this exemption in the final rules, ICE does not believe this exemption is an adequate substitute for the removal of the risk management exemption. Instead, ICE recommends that in addition to refining the pass-through swap exemption, the Commission should add the risk management exemption to the list of bona fide enumerated hedges.

Nonetheless, to the extent market participants may need to rely on the pass-through exemption in the absence of a risk management exemption, or as an alternative, ICE believes that the same considerations discussed below with respect to the Temporary Substitution Test (notably the proposed requirement that the transaction "always" be in connection with the product, sale or use of the physical commodity) apply in this context as well. It should also be permissible to use the pass-through exemption in connection with a spread strategy that would itself otherwise be exempt from position limits.

(F) <u>Cross-Commodity Hedging</u>

The Commission proposes that, to qualify as a cross-commodity hedge, fluctuations in value of the position in the commodity derivative contract or of the underlying cash commodity must be "substantially related" to the fluctuations in value of the actual or anticipated cash position. According to the Commission, in order to be "substantially related," the derivative and the cash market position must have a "reasonable commercial relationship."[8] ICE supports the Commission's cross-commodity hedge exemption proposal and also commends the Commission for revising the cross-commodity hedge exemption to remove the quantitative factor used to determine whether a transaction qualifies as a cross-commodity hedge. ICE does, however, recommend that the Commission include a non-exclusive list of commonly used cross-commodity hedges that satisfy the substantially related requirement. There should, for example, be no question that natural gas core and referenced contracts can be used to hedge electricity price exposure and vice versa.

(G) <u>Spread</u>

ICE supports the inclusion of the spread exemption in the Proposed Rule, however, it recommends that the Commission clarify that the list of spread transactions in the definition thereof in the Proposed Rule is non-exhaustive. ICE also believes that the definition of spread transaction in Rule 150.1 should explicitly include two types of intermarket spread transactions:[9]

- Intermarket spreads, in which both legs are futures contracts in the same commodity in the same calendar month or expiration but are traded at different exchanges; and
- Intermarket spreads, in which one leg is a futures contract and the other is an over-the-counter swap or derivative;

However, in the event that the list of spread positions in the definition in the Proposed Rule is determined to be exhaustive, ICE recommends the Commission provide explicitly that an exchange may grant a spread exemption outside of the requirements in Proposed Rule 150.3, or otherwise in accordance

[8] Proposed Rule at 11609.

[9] ICE notes that in its discussions with Staff, Staff has indicated its support for the two inter-market spread examples listed below.

with Proposed Rule 150.9. This will allow the Commission to review novel spread strategies within the framework of the 10-day review process.

Finally, as noted in the following section, ICE recommends the extension of "unforeseen" hedging and the 2-day review process to spread strategies meeting the criteria in Proposed 150.3, in which a market participant exceeds the position limits and the position is tied to a permissible spread strategy. Further, ICE recommendations that in the event the Commission requires further information from an exemption applicant related to a novel spread strategy that it provides feedback in the manner of Proposed Rule 150.9, or a similar process with a consistent time outlay.

(H) Temporary Substitution Test

The Commission is proposing to modify the definition of a *bona fide* hedge by eliminating the term "normally" and in effect replacing it with "always" in the "Temporary Substitution Test." ICE disagrees with the Commission's preliminary interpretation that the Temporary Substitute Test requires that "a *bona fide* hedging position in physical commodities must *always* be in connection with the production, sale, or use of a physical cash-market commodity."[10] The statutory definition does not require that a hedge "always" represent a substitute for positions taken or to be taken in a physical marketing channel. Moreover, the Commission has not cited any legislative history to support inferring the term "always." ICE proposes that the Commission interpret the definition of *bona fide* hedging in light of the broader purposes of the CEA, including the promotion of sound risk management and price discovery. This interpretation is consistent with the statutory definition of *bona fide* hedging position or transaction. Furthermore, for the reasons cited earlier, ICE recommends that the Commission not foreclose an interpretation of *bona fide* hedging that allows for risk management positions if such positions increase market liquidity, enhance price discovery and are not speculative.

