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**BY ELECTRONIC TRANSMISSION**

Submission 08-68  
December 11, 2008

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

OFFICE OF THE SECRETARIAT

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**Re: Amendments to By-Law Sections 5.5, 7.1, 7.2, 7.4 and 7.5 and Rules 111, 802, 803, 904, 906 and 907 and Resolutions Delegating Authority - Submission Pursuant to Section 5c(c)(1) of the Act and Regulation 40.6**

Dear Mr. Stawick:

Pursuant to Section 5c(c)(1) of the Commodity Exchange Act, as amended, and Commission Regulation 40.6, ICE Clear U.S., Inc. ("ICE Clear U.S." or "Clearing Corporation") submits, by written certification, amendments to By-Law Sections 5.5, 7.1, 7.2, 7.4 and 7.5 and Rules 111, 802, 803, 904, 906 and 907, attached as Exhibit A, and Resolutions delegating authority.

**Rules 111(b), 904, 907 and 906 - Conflicts of Interest and Clearing Member Financial Emergencies**

Rule 904 currently provides the procedure under which the Board can take such action as it deems necessary in the event there is a *substantial question* as to whether a Financial Emergency exists with respect to a clearing member. The amendments to Rule 904 provide that action may also be taken in the event that a Financial Emergency (not merely a substantial question) is found to exist. In addition, some of the types of actions that the Board may take have been enumerated.

Rule 907 has been amended to provide that the costs associated with transferring or liquidating contracts (in addition to the other costs already specified in the Rule) may be imposed on the clearing member, thereby allowing ICE Clear U.S. to recover expenses incurred in dealing with a Financial Emergency.

Rule 111(b) describes the process for assessing conflicts of interest when the matter before the Board involves a "named party in interest", such as a specific clearing member. Rule 111(b) was originally an ICE Futures U.S. rule adopted pursuant to CFTC requirements and

applicable to matters involving floor brokers. Accordingly, it has been amended to delete relationships that relate to floor brokers and address relationships that would involve clearing members. In particular, the amendments provide that a member of the Board will not automatically be deemed to have a conflict of interest solely because the firm with which he is affiliated executes transactions opposite the firm that is the named party in interest, or carries an account for or with the named party in interest or an Affiliated Person of the named party in interest. Rule 111(b) is made directly applicable to actions taken under Rule 904 by virtue of the amendments to Rule 906.

#### By-Law Sections 7.2 and 7.5 - Emergency Action

By-Law Sections 7.2 and 7.5 were amended to incorporate the definition of the term “emergency” contained in Part 40 of the Commission’s regulations. In addition, the supermajority requirement for taking emergency action has been reduced from three-fourths to two-thirds. A reference to the Executive Committee has also been added, making clear that it, too, has the power of the Board to take emergency action. The amendments also add the President as a person authorized to take emergency action, but only in the extraordinary event that neither the Board nor the Executive Committee can be convened, e.g., in a 9/11 scenario.

#### Miscellaneous Amendments

By-Law Section 5.5(b) enumerates the financial resources to be used by the Corporation in the event of a monetary default and allows a loan, secured by the Guaranty Fund, to be obtained. The amendment specifies that in the absence of the Board officers, the President, with the concurrence of any director, may secure such a loan.

The amendments to By-Law Section 7.1 are grammatical in nature, and the amendments to By-Law Section 7.4 change the order of persons authorized to take action during a physical emergency.

Rule 802 requires that the positions of a firm that is suspended or ceases to be a clearing member be immediately liquidated unless the contracts are transferred or certain specified Board officers determine that the financial integrity of the Clearing Corporation does not require such liquidation. The amendments to subparagraph (a)(i) specify that such transfers can be made by the clearing member or by the Clearing Corporation pursuant to auction procedures or other procedures that may be instituted by the Clearing Corporation. Subparagraph (a)(ii) has been amended to allow the President, with the concurrence of Board officers ( or in their absence, any director) to determine whether liquidation is actually necessary and to authorize the placement of hedging transactions to reduce the risk associated with maintaining positions of a suspended clearing member.

