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January 5, 2009

Mr. David Stawick
Secretary of the Commission
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

COMMENT

Re: **Proposed Rules for Trading Off the Centralized Market**

Dear Mr. Stawick:

ICE Futures U.S., Inc. ("ICE Futures" or "Exchange") submits this letter in response to the Commission's Request for Comments appearing in 73 Fed. Reg. 54097, et seq. (September 18, 2008) (the "RFC") concerning the proposed amendments to Regulation 1.38 and guidance and acceptable practices for compliance with Core Principle 9 under the Commodity Exchange Act, as amended (the "Act") as it relates to Regulation 1.38.

ICE Futures is a designated contract market ("DCM") under the Act which provides a marketplace for trading in agricultural, equity index and currency contracts. ICE Futures offers these markets to participants around the world through a technology infrastructure and trading platform operated by its parent, IntercontinentalExchange, Inc. and an open-outcry trading floor maintained in NewYork. The members and participants of ICE Futures represent a diverse range of market users including floor brokers, commercial hedgers, futures commission merchants, commodity trading advisors and broker-dealers.

The RFC reflects the Commission's careful consideration of the comments received in response to the July 1, 2004 Notice of Proposed Rulemaking (the "NPR"), which had addressed Regulation 1.38 and Core Principle 9 under the Act. We commend the Commission for incorporating into the RFC many of the comments that were submitted in response to the 2004 NPR. As an example, the Commission has revised the former "one size fits all" standard for setting the appropriate minimum size of block trades, and is proposing that DCMs analyze the product and the marketplace when setting and revising the minimum size threshold. However, the Exchange is troubled by some of the standards identified in the Acceptable Practices, insofar as they are not consistent with long-standing Exchange rules or industry practice, and the rationale underlying their inclusion is not explained in the RFC. The particular areas of concern are discussed below.

Pricing of Exchange of Futures for Commodities or for Derivative Positions

In the RFC the Commission sets out the following guidance and acceptable practice regarding the pricing of exchange of futures for commodities or for derivative positions ("EFPs"), without any discussion or explanation as to why this should be the case:

> "The price differential between the futures leg and the commodities leg or derivatives position should reflect commercial realities, and at least one leg of the transaction should be priced at the prevailing market price."(emphasis added)

ICE Futures disagrees with the assertion that the pricing of EFP transactions should have such a limitation, and notes that no such requirement exists under its rules today. The RFC injects this new requirement without any explanation of why there should be restrictions on the flexible EFP pricing enjoyed by traders today. EFP transactions have a long history in the futures industry. Traditionally, EFPs were executed when the physical commodity being delivered didn't meet the standards for delivery under the terms of the futures contract being exchanged. The commercial, who owned the physical and a short futures position, would arrange with another commercial entity that wanted the physical and had a long futures position, to switch ownership of the physical and their respective futures positions. In essence, it was a delivery off the exchange. Pricing of the physical would take into consideration various factors, including the inability to meet the standards for exchange delivery, which by its very nature meant that the price would be different than the prevailing market price.

EFPs have evolved from their traditional purpose along with the growth and evolution of the derivatives markets, and are used to open as well as close out positions. Today in the agricultural markets traded at ICE Futures, commercial users may enter into long term forward contracts which slowly unwind as monthly deliveries of the physical take place and there is no longer a need to hedge that delivery month. EFPs are the mechanism by which these long term forward contracts are unwound. The pricing terms of the forward contracts may be agreed to long before the EFPs are transacted and reflect the needs of the parties, not necessarily the prevailing market price on a date in the future.

Currently, our rules require that an EFP must consist of two separate, bona fide transactions in which the seller of the futures is the buyer of the physical or derivative product, and vice versa. To our knowledge, no exchange has a rule limiting the pricing of EFPs. EFP surveillance is, and always has been, based upon a review of the legitimacy of the two transactions, not an analysis of the price. The Commission is now introducing, via the Acceptable Practice, an entirely new element without any discussion of the purpose or reason behind it. It is unclear why a currently legitimate EFP should no longer qualify as such if it does not meet a new and arbitrarily imposed pricing standard. In addition, for those commercials that have long term forward contracts currently in place, the pricing requirement may interfere with their ability to unwind. To introduce a requirement that is at odds with long-standing industry practice, without any discussion of why the prevailing commercial practice should be rejected, is unwarranted and could be disruptive to the market. We urge the Commission to reconsider this position.

