

## Commodity Futures Trading Commission

**Order: (1) Pursuant to Section 4(c) of the Commodity Exchange Act (a) Permitting Eligible Swap Participants to Submit for Clearing and ICE Clear U.S., Inc. and Futures Commission Merchants to Clear Certain Over-The-Counter Agricultural Swaps and (b) Determining Certain Floor Brokers and Traders to be Eligible Swap Participants; and (2) Pursuant to Section 4d of the Commodity Exchange Act, Permitting Certain Customer Positions in the Foregoing Swaps and Associated Property to be Commingled With Other Property Held in Segregated Accounts.**

**Agency:** Commodity Futures Trading Commission.

**Action:** Order.

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**Summary:** On December 7, 2007, the Commodity Futures Trading Commission (“CFTC” or “Commission”) published for public comment requests (a) to permit ICE Clear U.S., Inc. (“ICE Clear”) to clear certain over-the-counter (“OTC”) swap contracts and (b) to determine that certain ICE Futures U.S., Inc. (“ICE Futures”) floor brokers and traders are Eligible Swap Participants (“ESPs”) for the purpose of trading those OTC swaps (“Notice.”).<sup>1</sup> On January 7, 2008, the comment period was extended to February 6, 2008.<sup>2</sup> ICE Clear also filed a request for an order pursuant to Section 4d of the Commodity Exchange Act (“CEA” or “Act”) to allow ICE Clear and Futures Commission Merchants (“FCMs”) clearing through ICE Clear to commingle positions in those cleared OTC swap contracts and property supporting those positions with property and positions otherwise required to be held in customer segregated accounts. That request was published on the CFTC’s website for public comment during the same timeframe with the same comment deadline. The Commission has reviewed the comments made in response to the requests for comment and the entire record in this matter and has determined to issue an order granting the requests.

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<sup>1</sup> 72 FR 68862 (December 7, 2007).

<sup>2</sup> 73 FR 1205 (January 7, 2008).

**Dates:** *Effective Date:* December 12, 2008.

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**Supplementary Information:**

**I. The ICE Clear 4(c) Petition**

ICE Clear, the clearing organization for ICE Futures, sought to offer ESPs who enter into certain bilateral swap transactions involving coffee, sugar, or cocoa the opportunity to submit them to ICE Clear for clearing. ICE Clear represented that swap transactions in various agricultural products, including coffee, sugar, and cocoa, currently trade in OTC markets exempt from provisions of the CEA pursuant to Part 35 of the Commission's regulations,<sup>3</sup> that these swap agreements are commonly entered into by participants exchanging fixed for floating reference prices, and that participants in these markets include trade houses, commodity lenders, producers, end users, and large speculators.

Part 35 of the Commission's regulations exempts, subject to conditions, swap agreements and eligible persons entering into these agreements from most provisions of the CEA.<sup>4</sup> The term "swap agreement" is defined to include, among other types of agreements, "a ... commodity swap,"<sup>5</sup> which latter term includes swaps on agricultural products.<sup>6</sup> Part 35 was promulgated

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<sup>3</sup> 17 CFR Part 35.

<sup>4</sup> Jurisdiction is retained for, *inter alia*, provisions of the CEA proscribing fraud and manipulation. *See* Commission Reg. §35.2, 17 CFR §35.2 (Commission regulations are hereinafter cited as "Reg. §\_\_\_").

<sup>5</sup> Reg. §35.1(b)(1)(i).

pursuant to authority provided to the Commission in Section 4(c) of the Act to exempt certain transactions in order to explicitly permit certain off-exchange derivative transactions, and thus to promote innovation and competition.<sup>7</sup> In the Commodity Futures Modernization Act of 2000,<sup>8</sup> Congress enacted a number of exemptions and exclusions from the CEA for contracts traded outside of Designated Contract Markets (“DCMs”), but none apply to agricultural contracts.<sup>9</sup>