Rule 803 authorizes the placement of liquidating orders by the President with ICE Futures U.S. members. The amendments establish a succession of authority in the absence of the

President, authorize the hiring of a third party to effectuate the liquidation and allow orders to be placed directly to the trading platform of ICE Futures U.S.

In addition to the amendments described above, the Board adopted resolutions which delegate the Board's authority to the Executive Committee between regularly scheduled meetings of the Board and delegate the President's authority to other officers, in succession.

ICE Clear U.S. certifies that the amendments comply with the requirements of the Commodity Exchange Act and the rules and regulations promulgated thereunder. No substantive opposing views were expressed by members or others with respect to the amendments or resolution.

The amendments were adopted by ICE Clear U.S.'s Board of Directors on December 9, 2008 and will become effective on December 15, 2008.

If you have any questions or need further information, please contact me at (212) 748-4083 or at [audrey.hirschfeld@theice.com](mailto:audrey.hirschfeld@theice.com).

Sincerely,

Audrey R. Hirschfeld  
Senior Vice President  
General Counsel  
ICE Futures U.S., Inc.

cc: John Lawton  
CFTC, Division of Clearing and Intermediary Oversight  
James Goodwin  
CFTC, New York Regional Office

## EXHIBIT A

(In the text of the amendments below, additions are underlined and deletions are bracketed and lined out.)

### **Section 5.5. Monetary Defaults; Use of Guaranty Fund; Assessments**

\* \* \*

(b) If the margin, Guaranty Fund deposit and other assets of a Defaulting Clearing Member under the control of the Corporation are in the aggregate less than the Defaulted Obligation, and if the Defaulting Clearing Member fails to pay the Corporation the amount of the deficiency on demand, such Defaulting Clearing Member shall continue to be liable therefor, but the amount of the deficiency, until collected from the Defaulting Clearing Member, shall be met from the following sources of funds in the order listed (each such source to be fully utilized before the next following source is applied):

\* \* \*

(ii) If the President, with the concurrence of the Chairman or the Vice Chairman, or, in the absence of both the Chairman and the Vice Chairman, any director, so determines, a loan on such terms and conditions as they may determine to be necessary or appropriate (including without limitation granting an assignment, pledge or other lien on or security interest in the Guaranty Fund or the cash, securities and other property held in the Guaranty Fund as provided in Section 5.4(f) of these By-Laws);

[REMAINDER OF BY-LAW UNCHANGED]

### **Section 7.1. Exchange-Determined Emergency**

If [~~any~~] the Exchange determines that there is an Emergency, the Corporation shall take such action as may be ordered by, or as may be necessary or appropriate to implement emergency action ordered by, that Exchange with respect to (a) Contracts traded on or subject to the rules of th[at]e Exchange and cleared by the Corporation, and (b) Clearing Members of th[at]e Exchange.

### **Section 7.2. Corporation-Determined Emergency**

If the Board [~~, by a three-fourths~~] or the Executive Committee, by a two-thirds vote of the members of the Board or the Executive Committee present and voting at any meeting at which there is a quorum, determines that there is an Emergency, it may place into immediate effect a rule, or authorize other action to be taken by [~~which may provide for, or may authorize~~] the Corporation [~~to undertake, actions~~] as it deems necessary or appropriate to meet the Emergency. In the extraordinary event that neither the Board nor the Executive Committee can be convened under the circumstances then existing, the President may determine whether there is an Emergency and may place into effect a rule, or order such other actions to be taken, as the President deems necessary or appropriate to meet the Emergency. Any such determination and action ordered by the President shall be reported to, and reviewed by, the Board or the Executive Committee as soon as practicable thereafter. Any actions taken pursuant to this By-Law Section 7.2 shall be subject to the conflict of interest principles set forth in Rule 111 and shall be reported to the Commission no later than twenty-four (24) hours after the action is taken.