(I) Five Day Rule

The CFTC proposes to eliminate the "five-day rule" for the enumerated hedges to which the five-day rule currently applies and proposes instead to provide exchanges with the discretion to apply, and when appropriate, waive the five-day rule for purposes of exchange-set limits. ICE supports the proposed revisions and the elimination of the five-day rule.

IV. The Commission Should Revise the Process for Exchange-Granted Non-Enumerated Hedge Exemptions

(A) Commission Review Process

ICE strongly supports allowing an exchange to grant a non-enumerated hedge exemption. In general, ICE believes that granting an exemption is inherently the type of fact-specific inquiry, depending on the situation and trading plan of the trader, that is better suited to an exchange, acting as a self-regulatory organization, than the Commission itself or its staff. However, ICE is concerned that the Proposal fails to follow through on the approach, by imposing unnecessary procedural obstacles, burdens and delays that effectively prevent exchanges from performing this role.

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[10] Proposed Rule at 11605.

First, ICE questions whether it is necessary for the Commission to routinely review each non-enumerated exemption determination made by the exchange. Effectively, this means that the exchange is not, in substance, granting the exemption. The mandatory Commission review largely eliminates the benefits, from the perspective of allocation of regulatory resources, of having the exchange conduct the review, and instead imposes unnecessary duties on the Commission and its staff. It would, in ICE's view, make more sense for the Commission to review overall exchange policies for granting such exemptions, at a higher level, rather than specific determinations, consistent with the Commission's generally principles-based approach to exchange supervision.

The 10-day review process also imposes unnecessary burdens and delays on market participants seeking an exemption. The need for Commission review may create uncertainty for market participants seeking exemptions, both as to the availability of an exemption and the timing. In addition, the proposed 10-day review period, on top of any review conducted by the exchange, is too long for a market participant to go unhedged while waiting for an exemption to be approved and as such does not seem practicable nor commercially reasonable.

If the Commission determines to retain a review period, ICE recommends a shorter period in which the Commission may review non-enumerated exemptions, which will provide the applicant with greater opportunity to hedge their commercial risks in a timely manner. For this purpose, Commission staff can and should rely on the fact that the relevant exchange will already have conducted a review of the exemption and the basis for it. Additionally, ICE recommends that the Commission set a maximum time period for which it may stay an exemption request pending review by the Commission.

As an alternative, the Commission could permit a market participant to engage in hedging up to the requested exemption limit while waiting for the exemption to be approved. In such case, if the exemption were not ultimately approved, the market participant could be required to reduce its position within a commercially reasonable time, in the same manner contemplated for exemptions for sudden or unforeseen increases in hedging needs under proposed Rule 150.3(b)(3)(ii).

Furthermore, ICE requests that the Commission amend the Proposed Rule to clarify that the proposed review period only applies when a participant first applies to the exchange for a non-enumerated hedge exemption. If the Commission deems the non-enumerated hedge exemption granted after the review period, a participant should be able to treat the hedge as a bona fide hedge provided the participant re-applies to the exchange for an exemption on an annual basis (without an additional Commission review in the ordinary course). The Commission should also clarify whether a participant may put on additional positions during the review period. Lastly, the Commission should clarify in the final rulemaking that the monthly reports provided by the exchange to the CFTC should only apply to positions subject to the federal limits and does not apply to other exchange set non-enumerated exemptions and allow Exchanges with discretion on when to provide this information to the CFTC on a monthly basis.

If the Commission requires a review period, the Commission should confirm that an exchange can grant non-enumerated hedge exemptions, subject to the Commission's review period, prior to the final rule compliance date in order to promote a smooth implementation of the federal position limits. Allowing market participants to apply for an exemption before the compliance date will reduce the possibility a situation where the exchanges receive a large number of market participants simultaneously applying for an exemption.

(B) Exemptions from Multiple Exchanges

ICE recommends that the Commission clarify in the final rule that if a participant receives a bona fide hedge exemption from more than one exchange, the exchange will monitor positions of the participants subject to the exemptions it has granted. A common situation will arise where a participant applies to more than one exchange for a hedge exemption related to the same underlying exposure, and the sizes of the exchange-granted exemptions will differ. For purposes of compliance with the federal limit, the Commission should confirm that the participant is subject to the exemptions granted by the exchanges, but, relatedly, the exchanges are not bound by, or responsible for monitoring compliance with, exemptions approved by other exchanges.

