



New York  
Mercantile Exchange

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February 7, 2008

Mr. David Stawick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> St. N.W.  
Washington, D.C. 20581

COMMENT

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Re: **ICE Clear and ICE Futures Exemption Requests and Request for Relief Pursuant to Section 4(C): 72 F.R. 68862 (December 6, 2007)**

Dear Mr. Stawick:

The New York Mercantile Exchange, Inc. ("NYMEX" or "Exchange") appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC" or "Commission") Federal Register Release dated December 6, 2007 ("the Release").<sup>1</sup> ICE Clear is proposing to offer clearing services for agricultural swaps that will be executed off-exchange and then novated and replaced with a position in a contract to be listed by ICE Clear on a "clearing-only" basis. NYMEX is a for-profit corporation organized under the laws of the State of Delaware. It is the chief operating subsidiary of NYMEX Holdings, Inc., ("NYMEX Holdings"). As a designated contract market and a registered derivatives clearing organization, NYMEX is the largest exchange in the world for the trading and clearing of futures and options contracts on energy and metals commodities.

**NYMEX Support for OTC Clearing**

NYMEX is a strong advocate of the provision of clearing services for transactions executed off-exchange in OTC trading venues. The Exchange was one of the first DCOs to begin providing this service to OTC market participants. NYMEX presumes for purposes of this comment letter that the benefits of such clearing services that are currently enjoyed by other commodity categories also would apply to agricultural products as well and generally supports making OTC clearing services available for agricultural swaps. The balance of the comment letter will consider a few points that warrant clarification.

<sup>1</sup> The CFTC requested comment on whether to extend the exemption granted under Part 35 of the Commission's regulations to certain agricultural over-the-counter ("OTC") swaps that do not meet the requirements of Commission Regulation 35.2. This exemption was requested by ICE Clear U.S., Inc. ("ICE Clear"), a derivatives clearing organization ("DCO"). The CFTC also requested comment on whether ICE Futures U.S., Inc. ("ICE Futures U.S.") floor traders and floor brokers who are registered with the Commission, when trading for their own accounts, may be determined to be eligible swap participants ("ESPs") and permitted to enter into certain specified OTC swap transactions. This exemption was requested by ICE Futures U.S., a designated contract market. It appears that the relief for both petitions is proposed to be addressed pursuant to the CFTC's authority under Section 4(c) of the Commodity Exchange Act ("Act"). Section 4(c) generally authorizes the Commission to exempt "any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of Section 4 from any requirements of the Act (excepting certain specified provisions). Although Section 4(c) by its terms appears to apply only to exemptions from statutory provisions, the broader question for the Commission may be whether it is an appropriate exercise to in effect create an exemption to an exemption. As an alternative, the CFTC may wish to consider undertaking a rulemaking to amend Part 35 so that the relief may be of broader application.

New York Mercantile Exchange, Inc.  
World Financial Center  
One North End Avenue  
New York, NY 10282-1101  
(212) 299-2000

*The New York Mercantile Exchange, Inc., is composed of two divisions.  
The NYMEX Division offers trading in crude oil, heating oil, unleaded gasoline,  
natural gas, electricity, coal, propane, platinum, and palladium. The COMEX Division  
offers trading in gold, silver, copper, and aluminum.*

### **Review of OTC Clearing Proposal**

A number of agricultural commodities have experienced a significant run-up in price over the last twelve to eighteen months along with a measure of increased volatility at the higher price levels.

That market activity in and of itself should not be a basis for exclusion of these types of products from OTC clearing services. Rather, in the interest of a level and competitive playing field, the CFTC needs to maintain uniform standards across product types regarding the conditions and requirements that will be applicable to the provision of OTC clearing services. Thus, the CFTC should clarify the extent to which the liquidity and volatility of the underlying commodity is material in weighing the appropriateness of OTC clearing for a particular product or commodity. The CFTC also should clarify the extent to which routine monitoring tools, such as large trader reporting and position accountability levels and/or position limits are appropriate for OTC clearing generally. Substantive process, fairness and policy consistency concerns all support the creation of consistent standards and conditions applicable to the clearing of agricultural swaps relative to other commodities that are eligible for OTC clearing.

### **Review of ESP Relief**

The Release sets forth several conditions that would apply for ICE Futures US floor members becoming ESPs and then observes that the list of conditions is “substantially similar” to previous CFTC orders that permit floor members to be eligible contract participants. Yet, the Commission previously has required that the clearing member providing a financial guarantee to a floor member must maintain capitalization of a certain size in order to be able to issue such guarantees. That requirement is not included in the list of conditions to be applied to ICE Clear, and the Release does not provide any policy rationale for the standards for ESP relief to be different from the standards applicable to orders for ECP status. Absent the articulation of such a rationale, the Commission should clarify the uniform conditions that would be applicable to a request for relief for CFTC registrants either to obtain ESP or ECP status.

### **Request for Section 4(c) Relief**

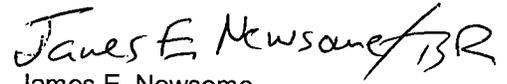
The CFTC additionally should identify any remaining applicability of requirements concerning standardized terms or the credit-worthiness of a counterparty. Finally, the CFTC should also confirm the continuing vitality of the requirement that the swap is not “entered into and traded on or through a multilateral transaction execution facility.” In that connection, as this type of facility does not appear to be defined by CFTC regulation, the Commission should further clarify the scope of this facility relative to terms that are defined, such as the term “trading facility” as that term is used in the Act.

### **Conclusion**

We support allowing OTC clearing services to be made available for agricultural swaps. We also strongly believe that there should be a level playing field across product types with regard to the requirements and conditions imposed upon DCOs generally offering OTC clearing services. A commitment to regulatory parity is an inherent requirement for just and equitable treatment, regulatory fairness and substantive due process under the law.

Should you require any additional information or have any comments or questions regarding this comment letter, please do not hesitate to contact me at any time.

Very truly yours,

Handwritten signature of James E. Newsome in black ink, with a stylized 'BR' at the end.

James E. Newsome  
President and Chief Executive  
Officer

cc: Walt Lukken, Acting Chairman  
Michael Dunn, Commissioner  
Jill E. Sommers, Commissioner  
Bart Chilton, Commissioner  
Ananda Radhakrishnan  
Rick Shilts  
David Van Wagner