Part 35 requires, *inter alia*, that a swap agreement not be part of a fungible class of agreements that are standardized as to their material economic terms,<sup>10</sup> that the agreement be solely between ESPs,<sup>11</sup> and that the creditworthiness of any party having an interest under the agreement be a material consideration in entering into or negotiating the terms of the agreement.<sup>12</sup> Under the arrangement that ICE Clear seeks to establish, OTC contracts would be submitted for clearing, a process that would extinguish the original OTC contract and replace it with an equivalent number of cash-settled “cleared-only” contracts, with the clearinghouse interposed as central counterparty.<sup>13</sup> A cleared-only contract could be offset by another cleared-only contract. Thus, clearing of these OTC contracts would result in contracts that were fungible with other cleared-only contracts with approximately equivalent terms. In addition, due to the

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<sup>6</sup> “Commodity” is defined in Section 1a(4) of the CEA to include a variety of specified agricultural products, “and all other goods and articles, except onions... and all services, rights and interests in which contracts for future delivery are presently or in the future dealt in.”

<sup>7</sup> See 58 FR 5587 (January 22, 1993). Section 4(c) of the CEA was added by § 502(a) of the Futures Trading Practices Act of 1992, Pub.L. 102-546, 106 Stat. 3590.

<sup>8</sup> Pub.L. 06-554, 114 Stat. 2763 (2000).

<sup>9</sup> See, e.g., CEA §§2(d), (g), and (h).

<sup>10</sup> Reg. §35.2(b).

<sup>11</sup> Reg. §35.2(a).

<sup>12</sup> Reg. §35.2(c).

<sup>13</sup> The OTC transaction would be required to involve the coffee, sugar, or cocoa underlying the corresponding cleared-only contract. The unit size, quality, and other specifications for the OTC coffee, sugar, or cocoa transaction would be approximately equivalent to the unit size, quality, and other specifications of the corresponding physical delivery futures contract listed on ICE Futures.

clearing guarantee, the creditworthiness of the counterparty would no longer be a consideration. Accordingly, the OTC contracts ICE Clear clears in this fashion would not fulfill all of the conditions of Part 35.

ICE Clear also requested an order under CEA Section 4d so that ICE Clear and its clearing members can hold the cleared-only contracts and property supporting them in the customer segregated account along with exchange-listed futures contracts and associated property, resulting in improved collateral management and other benefits.

## **II. The ICE Futures Petition**

ICE Futures, a U.S. DCM, sought to permit floor traders and floor brokers (collectively, floor members) who are registered with the Commission, when trading for their own accounts, to enter into the OTC swap transactions discussed above. Part 35, however, defines the term ESP to include floor members only as follows: (1) floor members generally who are other than natural persons or proprietorships; (2) floor members who are natural persons, provided they have total assets exceeding at least \$10,000,000; or (3) floor members who are proprietorships, provided they have total assets exceeding at least \$10,000,000, or have the obligations under the swap agreement guaranteed or otherwise supported by certain other ESPs, or have a net worth of \$1,000,000 and enter into the swap agreement in connection with the conduct of their business or to manage the risk of an asset or liability owned or incurred in the conduct of their business or reasonably likely to be owned or incurred in the conduct of their business.<sup>14</sup> Therefore, ICE Futures petitioned the Commission for an order pursuant to Section 4(c) of the CEA that would permit all ICE Futures floor members who are registered with the Commission, when trading for

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<sup>14</sup> Reg. §35.1(b)(2)(x).

their own accounts, to be ESPs for the purpose of entering into bilateral swap transactions involving agricultural commodities as described above.

ICE Futures represented that all floor members entering into the swap transactions would be sophisticated and knowledgeable in the relevant products and markets and would be fully capable of evaluating the transactions. Further, because the transaction results in a cleared-only futures contract, floor members would not be subject to counterparty credit risk and would rely on the credit of ICE Clear and their clearing FCMs.

The Commission stated that it anticipated that any Section 4(c) order issued in response to ICE Futures' request would be subject to the following conditions:

- (1) The contracts, agreements, or transactions would have to be executed pursuant to the requirements of Part 35, as modified by the order.
- (2) The ICE Futures floor member would have to obtain a financial guarantee for the OTC swap transactions from an ICE Futures clearing member that:
  - (i) is registered with the Commission as an FCM; and
  - (ii) clears the OTC swap transactions thus guaranteed.
- (3) Permissible OTC swap transactions would be limited to cleared-only contracts in the eligible products identified in the order.
- (4) Permissible OTC swap transactions would have to be submitted for clearance by an ICE Futures clearing member to ICE Clear pursuant to ICE Clear rules.
- (5) An ICE Futures floor member could not enter into OTC swap transactions with another ICE Futures floor member as the counterparty for ICE Clear cleared-only contracts.