(C) Unforeseen Hedging Needs

Moreover, as the Proposal is drafted, ICE believes that a market participant may only exceed the position limit (without a prior exemption) as a result of sudden or unforeseen bona fide hedging needs. ICE recommends the Commission expand the definition of unforeseen hedging to include other permitted exemptions, including a spread exemption. ICE also recommends the Commission make clear that pass-through swap positions executed as a result of unforeseen hedging needs are also included in this definition. Additionally, ICE recommends the definition also include position limit overages that are the result of operational or incidental issues, in which the participant did not have the intent to evade position limits.

(D) Expansion of Enumerated Hedges List

Lastly, ICE requests the Commission establish a process for moving non-enumerated hedge exemptions to the list of enumerated exemptions. ICE's understanding is that establishing this process would likely require a CFTC notice and comment rulemaking, so we would ask that the final rule include a requirement for Staff to provide an annual report to the Commissioners recommending non-enumerated hedge exemptions that should be added to the list of enumerated hedge exemptions.

V. Treatment of Certain Contracts as Referenced Contracts, or as Excluded Contracts, Should be Clarified

ICE strongly supports the Commission's decision to exclude from the definition of referenced contract in the Proposed Rule certain contracts that are not substitutes for the core referenced contracts, such as location basis contracts and outright contracts whose settlement price is based on an index published by a price reporting agency that surveys cash market transaction prices ("Price Index Contracts"). As the Commission has recognized, although there may be certain relationships, or similarities, between such contracts and core referenced contracts, such contracts have different underlying economic terms and different uses. Fundamentally, such contracts are simply not identical to, and are not substitutes for, the core referenced contracts, and it would therefore be inappropriate for the positions limits applicable to core referenced contracts to apply to them, or for such contracts to be aggregated with (or netted against) core referenced contracts for position limit purposes. In ICE's view, this marks an important enhancement of the current Proposal over the 2016 Proposal, which raised significant questions about the treatment of such contracts.[11] Requiring aggregation of such contracts with core referenced contracts would likely have had significant adverse effects on liquidity and would

[11] See, for example, fn. 329 of the 2016 Reproposal.

likely have stifled the development of new basis contracts or types of contracts referencing the commodities underlying the core referenced contracts, without obvious benefit.

In the case of location basis contracts, for example, the Commission has correctly recognized that such contracts, while they may settle based on the difference between the price of a core referenced contracts, as one component, and another contract, are not equivalent to or look-alike contracts for the core referenced contract. As a result, it is not appropriate to aggregate such basis contracts with, or net such contracts against, core referenced contracts for purposes of determining compliance with the limits for core reference contacts. As a matter of policy, the Commission's position on such contracts also recognizes that they may serve an important purpose for commercial end users that want to hedge commodity prices at specific delivery locations (which may not match the core referenced contract).

Similarly, in the case of Price Index Contracts, such contracts are unlikely to be true substitutes for the core referenced contract. Such indexes are based on cash market prices submitted to a price reporting agency. They do not necessarily reflect the prices in the related futures market or the prices of all of the relevant transactions in the cash market at a particular time. They may also reflect certain judgments made by the index provider, including to exclude transactions deemed anomalous or not representative. The underlying index is based on a methodology determined by the third-party price reporting agency that is not subject to the supervision or control of the exchange. Because the methodology may differ significantly from the core referenced futures contract, there could be significant divergence in these contracts from the price of the core-referenced futures contract. As a result, the Commission has appropriately recognized that such contracts are not a substitute for, and should not be aggregated with or netted against, the core referenced contract. In addition, in ICE's view, such contracts provide a useful alternative source of pricing for a particular commodity in the cash market. There is also a long history of the trading of such contracts, without evidence of excessive speculation that has caused market or settlement disruption with respect to the core referenced contract in the underlying commodity.