### **Section 7.4. Physical Emergency**

If, in the judgment of the persons specified below, the physical functioning of the Corporation is, or is threatened to be, severely and adversely affected by a Physical Emergency, such persons are authorized to take such action as they deem necessary or appropriate to deal with such Physical Emergency. The persons authorized to take action pursuant to this Section 7.4 are any one of the following, in the order of

their availability to take such action: (a) the ~~[Chairman]~~ President; (b) any Vice ~~[Chairman]~~ President; (c) the ~~[President]~~ Chairman; (d) any Vice ~~[President]~~ Chairman; and (e) any other officer of the Corporation.

### **Section 7.5. Definitions**

For purposes of this ARTICLE VII of the By-Laws, the following terms shall have the following meanings:

(a) The term "Emergency" means (i) any occurrence or circumstance which ~~[an]~~ the Exchange determines constitutes an emergency or physical emergency in accordance with the by-laws or rules of th[at]e Exchange, (ii) any Physical Emergency, or (iii) any occurrence or circumstance which the Board, Executive Committee or President, pursuant to Section 7.2, determines requires immediate action and threatens or may threaten such things as [the orderly matching, clearing or] the fair and orderly trading in, or the liquidation of, or delivery [or exercise pursuant to, any Contract, including such matters as:] pursuant to, any agreements, contracts or transactions cleared by the Corporation, including manipulative or attempted manipulative activity; any actual, attempted or threatened corner, squeeze, congestion or undue concentration of Positions; any circumstances which may materially affect the performance of agreements, contracts or transactions cleared by the Corporation, including failure of the payment system or the bankruptcy or insolvency of any Clearing Member; any action taken by any governmental body or any other board of trade, market or facility which may have a direct impact on trading on the Exchange or clearing by the Corporation; and any other circumstance which may have a severe, adverse effect upon the functioning of the Corporation.

~~[(i) Any Physical Emergency.~~

~~(ii) The bankruptcy or insolvency of any Clearing Member, or the initiation of any proceedings for the liquidation of any Clearing Member, or the imposition of any injunction or other restraint by any government agency, court or arbitrator upon a Clearing Member which may affect the ability of that Clearing Member to perform its obligations under the By-Laws or the Rules.~~

~~(iii) Any circumstance in which it appears that a Clearing Member or any other person has failed to perform Contracts, is insolvent, or is in such financial or operational condition or is conducting business in such a manner that such person cannot be permitted to continue in business without jeopardizing the safety of customers' funds, of other Clearing Members, or of the Corporation.~~

~~(iv) Any circumstance or event which suddenly curtails the operations of one or more banks involved in the margining of Contracts; and~~

~~(v) Any other unusual, unforeseeable and adverse circumstance with respect to which it is impracticable for the Corporation to submit, in a timely fashion, a reviewable rule to the Commission for prior approval.]~~

(b) The term "Physical Emergency" means any circumstance which ~~[may have]~~ has, or threatens to have, a severe, adverse effect upon the physical functions of the Corporation including, but not limited to, fire or other casualty, bomb threats, substantial inclement weather, power failures, communication breakdowns, transportation breakdowns and computer malfunctions, backlog or delay in clearing or in the processing of data related to clearing, trading system breakdown or any other similar events.

### **Rule 111. Conflicts of Interest**

(a) *Definitions.* For purposes of this Rule the following definitions shall apply:

\* \* \*

(3) The term "Board" shall mean the Board of Directors, and any subcommittee thereof duly authorized to take action or to recommend the taking of action on behalf of the [Exchange] Corporation.

(4) The term "oversight panel" shall mean any panel, or any subcommittee thereof, authorized to recommend or establish policies or procedures with respect to the [Exchange's] Corporation's surveillance, compliance, rule enforcement, or disciplinary responsibilities.