(6) ICE Futures would maintain appropriate compliance systems in place to monitor the OTC swap transactions of its floor members.<sup>15</sup>

### III. Sections 4(c) and 4d of the CEA

#### A. Permitting the OTC Contracts to be Cleared

Section 4(c)(1) of the CEA empowers the CFTC to “promote responsible economic or financial innovation and fair competition” by exempting any transaction or class of transactions from any of the provisions of the CEA (subject to exceptions not relevant here) where the Commission determines that the exemption would be consistent with the public interest.<sup>16</sup> The Commission may grant such an exemption by rule, regulation, or order, after notice and opportunity for hearing, and may do so on application of any person or on its own initiative.

In enacting Section 4(c), Congress noted that the goal of the provision “is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive

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<sup>15</sup> The Commission noted that these conditions are substantially similar to the conditions included in two previously issued Commission orders that permit floor members to be Eligible Contract Participants (“ECPs”) pursuant to Section 1a(12)(C) of the Act, 7 U.S.C. § 1a(12)(C). On March 14, 2006, the Commission issued an order that permitted Chicago Mercantile Exchange (“CME”) floor members to be ECPs with respect to OTC transactions in excluded commodities entered into pursuant to Section 2(d)(1) of the Act. On August 3, 2006, the Commission issued a second order (the first was issued February 4, 2003) that permitted New York Mercantile Exchange (“NYMEX”) floor members to be ECPs with respect to OTC transactions in exempt commodities entered into pursuant to Section 2(h)(1) of the Act.

<sup>16</sup> Section 4(c)(1) of the CEA, 7 U.S.C. § 6(c)(1), provides in full that:

In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 7 of this title) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of this section (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of this section, or from any other provision of this chapter (except subparagraphs (c)(ii) and (D) of section 2(a)(1) of this title, except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D) of this title), if the Commission determines that the exemption would be consistent with the public interest.

manner.”<sup>17</sup> The Commission requested comment on whether it should permit the OTC transactions in coffee, sugar, and cocoa to be cleared through ICE Clear as described above. The Commission also requested comment on whether it should determine ICE Futures floor members, subject to certain conditions, to be ESPs for the purpose of entering into the OTC transactions in coffee, sugar, and cocoa.

Section 4(c)(2) provides that the Commission may grant exemptions from Section 4(a) of the CEA only when the Commission determines that the requirements for which an exemption is being provided should not be applied to the agreements, contracts, or transactions at issue, and the exemption is consistent with the public interest and the purposes of the CEA; that the agreements, contracts or transactions will be entered into solely between appropriate persons; and that the exemption will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory responsibilities under the CEA.<sup>18</sup>

Section 4(c)(3) includes within the term “appropriate persons” a number of specified categories of persons deemed appropriate under the Act for entering into transactions exempt by the Commission under Section 4(c). This includes persons the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections. ESPs, as defined in Part 35 of the Commission’s regulations, will be

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<sup>17</sup> House Conf. Report No. 102-978, 1992 U.S.C.C.A.N. 3179, 3213.

<sup>18</sup> Section 4(c)(2) of the CEA, 7 U.S.C. §6(c)(2), provides in full that:

The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) of this section unless the Commission determines that--

(A) the requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and

(B) the agreement, contract, or transaction—

(i) will be entered into solely between appropriate persons; and

(ii) will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

eligible to submit for clearing to ICE Clear the OTC transactions described above. That definition includes many of the classes of persons explicitly referred to in CEA Section 4(c)(3) (*e.g.*, a bank or trust company) as well as some classes of persons who are included under the category of Section 4(c)(3)(K) (“[s]uch other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections”). ICE Futures has requested that the Commission expand this list of appropriate persons to include ICE Futures floor members. The Commission requested comment on this determination. The Commission also requested comment as to whether these exemptions will affect its ability to discharge its regulatory responsibilities under the CEA, or with the self-regulatory duties of any contract market or Derivatives Clearing Organization (“DCO”).