Despite this clear and appropriate position in the Proposal, ICE notes that the current version of the Staff Workbook lists, as part of its non-exhaustive list of referenced contracts subject to federal limits, certain contracts that would appear to be location basis contracts or Price Index Contracts. For example, certain listed contracts, including the ICE Henry Basis Future, ICE Henry Index Future, ICE Henry Swing Future, and ICE Option on Henry Swing Future, settle based on cash market surveys conducted by S&P Global (Platts), which utilize cash market data in determining and publishing an index price[12]. As such, ICE respectfully requests the CFTC modify the Staff Workbook to remove these contracts, consistent with the Proposed Rule.[13]

[12] Price Reporting Agency (PRA) Outrights or Differentials to NYMEX NG or WTI or Heating Oil Contracts which should be removed from the Staff Workbook include: Henry Basis Future, Henry Index Future, Henry Swing Future, Option on Henry Swing Future, Crude Diff - WCS TX 1b Index Future, Natural Gasoline, OPIS Mt. Belvieu Non-TET vs WTI 1st Line Crude Differential Future, Crude Diff - Argus WTS vs WTI Trade Month Future, Crude Diff - Argus Mars vs WTI 1st Line Future, Crude Diff - Argus Mars vs WTI 1st Line Future Average Price Option, Crude Diff - Argus WTS vs WTI 1st Line Average Price Option, Crude Diff - Argus Mars vs WTI Trade Month Future, Crude Diff - Argus Mars vs WTI Trade Month Average Price Option, Crude Diff - Argus WTS vs WTI 1st Line Future, Crude Diff - Argus WTI Midland vs WTI 1st Line Future, Crude Diff - Argus WTI Midland vs WTI 1st Line Future Option, Crude Diff - Argus WTI Midland vs WTI Trade Month Future, Jet Fuel Diff - Gulf Coast Jet Fuel vs Heating Oil 1st Line Future, Jet Fuel Diff - Argus NYH Jet Fuel vs Heating Oil 1st Line Future.

[13] There is no stated explanation for the inconsistent position taken in the Staff Workbook, and it appears to ICE that the contracts listed in the Staff Workbook may have been carried over from the corresponding draft workbook for the 2016 Reproposal. We note that there is nothing in the Proposed Rule itself to suggest that the Commission intended that the location basis contracts and price reporting agency contracts listed in the current draft of the Staff Workbook be treated as referenced contracts. Rather, such

Building on the treatment of location basis contracts and Price Index Contracts, ICE recommends that the status of certain other contracts under the Proposed Rule be clarified more generally. In particular, cash-settled differential, basis and spread contracts, even if they reference a core referenced futures contract as one component, should generally be excluded from being treated as reference contracts. As discussed above, the Proposed Rule recognizes, for example, that location basis contracts are not appropriately treated as referenced contracts, since they are not equivalent to, and should not be aggregated with or netted against, the underlying core referenced futures contract. The same is even more true of basis or differential contracts that are cash settled based on the difference between different grades of a commodity (e.g. WTI vs. sour crude) or between different but related commodities (e.g., a crack differential). Although the Proposed Rule contemplates that spread positions (which may be economically similar) may be exempt from position limits, it is not clear how this exemption would be applied to a single cash-settled contract based on the difference between two commodities (as opposed to positions in two different contracts). For such a contract, the requirement that a spread exemption be approved by the exchange seems unnecessary and is probably unworkable. It would be preferable for the Commission to exclude basis, differential and similar contracts from the referenced contract definition and reserve the spread exemption for trading that involves an actual position in a reference contract.

In any case, it is important for the Commission and its staff, exchanges and market participants to have a clear, transparent and consistent understanding as to what contracts are included as reference contracts and the basis for making such determinations. We note in this regard that under the Proposal, when an exchange lists a new contract, it will be required as part of its submission under Rule 40.2 to indicate whether it is a referenced contract. It is not currently clear what level of analysis of this issue will be required to be included, nor what the process will be for the Commission or its staff to consider this aspect of the exchange's submission. In order for this issue not to interfere with the principles-based, self-certification process, and the ability of exchanges to develop and list new contracts without undue delay or complication, it is critical for the exchanges to have clear guidance as to how new contracts are to be assessed to determine whether they will be referenced contracts. Clear guidance will also help avoid situations where exchanges may take different views on this issue with respect to economically similar products, which would create further potential disruption and uncertainty for market participants.