\* \* \*

(6) The term "named party in interest" shall mean a person or entity that is identified by name as a subject of any matter being considered by the [b]Board, a disciplinary committee, or oversight panel.

(7) The term "significant action" shall mean ~~[any of the following types of actions or rule changes that are implemented without the Commission's prior approval:~~

~~(i) Any actions or rule changes which address an "emergency" as defined in CFTC Regulation 1.41(a)(4)(i) through (iv) and (vi) through (viii); and,~~

~~(ii) A] (A) Emergency, as defined in Section 7.5(a) of the By-Laws and (B) any changes in margin levels[-(A)] that are designed to respond to extraordinary market conditions (such as an actual or attempted corner, squeeze, congestion or undue concentration of positions), or [(B)] that otherwise are likely to have a substantial effect on prices in any [e]Contract [traded at the Exchange] cleared by the Corporation; [but shall not include any rule not submitted for prior CFTC approval because such rule is unrelated to the terms and conditions of any contract traded at the Exchange. F] provided, however, that for purposes of clause (B) above, a margin change shall not be deemed likely to have a substantial effect on the price of a [e]Contract [traded on the Exchange] cleared by the Corporation if such margin change was made in response to a change in the Settlement [p]Price of any delivery month of such [e]Contract [which] if the amount of such margin change is equal to or less than 15% of the [s]Settlement [p]Price of such delivery month on the previous [b]Business [d]Day.~~

*(b) Named Party in Interest Conflict*

(i) Prohibition. No member of the Board, a disciplinary committee or oversight panel shall knowingly participate in such body's deliberations or voting in any matter involving a named party in interest where such member (A) is ~~[a named party in interest, (B) is an employer, employee or fellow employee of a named party in interest, (C) is associated with a named party in interest through a broker association, (D) has a family relationship with a named party in interest or (E)]~~ an officer, director or employee of the named party in interest or an Affiliated Person of such named party in interest or (B) has any other significant, ongoing business relationship with a named party in interest[-excluding relationships limited to executing futures or option transactions opposite each other or to clearing futures or options transactions through the same clearing member] or an Affiliated Person of such named party in interest. No member shall automatically be deemed to have a significant ongoing business relationship with a named party in interest solely by virtue of being an officer, director or employee of a Clearing Member or Affiliated Person of such a Clearing Member that executes trades opposite, clears Contracts for, carries Contracts with, the named party in interest of an Affiliated Person of such named party in interest.

\* \* \*

*(c) Financial Interest in a Significant Action Conflict*

(i) Prohibition. No member of the Board, a disciplinary committee or oversight panel shall participate in such body's deliberations and voting on any [s]Significant [a]Action if such member knowingly has a direct and substantial financial interest in the result of the vote based upon either Exchange or non-Exchange positions that could reasonably be expected to be affected by the [s]Significant [a]Action under consideration, as determined pursuant to this Rule.

(ii) Disclosure. Prior to consideration of any [s]Significant [a]Action, each member of the deliberating body who does not choose to abstain from deliberations and voting shall disclose to the President or his designee position information, that is known to such member, with respect to any particular month or months that are under consideration, and any other positions which the deliberating body reasonably expects could be affected by the [s]Significant [a]Action, as follows:

\* \* \*

(E) any other types of positions, whether maintained at the Exchange or elsewhere, held in the member's personal accounts or the proprietary accounts of the member's affiliated firm, that the [Exchange] reasonably expects could be affected by the significant action.

(iii) Procedure and Determination. [Exchange] Corporation staff shall determine whether any member is subject to a conflicts restriction under this paragraph (c) based upon a review of the most recent large trader reports and clearing records available to the [Exchange] Corporation, information provided by the member with respect to positions pursuant to paragraph (c)(ii) of this Rule and any other source of information that is held by and reasonably available to the [Exchange] Corporation, taking into consideration the exigency of the significant action being contemplated. Unless the deliberating body establishes a lower position level, a member shall be subject to the conflict restriction in paragraph (c)(i) of this Rule if the staff's review identifies a position in the member's personal or controlled accounts or accounts in which the member is a principal as specified in paragraphs (c)(ii)(A), (C) and (E), in excess of 10 lots, or a position in the accounts of the member's affiliated firm as specified in paragraphs (c)(ii)(B), (D) and (E), in excess of 100 lots.