Pricing and Recordation of Block Trades Between Affiliated Parties

All transactions executed between affiliated parties are required by ICE Futures to be done at arm's length, irrespective of the specific trade type. For example, Rule 4.19 concerning cross trades and market surveillance procedures for reviewing EFPs specifically require that each affiliated party has separate business operations, separate decision makers and separate trading accounts which are not aggregated for position limit purposes. Once those standards are met, the transaction itself must meet the requirements applicable to the particular trade type under the Rules.

The Commission is now proposing to amend Regulation 1.38 by adding a pricing restriction on block trades executed between affiliated entities. The stated purpose of the pricing restriction is to establish objective criteria that will guard against affiliated parties engaging in potential trading abuses and collusive activity. The proposed pricing standard requires that the price "must be based on a competitive market price, either by falling within the contemporaneous bid/ask spread on the centralized market or calculated based on a contemporaneous market price in a related cash market." The Exchange does not believe that an objective pricing standard is essential to the legitimacy of a block trade transacted between affiliated parties. Rather, we believe that, so long as the affiliated parties meet all of the criteria of the Exchange rules and procedures establishing the independence of the parties with respect to the transaction - separate operations, separate business purposes, separate decision makers and separate trading accounts - they should not be limited in pricing the transaction, other than to use a price that is fair and reasonable. Using the contemporaneous price from the centralized market is certainly one way to establish a fair and reasonable price for a block trade, but it is not the only way to do so, nor does it ensure that the transaction does not otherwise contravene applicable rules or law for reasons not readily apparent from the price alone.

The pricing standard also poses impediments for the parties because block trades are not necessarily executed at times when the centralized market has a bid/ask price or the cash market is active. This is particularly true for agricultural commodities, in contrast to stock indexes and foreign exchange. Consequently, it may be difficult to say with any level of objectivity, what the prevailing market price is at a particular time on a specific day. In addition, the bid/ask in the electronic environment can change in milliseconds making it difficult to determine the appropriate bid/ask that existed at the time the block trade was agreed upon between the parties. Moreover, it may not be economically feasible for either party to execute at a price that would fall within the contemporaneous bid/ask spread or cash market price, but would be feasible to execute at a price that is considered fair and reasonable under all the circumstances. Finally, the number of contracts bid or offered in connection with the contemporaneous bid/ask spread may not be, and in fact is probably not, as high as the number of contracts that are part of a block trade. Therefore, the contemporaneous bid/ask spread may only be a representative price for a small portion of the entire block trade.

Trading among affiliated parties has always been subject to a higher level of scrutiny because of the relationship between the parties and the opportunities that flow from it. The objective pricing criteria adds nothing to market surveillance, except that it would automatically render suspect an otherwise legitimate transaction that was not priced in accordance with the proposed standard. In light of the heightened scrutiny already directed to transactions between affiliated parties in general, the Commission's proposal to amend Regulation 1.38 to limit the prices at which affiliated parties can execute block trades injects a level of detail that is inconsistent with the agency's oversight role and the purpose of having flexible core principles. For that reason, we believe block trades between affiliated entities should be subject to the standard of "fair and reasonable" pricing as are block trades between non-affiliates.

In addition, the Acceptable Practice requires that the Trade Register maintained by a DCM under Regulation 1.35 specifically identify block trades that are executed between affiliated parties. There has never been any such requirement in Regulation 1.35, and it is inappropriate to back-door such a requirement by making the safe harbor of the Acceptable Practice conditioned on compliance with this requirement. The Exchange can identify block trades between affiliated firms for surveillance purposes without flagging each such trade in its Trade Register.

ICE Futures appreciates the opportunity to comment on the RFC and would be happy to provide any further information that the Commission may require. If you have any questions regarding this letter, please contact the undersigned at (212) 748-4083.

Very Truly Yours,

Audrey R Hirschfeld

Audrey R. Hirschfeld
Senior Vice President and General Counsel