ICE

Atlanta Calgary Chicago Houston London New York Singapore

Mr. David Stawick
Secretary
Commodity Futures Trading Commission
1151 21st Street N.W.
Washington, D.C. 20581

August 5, 2009

Request for Modification of Exemptive Order Issued Under Section 4(c) of the Commodity Exchange Act

On December 12, 2008, the Commission issued an Order (1) pursuant to Section 4(c) of the Commodity Exchange Act (the "Act") (a) permitting eligible swaps participants to submit for clearing, and ICE Clear U.S. ("ICE Clear") and futures commission merchants ("FCMs") to clear, certain over-the–counter ("OTC") swaps contracts involving coffee, sugar and cocoa and (b) determining certain floor brokers and traders to be eligible swaps participants; and (2) pursuant to Section 4d of the Act , permitting ICE Clear and FCMs clearing through ICE Clear to commingle certain customer positions in the cleared swaps contracts and the property supporting those positions with property and positions otherwise required to be held in segregated customer accounts (hereafter the "Order"). ICE Clear commenced clearing the permitted swaps on February 13, 2009.

The Order was subject to certain conditions that were based, in substantial part, on the facts and representations made by ICE Clear in its exemptive request. In particular, Section 3(B) provides that:

> "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".

ICE Clear is requesting a modification of the terms of the Order to allow it to (1) clear OTC swaps in coffee, sugar and cocoa that have economic terms analogous to the terms of the corresponding futures contracts listed for trading on ICE Futures U.S. ("ICE Futures") except for the fact that the swaps extend to a date beyond that for which there is a futures contract listed for trading on ICE Futures (hereafter "Long-Dated Swaps") and (2) establish independent settlement prices for Long-Dated Swaps until such time as there is a corresponding futures contract, with the same expiration date, listed for trading on ICE Futures . ICE Clear believes that the analysis conducted by the Commission under Section 4(c) of the Act and the conclusions it reached in support of issuing the Order are equally valid in all respects when applied to clearing Long-Dated Swaps and fully support the requested modification.

ICE Clear is not asking the Commission to modify the Section 4d Order to include Long-Dated Swaps within its scope, even though it believes that its risk management procedures mitigate any additional risk that Long-Dated Swaps might be viewed as posing were they to be carried in the customer account and the associated margin funds commingled with segregated customer funds. However, once the expiration date of a swap that was long-dated when initially cleared corresponds to a futures contract listed for trading by ICE Futures, the swap would then satisfy all the requirements specified in the Order and, therefore, could be carried in the customer segregated account like any other cleared swap that was not initially cleared as a Long-Dated Swap, subject of course to the conditions of the Order. Among other things, at that point in time the Clearing House would no longer establish independent settlement prices for the swap originally cleared as long-dated, but would, instead, use the settlement price of the corresponding listed futures contract.

For example: assume that a trader clears a Long-Dated Swap in sugar today with an expiry date of July 2015. The current ICE Futures listing cycle will result in a July 2015 sugar futures contract being listed for trading on August 1, 2012. Consequently, on that date the trader could enter into a cleared-only sugar swap for July 2015 and, in accordance with the terms of the Order and the Clearing House rules, it would be eligible to be carried in segregation and would be settled using the corresponding futures settlement price. On August 1, 2012, the Long-Dated Swap that was cleared today will become indistinguishable from any other July 2015 sugar swap that the trader clears on or after August 1, 2012. All of the swaps will expire and be cash settled in the same manner and on the same day in July 2015, and importantly, all of them will be marked-to-market by the Clearing House using the settlement price for the corresponding ICE Futures contract. In these circumstances, it is appropriate and consistent with the terms and analysis contained in the Order, for Long-Dated Swaps to be carried in segregation, like any other cleared swap covered by the Order, when a corresponding futures contract is listed for trading on ICE Futures.

I. The Commission's Earlier Findings Remain Valid

In the Order the Commission analyzed the three prongs of Section 4(c) in deciding to grant the requested exemption. First, if found that granting the exemption was consistent with the public interest and the purposes of the Act because it would foster financial innovation and competition. We believe that bringing transparency to the OTC markets and fostering the avoidance of systemic risks also are consistent with that public interest and the purposes of the Act. Therefore modifying the Order to extend its coverage to Long-Dated Swaps in the eligible instruments furthers policies underlying the Act and is a logical extension of the Order.

In its analysis the Commission also found that the relevant swaps would be entered into solely by "appropriate persons" because they would be limited to persons qualifying as eligible swaps participants ("ESPs") and those floor brokers and floor traders deemed ESPs for that purpose. This conclusion remains valid and unaffected by the requested modification of the Order because the same categories of traders would be eligible to engage in Long-Dated Swaps.

With respect to the third prong of the section 4(c) analysis, the Commission concluded that 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. In this regard the Order acknowledged that "ICE Clear will use the same systems, procedures, people and processes" to clear the swaps as it currently employs for all other transactions it clears. This finding, likewise, remains valid and unchanged by the further exemptive relief requested, as described hereafter.

Heightened financial requirements for clearing members, margining, position limits and all other aspects of the risk management practices utilized by ICE Clear, and relied upon by the Commission in issuing the Order, will be leveraged and used in conjunction with tools that have been specifically tailored for Long-Dated Swaps. For example, ICE Clear will determine and collect appropriate margin for Long-Dated Swaps and monitor the price and volatility risks in comparison to the underlying futures contracts, so that if increased risk warrants a higher margin level, margin requirements can be increased.

Additionally, to ensure adequate coverage of potential liquidation costs, ICE Clear will calculate the liquidation and carry costs of Long-Dated Swaps required to mitigate OTC risk in the actively traded underlying future.