#### **B. Segregation of Customer Funds**

CEA Section 4d(a)(2) prohibits commingling customer positions executed on a contract market and property supporting such positions together with any property not required to be so segregated. Section 4d(a)(2) provides that the Commission may grant exceptions to this prohibition by order. In this case, the OTC coffee, sugar, and cocoa contracts are not executed on a contract market and thus holding them together with customer property and positions required to be segregated would, absent a Commission order, violate Section 4d. As discussed further below, the Commission has analyzed the risks and benefits associated with commingling the cleared-only positions and associated customer funds with positions and customer funds otherwise required to be segregated, and has determined that the benefits of the proposal outweigh the risks and that the proposal, along with conditions set forth by the Commission, will provide for a sufficient level of safeguards to address the risks adequately.

#### **IV. Comment Letters**

The Commission received eleven letters in response to its request for comment. An initial comment letter from the CME Group Inc. (“CME Group”) requested an extension of the comment period and listed various concerns CME Group suggested might have to be addressed in order for the Commission to act on ICE Clear’s request for an extension of the swaps exemption of Part 35. However, a subsequent comment letter from CME Group took the position that the Commission should permit the clearing of OTC agricultural swap contracts but pursuant to appropriate conditions to protect the market and market participants in a manner that would establish a level playing field for all DCOs.

Brief comments from two individuals expressed concerns related to their belief that the OTC transactions would be undertaken primarily by large traders, such as hedge funds, to the detriment of smaller traders who use the markets for hedging. Neither of these comments provided any evidence that would support the conclusion that smaller traders would be adversely affected by the requested relief. One of the comments did note that there was no mention of the application of speculative limits. As discussed further below, the order will require ICE Futures to apply position accountability levels to the cleared-only contracts that are appropriate in light of the position accountability levels applicable to the underlying futures contracts.

The remaining seven comment letters are from two futures exchanges and five commodity trading firms, all of which support ICE Clear’s and ICE Futures’ requests for exemption.

With respect to the ICE Futures request that floor members be deemed ESPs, NYMEX commented regarding the Commission’s assertion that the proposed conditions pertaining to the determination were substantially similar to the conditions included in two previously issued

Commission orders that permit floor members to be ECPs pursuant to Section 1a(12)(C) of the CEA.<sup>19</sup> Specifically, NYMEX stated that the Commission previously has required that the clearing member providing a financial guarantee to a floor member deemed to be an ECP must maintain capitalization of a certain size to be able to issue such a guarantee, that the financial requirement was not included in the list of conditions to be applied to ICE Futures clearing members guaranteeing floor members deemed to be ESPs, and that the Notice did not provide any policy rationale for imposing different financial standards for clearing member guarantors.

On February 4, 2003, the Commission issued to NYMEX the first order determining that floor members could be ECPs. Due to the order's novel nature and the concern that a trader entering into OTC transactions could create financial difficulty for the guarantor FCM, the clearing entity, or other clearing firms, the order required clearing members that guaranteed and cleared OTC transactions to meet specified minimum capital requirements, and for NYMEX to submit a report to the Commission not later than 30 days after the order was in effect for 18 months.<sup>20</sup>

CME subsequently petitioned the Commission for an order that would permit CME floor members to be deemed ECPs. After reviewing the impact of the NYMEX order upon NYMEX and its floor members, and noting the lack of problems associated with it, the Commission issued an order to CME that did not include a special guarantor capitalization requirement.<sup>21</sup>

Immediately thereafter, Commission staff advised NYMEX that it could petition for a new or

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<sup>19</sup> See *supra* note 15.

<sup>20</sup> The order required that, as part of the report, NYMEX review its experiences and the experiences of its floor members and clearing members under the order during those 18 months.

<sup>21</sup> The floor member must have a guarantee from, and the trades must be cleared by, a CME clearing member FCM. That FCM must have adjusted net capital that equals or exceeds the greater of \$2,500,000, CFTC requirements as computed pursuant to Reg. §1.17, or Securities and Exchange Commission requirements.

amended order that would not include a special guarantor capitalization requirement, but NYMEX to date has not so petitioned.