VI. Aggregation for Cash-Settled Contracts Should Not be Required Across Exchanges

ICE also has concerns about the general approach in the Proposed Rules to aggregate (or net) contracts across all exchanges. ICE understands the Commission's concern that a trader could accumulate large positions on different exchanges, in look-alike products (e.g. NYMEX Natural Gas Futures and ICE Henry LD1 Fixed Price Future). However, ICE is also concerned about the potential anticompetitive aspects of the Commission's approach. Having a single federal position limit, for all referenced contracts across all exchanges, may make it very difficult for an exchange to launch a new contract that would be aggregated with an existing contract for position limit purposes. It may be even more difficult for a new exchange to be launched under these circumstances. With a single limit, it could be difficult for a new contract or exchange to attract enough liquidity to become sustainable on an ongoing basis. ICE notes in this regard that Section 15 of the CEA requires that the Commission, in

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inclusion is contrary to the explicit treatment of such contracts as outside the scope of referenced contracts under the Proposed Rule. If the Commission were to take a different approach, such that those contracts were to be treated as referenced contracts, ICE believes that would constitute a fundamental change from the Proposal such that re-proposal of the rule for further comment would be necessary.

promulgating a rule, have regard to the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA. ICE does not believe that the aggregation of referenced contracts across all exchanges meets this standard. This is particularly true for cash-settled contracts and for other contracts outside of the delivery month. ICE believes that a more flexible approach to aggregation of positions, that allows each exchange to develop its own liquidity (and establish its own limits), even for similar or look-alike contracts, will better advance the goals of developing robust and liquid markets while providing adequate means to protect against excessive speculation.

VII. The Commission Should Continue Permitting Higher Position Limits for Cash Settled Contracts

ICE strongly supports the Commission establishing spot month position limits for cash-settled contracts at levels higher than the physically-delivered contracts by maintaining the conditional spot month limit for cash-settled contracts. The Commission has recognized that cash-settled contracts present a reduced potential for manipulation of the price of the physically-settled contract, and therefore a higher spot month limit is appropriate.[14] Spot month limits are designed primarily to reduce the ability of a trader to manipulate the price of the contract or underlying commodity. For physically-settled contracts, spot month limits are designed to reduce the potential for corners and squeezes as the physically-delivered contract approaches expiration, rather than address any incentives for manipulation that may exist due to positions in the cash market. Historically, for cash-settled contracts, where there is no possibility of corners or squeezes, neither the level of the deliverable supply nor the number of positions in the cash market have been a relevant factor in setting the spot month limit. Rather, exchanges have been required to set the level as necessary to "minimize the potential for manipulation or distortion of the contract's or the underlying commodity's price."

In the Proposed Rule, the Commission has once again recognized that trading in cash-settled contracts has no ability to influence the final settlement price of the corresponding physically-delivered contract, and Dodd-Frank changes have pushed significant volumes of cash-settled contracts in the OTC markets into exchanges and clearinghouses.

For natural gas, however, ICE would request that in the final rulemaking, the Commission revert back to the five-time conditional limit for cash settled contracts seen in the 2011 and 2013 position limit rulemakings,[15] instead of the conditional limit of 10,000 contracts in the Proposed Rule. Applying a five-time multiplier versus a hard limit, would allow the conditional limit to track any changes in the spot month limits over time, which in turn will reflect changes in deliverable supply.

VIII. Spot Month Accountability Levels Should be Maintained for the Henry Hub Penultimate Options and Futures Contracts

Penultimate options serve as price protection for commercial market participants so they can secure the economic equivalent of a futures contract. Penultimate futures serve as a risk mitigation strategy against the penultimate option position; they do not trade independently. Both contracts expire

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[14] *See* Former CFTC Rule pt. 38, app. B, core prin. 5, para. (b)(2) (2010). The Commission previously stated that the potential for distortion of prices is "negligible" for cash-settled contracts.