Long-Dated Swaps will be included in the calculation and application of ICE Clear's position limit regime, which establishes two limits (calculated separately for house and customer accounts) on each clearing member based on its adjusted net capital. The first limit, referred to as "permitted position risk", is the amount of original margin required for the positions carried by the firm, excluding option liquidating value. When the permitted position risk is exceeded by a clearing member, it must deposit additional margin (referred to as a supermargin deposit) equal to 50% of the amount by which the position risk exceeds the permitted position risk. The position risk that its clearing members can carry is subject to an absolute maximum which currently is 200% of the firm's capital in the case of customer accounts, 100% of its capital in the case of proprietary accounts and 250% of its capital in the case of all accounts combined. A firm that exceeds the maximum permitted position risk must transfer or liquidate such number of contracts as are necessary to bring the position risk of the clearing member into compliance with the permitted levels, failing which, ICE Clear can liquidate such contracts. Attached as Appendix A is a chart reflecting the permitted risk levels. ICE Clear always has the discretion to establish lower risk levels for any clearing member based upon its evaluation of the operational and financial capacity of the clearing member.

ICE Clear will also continue to use its real-time risk monitoring software that issues automatic alerts whenever clearing members exceed pre-determined surveillance thresholds established by the Risk Department based on trading, position and valuation activity of an account.

II. The Requested Modification

The Order provides that the economic terms and the daily settlement prices of each cleared swap 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. It is requested that the Order be modified to allow ICE Clear to clear Long-Dated Swaps and establish independent settlement prices for them until the date on which there is a corresponding futures contract listed for trading on ICE Futures.

In order to establish such prices, ICE Clear will develop specific pricing models for Long-Dated Swaps and use the best available market data to determine settlement prices. This process is similar to the industry standard pricing procedures for option pricing models used to value longer dated options positions in less liquid futures contract months. The market data that will be considered, in descending order, include: (i) cleared-swaps data submitted to the clearing house; (ii) year-on-year spread values for the underlying traded futures contract for actively traded months (as described below); (iii) OTC transaction data solicited from third-party brokers such as the major inter-dealer brokers; (iv) indicative quotes provided by third-party brokers; and (v) historical data.

The forward curves for sugar, coffee and cocoa share several characteristics. First, the seasonal pattern for each successive year typically resembles the seasonal pattern or "shape" of the prior year, allowing for spot-month and, at times, second month anomalies. For instance, if Dec 2011 is greater than Jan 2011, then it is expected that Dec 2012 will be greater than Jan 2012. Second, the year-on-year differences for two successive years are correlated with the year-on-year spreads for the next two years, and so on. For instance, if Mar 2011 equals 75 cents, Mar 2012 equals 85 cents, and March 2013 equals 95 cents, then it is expected the value of March 2014 to be in a tight range around 105 cents. These two characteristics mean that the most important inputs for the creation of a high-quality, long-dated forward curve for settlement prices are: (i) an accurate seasonal shape for at least one full twelve-month period; and (ii) year-on-year spreads for at least one year in addition to the current year. These methodologies for creating forward curves are market standard and market tested. NYMEX ClearPort includes hundreds of contracts for which the forward curves are prepared in this manner. Similarly, in the OTC market, IntercontinentalExchange, Inc. has hundreds of OTC markets for which the forward curves are created in this fashion.

With ICE Futures' longstanding liquid sugar, coffee and cocoa futures contracts, ICE Clear has the necessary data and characteristics to produce a seven-year forward curve on a daily basis. This approach is comparable to establishing prices for an exchange-traded futures contract for which there is not an abundance of traded contracts in a particular delivery month. ICE Clear will utilize the best shape and year-on-year spreads (and any other relevant data as described above) to establish the settlement prices for Long-Dated Swaps. In addition, it will confirm the quality of this approach by comparing the resulting prices to other data it will receive, on a daily basis.

Based on all of the foregoing information, it is respectfully requested that the Commission modify section 3(B) of the Order to bring within the scope of the Order contracts, agreements and transactions with economic terms that are analogous—but for the expiration date-- to the economic terms of a corresponding futures contract listed for trading on ICE Futures, and allow ICE Clear to establish independent settlement prices for such contracts, agreements and transactions until there is a corresponding futures contract listed for trading on ICE Futures.

Please feel free to contact me at (212) 748-4083 or at audrey.hirschfeld@theice.com if you have any questions regarding this request.

Very Truly Yours,

Audrey R. Hirschfeld
Senior Vice President & General Counsel

cc: Tom Hammond

ATTACHMENT A

POSITION RISK LIMITS

The following table describes the limits set forth in the Bylaws for firms with adjusted net capital less than $1 billion:

Category	Permitted Position Risk	Maximum Position Risk
Customer	150% of Adjusted Net Capital	200% of Adjusted Net Capital
House	75% of Adjusted Net Capital	100% of Adjusted Net Capital
Customer and House Combined	200% of Adjusted Net Capital	250% of Adjusted Net Capital

Firms with adjusted net capital between $1 billion and $10 billion use the following table to determine position risk limits:

Adjusted Net Capital	Adjusted Net Capital for Position Risk	Maximum Position Risk Limits
Customer	$300,000,000	Limit is set on customer and house combined net margin
House	$112,500,000	Limit is set on customer and house combined net margin
Customer and House Combined	$400,000,000	$800,000,000 combined customer and house net margin

Firms with adjusted net capital in excess of $10 billion use the following table to determine position risk limits:

Adjusted Net Capital	Adjusted Net Capital for Position Risk	Maximum Position Risk Limits
Customer	$450,000,000	Limit is set on customer and house combined net margin
House	$225,000,000	Limit is set on customer and house combined net margin
Customer and House Combined	$600,000,000	$800,000,000 combined customer and house net margin