## V. Findings and Conclusions

After considering the complete record in this matter, including the comments received, the Commission finds that the requirements of CEA Section 4(c) have been met with respect to the requests for an order permitting the clearing of certain OTC transactions and determining that certain floor brokers and floor traders qualify as ESPs.

First, permitting the clearing of these transactions is consistent with the public interest and with the purposes of the CEA. The purposes of the CEA include “promot[ing] responsible innovation and fair competition among boards of trade, other markets, and market participants.”<sup>22</sup> The purpose of exemptions is “to promote economic or financial innovation and fair competition.”<sup>23</sup> Permitting the clearing of OTC coffee, sugar, and cocoa transactions by ICE Clear, as well as permitting ICE Futures floor members to trade such products, would appear to foster both financial innovation and competition. It could benefit the marketplace by providing ESPs the ability to bring together flexible negotiation with central counterparty guarantees and capital efficiencies. Clearing also may increase the transparency of the OTC market.

Second, the bilateral transactions in the OTC agricultural swaps would be entered into solely between appropriate persons. These would be limited to those persons qualifying as ESPs under Part 35 and those floor brokers and traders deemed ESPs herein by the Commission. ICE Futures floor brokers or traders that entered into the swap would be registered with the Commission and would have the requisite skills, experience, and market expertise to trade for

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<sup>22</sup> CEA §3(b), 7 U.S.C. §5(b).

<sup>23</sup> CEA §4(c)(1), 7 U.S.C. §6(c)(1).

their own accounts. Each such floor member would be financially backed by the ICE Clear clearing member that submits the swap for clearing, and all of its activity in the OTC agricultural swaps, limited only to coffee, sugar, or cocoa, will be closely monitored by ICE Futures.

Third, the exemption would not have a material adverse effect on the ability of the Commission or any DCM to carry out its regulatory responsibilities under the CEA. ICE Clear will use the same systems, procedures, people, and processes to clear the bilateral agricultural swap contracts in coffee, sugar, and cocoa as it currently employs with respect to all of the other transactions it clears.

With respect to ICE Clear's request for an order pursuant to Section 4d permitting ICE Clear and FCMs clearing through ICE Clear to commingle funds supporting positions in the cleared-only contracts resulting from these agricultural swaps with customer funds required to be segregated under CEA Section 4d, the Commission has considered whether the additional risk to customers presented by such commingling can be adequately addressed and mitigated. Additional risk is presented to customers as a result of the risk of default involving the commingled cleared-only contracts. However, the carrying FCM should have adequate means to address a default by a customer trading these contracts. Since each cleared-only contract will have identical economic terms as its underlying corresponding contract listed on ICE Futures and will settle on both a daily and final basis to that corresponding listed contract, the carrying FCM (or, if necessary, ICE Clear) economically could hedge any contracts that are the subject of a default by entering into the offsetting underlying exchange-listed contract. Therefore, the additional risk would be mitigated. The order requires that ICE Clear review its members' risk management capabilities to verify that all members participating in the program maintain sufficient operational capability to engage in such offsetting transactions. The order also

requires that ICE Futures (1) maintain a coordinated market surveillance program that encompasses the cleared-only contracts and the underlying futures contracts, and (2) adopt position accountability levels for each of the cleared-only contracts subject to the order that are appropriate in light of the position accountability levels applicable to the underlying futures contracts. These measures should mitigate market risk.

Accordingly, the Commission has determined that ICE Clear will be able to employ reasonable safeguards to protect customer funds, and that it will be able to measure, monitor, manage, and account for risks associated with transactions and open interest in the bilateral swap contracts as it does for other contracts it clears. The Commission believes that ICE Clear has demonstrated sufficiently that it will continue to comply with all of the core principles in CEA Section 5b of the Act in connection with holding customer positions in OTC agricultural swaps with property held in segregated accounts pursuant to CEA Section 4d.

## **VI. Related Matters**

### **A. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (“PRA”)<sup>24</sup> imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The exemption will not require a new collection of information from any entities that would be subject to the exemption.

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<sup>24</sup> 44 U.S.C. §3507(d).

## **B. Cost-Benefit Analysis**

Section 15(a) of the CEA,<sup>25</sup> requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs. Rather, Section 15(a) simply requires the Commission to “consider the costs and benefits” of its action.