[15] *Position Limits for Derivatives*, 76 Fed. Reg. 4752 (January 26, 2011); *Position Limits for Derivatives*, 78 Fed. Reg. 75680 (December 12, 2013).

one business day prior the expiration of the Henry Hub LD1 core referenced futures contract. Currently, penultimate options and futures have spot month accountability levels while both the Henry Hub LD1 physically-delivered and cash-settled contracts have spot month limits. The Proposed Rule aggregates Henry Hub penultimate options and futures with positions in the core-referenced futures contract thus subjecting penultimate futures and options to hard spot month position limits. However, the Proposed Rule does not provide clarity as to how the position limits would be assessed for aggregated referenced contracts subject to different expiration schedules, such as cash settled Henry LD1 Fixed Price Future and Henry Penultimate Futures and Options. ICE strongly recommends that the Commission continue to allow exchanges to impose spot month accountability levels which expire during the period when spot month limits for the Henry Hub core-referenced futures contract are in effect and to not aggregate penultimate options into the Henry Hub LD1 cash-settled limit. Natural gas is the only commodity where options, and the corresponding future they exercise into, expire during the spot month period for the underlying core referenced futures contract. As such, the Commission must recognize these nuances and accordingly allow accountability levels in the spot month. The Commission has no reason to believe that market participants will arbitrage these contracts in the spot month as the penultimate contracts currently trade side-by-side with the Henry Hub LD1 futures and there has been no evidence of a migration to the penultimate contracts due an accountability level versus a hard spot month limit.

In addition, prices in the penultimate future have no ability to impact to the settlement of the core referenced futures contract. The Commission states that penultimate contracts are economically the same as the last day contract however empirically this statement is not correct as settlement prices have demonstrated. Exchanges have listed penultimate contracts for decades to give participants the ability to have exposure to the day before settlement--a practice that started when many of these contracts were over-the-counter. The Commission should provide a necessity finding and economic basis for why penultimate options contracts should be aggregated with the last day contract. Lastly, due to the aggregated contracts having different expiration dates, a market participant who holds a flat position on one trading session, may be subject to a position limit overage on the next trading session, by virtue of its penultimate position expiring causing a unintentional position limit violation based solely on different delta calculation. The Commission should clarify how it intends to assess position limits for referenced contracts subject to different expiration schedules.

IX. The Requirements for Exchange Reporting Should Not Be Overly Burdensome

As it relates to the proposed reporting by exchanges, ICE suggests the Commission ensure that the proposed reporting is not overly burdensome or redundant in light of other existing reporting regimes currently in place. ICE recommends the Commission revise the proposal to make clear that periodic exchange reports on exemptions from position limits must only be made as it relates to those contracts subject to the proposed federal position limits. Additionally, the Commission should codify when the reports are required to be submitted and that the regular reporting can be made at the discretion of the exchange. Further, the Commission should make clear when and how factual and legal justifications for exemptions from position limits are provided to the Commission, and the level of granularity requisite.

X. Conclusion

ICE appreciates the opportunity to comment on the Proposal. As written, the Proposed Rule makes substantial changes to the current position limit regime and is improved in many respects from the previous position limit proposals. However, we strongly suggest that the Commission exercise great caution in making changes to a well-functioning market. We also suggest that the Commission analyze

the impact of the current (and new) position limit regime for energy markets before implementing this rule. If the Commission decides to go forward with this rule, we suggest that the Commission continue to allow higher limits for cash-settled contracts and sufficiently provide flexibility for commercial market participants to mitigate risk in connection with their business.

Again, ICE thanks the Commission for the opportunity to comment on the Proposed Rules.

Sincerely,

Kara Dutta
Assistant General Counsel
Intercontinental Exchange Inc.

cc: The Honorable Chairman Heath P. Tarbert, Chairman
The Honorable Commissioner Brian D. Quintenz, Commissioner
The Honorable Commissioner Dawn DeBerry Stump, Commissioner
The Honorable Commissioner Rostin Behnam, Commissioner
The Honorable Commissioner Dan M. Berkovitz, Commissioner
Dorothy DeWitt, Director, Division of Market Oversight
Aaron Brodsky, Senior Special Counsel
Steven Benton, Industry Economist
Jeanette Curtis, Special Counsel
Steven Haider, Special Counsel
Harold Hild, Policy Advisor
Lillian Cardona, Special Counsel