[REMAINDER OF RULE UNCHANGED]

#### **Rule 802. Liquidation on Termination or Suspension of Clearing Member**

(a) When a Person ceases to be a Clearing Member of [any] the Exchange or is suspended as a Clearing Member of [any] the Exchange, all open Contracts ~~[on such Exchange]~~ carried by the Corporation for such Clearing Member shall be liquidated in the manner set forth in Rule 803 as expeditiously as is practicable unless and to the extent that:

(i) Such open Contracts are transferred by the Clearing Member ~~[to]~~ and accepted by one or more other Clearing Members, with the prior consent of the Corporation, or transferred by the Corporation to one or more other Clearing Members pursuant to an auction of the Contracts or other procedure instituted by the Corporation;

(ii) The President and the Chairman, [any] or in the absence of the Chairman, the Vice Chairman or, in the absence of both the Chairman and ~~[every]~~ the Vice Chairman, any director ~~[and the President]~~ determine that, in their opinion, the protection of the financial integrity of the Corporation does not require such a liquidation; or

(iii) Such liquidation is delayed because of the cessation or curtailment of trading on the ~~[Listing]~~ Exchange for such Contracts.

(b) If it is determined pursuant to paragraph (a)(ii) of this Rule 802 not to liquidate any open Contracts of a Person, or if the Corporation is unable for any reason to liquidate such open Contracts in a prompt and orderly fashion, the President and the Chairman, [any] or in the absence of the Chairman, the Vice Chairman or, in the absence of both the Chairman and ~~[every]~~ the Vice Chairman, any director ~~[and the President]~~ may authorize the execution from time to time for the account of the Corporation, solely for the purpose of reducing the risk to the Corporation resulting from the continued maintenance of such open Contracts, hedging transactions, including, without limitation, the purchase, grant or sale of Contracts. Such officers may delegate to one or more persons the authority to determine, within such guidelines as such officers shall prescribe, the nature and timing of such hedging transactions. ~~[Any authorization of hedging transactions shall be reported to the Board not later than noon on the next Business Day, and any~~

~~such hedging transactions that are executed shall be reported to the Board on a daily basis.]~~ Any costs or expenses, including losses, sustained by the Corporation in connection with transactions effected for its account pursuant to this paragraph shall be charged to such Person, and any gains, net of any costs and expenses, shall be credited to such Person.

### **Rule 803. Method of Closing Out**

(a) The open Contracts of any Person which, pursuant to Rule 802, are required to be liquidated pursuant to this Rule 803, shall be liquidated in such manner as the Corporation, in its discretion, may direct. Without limiting the generality of the foregoing:

(i) Any such liquidation may be effected by placing, with one or more Exchange members chosen at the discretion of the President, or, in the absence of the President, any Vice President, or in the absence of the President and each Vice President, any other officer, or by directly entering to the Exchange's trading platform, orders for the purchase, grant, exercise, or sale of Contracts. The President may designate and authorize an individual, and may hire a third party, to be responsible for the placement of such orders.

\* \* \*

(v) Notwithstanding any other provisions of this Rule 803(a), any such liquidation may be effected without placing orders for execution ~~[on the floor]~~, by making appropriate book entries on the records of the Corporation (including, without limitation, by pairing and canceling offsetting long and short positions in the same delivery months of a futures contract or in the same option series carried by a Clearing Member) at a price equal to the settlement price or settlement premium on the day such liquidation is ordered or at such other price as the Board may establish; provided, however, if an Order for Relief has been entered with respect to such Person, the Corporation will not effect any such liquidation by book entry except as may be permitted by Commission Regulations.