Section 15(a) of the CEA further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

The Commission has considered the costs and benefits of this exemptive order in light of the specific provisions of Section 15(a) of the CEA, as follows:

1. *Protection of market participants and the public.* The contracts that are the subject of the exemptive requests will only be entered into by persons who are “appropriate persons” as set forth in Section 4(c) of the Act. Only ESPs and those floor brokers and traders deemed ESPs pursuant to ICE Futures’ request herein will enter into transactions in the OTC agricultural swaps that are the subject of ICE Clear’s request. Allowing the commingling of funds supporting positions in the resulting cleared-only contracts with customer funds required to be segregated

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<sup>25</sup> 7 U.S.C. §19(a).

under CEA Section 4d will benefit ESP market participants by facilitating clearing and the reduction of credit risk for contracts that meet market participants' specific risk-management requirements. ESP customers holding positions in cleared-only contracts also would benefit from having their property held in segregated accounts in the event of the insolvency of an FCM. In addition, the order is premised on ICE Clear maintaining a number of existing risk management and other safeguards.

2. *Efficiency and competition.* Allowing these swap agreements to be cleared appears likely to promote liquidity and transparency in the markets for OTC derivatives on coffee, sugar, and cocoa, as well as on futures on those commodities. Determining ICE Futures floor members to be ESPs will likely increase the flow of trading information between markets, increase the pool of potential counterparties for participants trading OTC, and provide additional trading expertise to the market. The commingling of funds supporting cleared-only positions with customer funds supporting exchange-traded positions should result in improved, more efficient, collateral management and lower administrative costs since risk-offsetting positions will be held together in the same account rendering a more precise estimation of the risk posed by the account. These types of efficiencies also generally support competition.

3. *Financial integrity of futures markets and price discovery.* Price discovery is likely to be enhanced through market competition. The extended exemption also may promote financial integrity by providing the benefits of clearing to these OTC markets. As discussed above, the risks associated with commingling funds supporting cleared-only positions with customer funds supporting exchange-traded positions are appropriately mitigated.

4. *Sound risk management practices.* Clearing of OTC transactions is likely to foster risk management by the participant counterparties. ICE Clear's risk management practices in

clearing these transactions are subject to the Commission's supervision and oversight.

5. *Other public interest considerations.* The granted exemptions are likely to encourage market competition in agricultural derivatives products without unnecessary regulatory burden.

The Commission requested comment on its application of these factors in the proposing release. No comments were received.

## **VII. Order**

After considering the above factors and the comment letters received in response to its request for comments on its application of these factors in the proposing release, the Commission has determined to issue the following:

### **ORDER**

1) The Commission, pursuant to its authority under CEA Section 4(c) and subject to the conditions below, hereby:

(A) Permits ESPs to submit for clearing, and FCMs and ICE Clear to clear, OTC agricultural swap contracts in coffee, sugar, or cocoa; and

(B) Permits all ICE Futures floor members that are registered with the Commission, when trading for their own accounts, to be deemed ESPs for the purpose of entering into bilateral swap transactions involving coffee, sugar, or cocoa agricultural commodities to be cleared on ICE Clear.

2) The Commission, pursuant to its authority under CEA Section 4d and subject to the conditions below, hereby permits ICE Clear and its clearing members that are registered FCMs and acting pursuant to this order to hold money, securities, and other property, used to margin,

guarantee, or secure transactions in OTC agricultural swap contracts involving coffee, sugar, or cocoa and belonging to customers that are ESPs (including customers that are deemed ESPs in accordance with this order) with other customer funds used to margin, guarantee, or secure trades or positions in commodity futures or commodity option contracts executed on or subject to the rules of a contract market designated pursuant to Section 5 of the Act in a segregated account or accounts maintained in accordance with Section 4d of the CEA (including any orders issued pursuant to Section 4d(a)(2) of the CEA) and the Commission's regulations thereunder, and all such customer funds shall be accounted for and treated and dealt with as belonging to the customers of the ICE Clear clearing member consistently with CEA Section 4d and the regulations thereunder.

