09-1
(1)

COMMENT

ICE

Atlanta Calgary Chicago Houston London New York Singapore Winnipeg

BY ELECTRONIC TRANSMISSION

February 20, 2009

Mr. David Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Re: Conflicts of Interest in Self-Regulation and Self-Regulatory Organizations

Dear Mr. Stawick:

ICE Futures U.S., Inc. ("ICE Futures" or the "Exchange") appreciates the opportunity to comment on the acceptable practices for Core Principle 15 insofar as they relate to the definition of the term "public director" proposed by the Commission and published in 74 Fed. Reg. 3475-3480 (January 21, 2009) (the "Amendments").

ICE Futures is a designated contract market ("DCM") under the Commodity Exchange Act that provides a marketplace for trading in agricultural, equity index and currency contracts. These markets are available to participants around the world through a technology infrastructure and trading platform operated by the Exchange's parent, IntercontinentalExchange, Inc., and an options trading floor maintained in New York. Participants in ICE Futures' markets represent a diverse range of traders including commercial hedgers, futures commission merchants, floor traders and other speculators.

The Amendments resolve certain ambiguities that existed in the acceptable practices originally adopted in January 2007. The proposed acceptable practices also reflect the Commission's incorporation of some of the comments previously made with respect to the amendments that were proposed in March 2007. In

ICE Futures U.S., Inc.
World Financial Center
One North End Ave
New York, NY 10282
phone 212 748 4000
fax 212 742 6981
online www.theice.com

particular, we commend the decision to free a DCM's public directors from bright-line tests that would have been failed if the directors also served on the board of the DCM's affiliates.

The Commission has recognized from the outset that the material relationship test is the single most important element of the definition of public director. Each DCM must conduct a facts and circumstances analysis to determine whether the relationship between the DCM and a potential public director is "material" within the meaning of the acceptable practices. That is, determine whether the relationship reasonably could affect the independent judgment or decision-making of the director. For most of the disqualifying relationships in the bright-line test---officers and employees of the DCM or its affiliates, members of the DCM and officers and directors of such members--- the relationship is so obviously material that no reasonable disagreement could be said to exist on the question of precluding service as a public director. However, the conclusion is not so clear in the case of indirect compensation relationships and, for that reason, we believe they should be scrutinized under the materiality test alone.

The bright-line test would exclude from the definition of public director any person who is an officer, director or partner of a firm which received more than $100,000 in combined annual payments from the DCM or any of its affiliates for legal, accounting or consulting services, subject to a one-year look back. Because this prohibition is so broad, and the dollar threshold so low, it needlessly sweeps into its net payments that would be considered *de minimis* by the firm being compensated and relationships that might not automatically create a conflict of interest.

For example, as proposed, the acceptable practices would preclude a person who is serving as an independent director of a large consulting firm from serving as a public director of the DCM, even though the individual is a non-executive director whose compensation as such is not driven by the profitability of the consulting firm. The bright-line test eliminates any facts and circumstances analysis that could result in distinguishing between the independent director in the hypothetical above, and a director who is the CEO and majority shareholder of a small consulting firm.

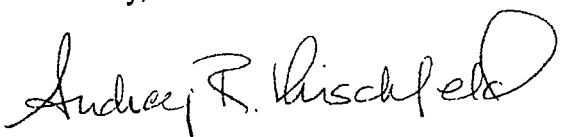
Setting the indirect compensation threshold at only $100,000 raises similar issues. Because the level is so low, the bright-line test excludes from service as public

directors individuals who may have no material relationship with the DCM. Payment of a $100,000 legal or consulting fee to a firm with $250 million in annual revenues would not give rise to the same considerations as payment of that amount to a firm with annual revenues of only $2.5 million. The DCM should be entrusted to evaluate all the relevant facts and circumstances, just as it must do for any other situation not covered by the bright-line test, and determine whether the independent judgment of a public director would be compromised by the indirect compensation arrangements. In the event that the Commission believes the appearance of a conflict of interest exists in a particular case, it can review the DCM's decision using the records required to be maintained under the acceptable practices.

To the extent that the Commission nonetheless determines to continue with the approach in the Amendments, we encourage it to significantly increase the dollar threshold for indirect compensation. In this respect the standards of the New York Stock Exchange for determining the independence of directors serving on the boards of listed-companies are instructive.[1] The Exchange is not advocating adoption of the NYSE standards *per se,* but rather note that there is a wide range between the two standards and that a higher threshold would eliminate some of the concerns highlighted in this letter and would result in a more meaningful and effective safe harbor under Core Principle 15.

Again, ICE Futures appreciates the opportunity for a dialogue on the elements of the acceptable practices and the careful consideration the Commission has given to this important issue.

Sincerely,



Audrey R. Hirschfeld
Senior Vice President and General Counsel

[1] In the case of indirect compensation, NYSE Rule 303A.02 (b)(v) precludes a person from being deemed 'independent' with respect to a listed company if such person is an employee, or a family member is an executive officer, of a company that has made payments to, or received payments from, the listed company for property or services exceeding the greater of $1 million or 2% of such other company's consolidated gross revenues.