[REMAINDER OF RULE UNCHANGED]

### **Rule 904. ~~[Hearings in]~~ Clearing Member Financial Emergencies**

(a) If at any time the Board, in its sole discretion, determines that a Financial Emergency exists, or there is a substantial question as to whether a Financial Emergency exists with respect to any Clearing Member, the Board may suspend, or take any other action against, involving or with respect to such Clearing Member and/or any Affiliated Person of such Clearing Member which is also a Clearing Member as the Board may deem necessary or appropriate including, but not limited to, order the Clearing Member to deposit such additional margin with the Corporation as deemed appropriate; prescribe such additional capital requirements as deemed appropriate; order special or advance variation margin payments to be made by such Clearing Member; prescribe such limitations on Position Risk as deemed appropriate; or transfer Contracts to another Clearing Member through an auction of such Contracts or otherwise.

(b) Any action taken against, involving or with respect to any Clearing Member pursuant to this Rule shall be taken after notice and an opportunity to be heard, unless (i) such Clearing Member shall have waived the right to such notice and opportunity, or (ii) the ~~[Board]~~ President, in ~~[its]~~ his sole discretion shall determine that (A) giving such notice or opportunity to be heard before taking such action is not practicable under the circumstances, and (B) there is reason to believe that immediate action is necessary to protect the best interests of the marketplace. Any such notice shall be given not later than one hour before the hearing.

\* \* \*

(d) In any hearing pursuant to this Rule the Board shall not be bound by formal rules of evidence or by technical considerations~~[-The Board]~~ and shall follow such procedures as it deems best calculated to ascertain material information and otherwise to insure a fair and impartial hearing.



(e) At the hearing, the President or his designee shall present such evidence and considerations as may tend to show that a Financial Emergency exists or that there is a substantial question as to whether a Financial Emergency exists with respect to such Clearing Member, and the Clearing Member may present such evidence and considerations as may tend to show that no such Financial Emergency or substantial question exists. The Clearing Member may be represented by legal counsel or any other representative of its choosing at such hearing. A substantially verbatim record of the hearing shall be made, but need not be transcribed unless the Clearing Member so requests or the Corporation so determines.

(f) The Board shall issue a written decision and shall provide a copy of such decision to the President and the Clearing Member, together with a copy of any transcript that may have been made of the hearing and copies of any documents that may have been presented at the hearing. The decision shall include a statement of the Board's determination as to whether a Financial Emergency exists or there is a substantial question as to whether a [f]Financial [e]Emergency exists with respect to such Clearing Member and, if so, a description of any action taken, including the affirmance, modification or reversal of any action theretofore taken, and the effective date and duration of the action. Such decision shall be the final action of the Corporation and shall not be subject to appeal within the Corporation.

#### **Rule 906. Conflicts of Interest**

A member of the Board may not participate in any proceedings conducted pursuant to this Part 9 if such member [~~or any Affiliated Person of such member directly or indirectly has a financial, personal or other interest in the matter under consideration~~] is precluded from participating in deliberations or voting on the matter pursuant to the conflict of interest principles set forth in Rule 111(b).

#### **Rule 907. Liability for Expenses**

Any Clearing Member which, after notice and opportunity for hearing pursuant to these Rules, has been found by final action of the Corporation to have violated any By-Law or Rule, or has been the subject of action taken pursuant to Rule 904, may, in the discretion of the Corporation, be required to pay to the Corporation an amount equal to any and all expenses incurred by the Corporation (including without limitation legal and accounting fees and expenses and the costs of liquidating or transferring Contracts) incurred in investigating the matter, preparing the matter for referral to [an] the Exchange or for submission to the Board, or otherwise in connection with such violation or action, as the case may be, in addition to any fine or other penalty which may be imposed on such Clearing Member.