3) This order is subject to the following conditions:

(A) The contracts, agreements, or transactions subject to this order must be executed pursuant to the requirements of Part 35 of the Commission's regulations, as modified herein, and are limited to cleared-only contracts in the following agricultural products: coffee, sugar, or cocoa;

(B) The economic terms and the daily settlement prices of each contract, agreement, or transaction subject to this order must be analogous to the economic terms, and equal to the daily settlement prices, respectively, of a corresponding futures contract listed for trading on ICE Futures;

(C) All contracts, agreements, or transactions subject to this order must be submitted for clearing by an ICE Futures clearing member to ICE Clear pursuant to ICE Clear rules;

(D) Each ICE Futures floor member acting as an ESP pursuant to this order must be the subject of a financial guarantee from a member of ICE Clear covering the trading of the OTC

swap contracts, agreements, or transactions subject to this order. The clearing member must be registered with the Commission as an FCM and must clear for the floor member the contracts, agreement, or transactions covered by the financial guarantee;

(E) An ICE Futures floor member is prohibited from entering into a transaction in a cleared-only contract subject to this order with another ICE Futures floor member as the counterparty;

(F) ICE Clear and its clearing members will mark to market each cleared-only contract subject to this order on a daily basis in accordance with ICE Clear rules;

(G) ICE Clear will apply its margining system and calculate margin rates for each cleared-only contract subject to this order in accordance with its normal and customary practices;

(H) ICE Futures must maintain appropriate compliance systems in place to monitor the transactions of its floor members in the OTC swap transactions permitted pursuant to this order;

(I) ICE Clear will apply appropriate risk management procedures with respect to transactions and open interest in the cleared-only contracts subject to this order. ICE Clear will conduct financial surveillance and oversight of its members clearing the cleared-only contracts, and will conduct oversight sufficient to assure ICE Clear that each such member has the appropriate operational capabilities necessary to manage defaults in such contracts. ICE Clear and its clearing members acting pursuant to this order will take all other steps necessary and appropriate to manage risk related to clearing cleared-only contracts;

(J) ICE Clear will make available open interest and settlement price information for the cleared-only contracts in the eligible products (coffee, sugar, and cocoa) on a daily basis in the same manner as for contracts listed on ICE Futures;

(K) ICE Futures shall establish and maintain a coordinated market surveillance program that encompasses the cleared-only contracts subject to this order and the underlying futures contracts listed by ICE Futures on its designated contract market. ICE Futures shall adopt position accountability levels for each of the cleared-only contracts subject to this order that are appropriate in light of the position accountability levels applicable to the underlying futures contracts.

(L) Cleared-only contracts subject to this order shall not be treated as fungible with any contract listed for trading on ICE Futures.

(M) Each FCM acting pursuant to this order shall keep the types of information and records that are described in CEA Section 4g and Commission regulations thereunder, including but not limited to Reg. §1.35, with respect to all cleared-only contracts in eligible products subject to this order. Such information and records shall be produced for inspection in accordance with the requirements of Reg. §1.31;

(N) ICE Futures shall provide to the Commission the types of information described in Part 16 of the Commission's regulations in the manner described in Parts 15 and 16 of the Commission's regulations with respect to all cleared-only contracts;

(O) ICE Clear will apply large trader reporting requirements to cleared-only contracts in accordance with its rules, and each FCM acting pursuant to this order shall provide to the Commission the types of information described in Part 17 of the Commission's regulations in the manner described in Parts 15 and 17 of the Commission's regulations with respect to all cleared-only contracts in which it participates; and

(P) ICE Clear and ICE Futures shall at all times fulfill all representations made in their requests for relief under CEA Sections 4(c) and 4d and all supporting materials thereto.

This order is based upon the representations made and supporting material provided to the Commission by ICE Clear and ICE Futures in their requests. Any material change or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its finding that the exemptions set forth herein are appropriate. Further, in its discretion, the Commission may condition, modify, suspend, terminate, or otherwise restrict the exemptions granted in this order, as appropriate, on its own motion.

Issued in Washington, DC, on December 12, 2008 by the Commission.

A handwritten signature in black ink, appearing to read "David A. Stawick". The signature is written in a cursive, flowing style.

**David A. Stawick**

Secretary of the Commission