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

RE: Rulemaking on Foreign Boards of Trade Located Outside of the United States

Dear Mr. Stawick:

IntercontinentalExchange, Inc. (ICE) welcomes the opportunity to comment on the Commodity Futures Trading Commission's (CFTC) proposed rulemaking on foreign boards of trade (FBOT). As background, ICE was established in 2000 as an over-the-counter (OTC) marketplace with the goal of providing transparency and a level playing field for the previously opaque, fragmented energy market. Today, ICE operates a leading global marketplace for futures and OTC derivatives across a variety of product classes, including agricultural and energy commodities, foreign exchange and equity indexes. Commercial market participants rely on our products to hedge and manage risk and investors in these markets provide necessary liquidity.

Summary

ICE believes that the CFTC generally strikes the right balance with the proposed rulemaking. However, ICE requests the CFTC to consider the following points:

- The CFTC should not supercede foreign regulatory authorities by adopting prescriptive rules for FBOTs.
- The CFTC should not require FBOTs to clear all swaps from U.S. customers.
- The CFTC should amend Commission Rule 30.10 to allow firms exempt from registration to clear swaps.
- The CFTC should consider grandfathering existing FBOTs.

Background

ICE has a long history with the CFTC's regulation of FBOTs. In 2001, ICE purchased the International Petroleum Exchange (now ICE Futures Europe), a UK based Recognized Investment Exchange, which first received no-action relief as a foreign board of trade in 1999. In 2007, ICE acquired the Winnipeg Commodity Exchange (now ICE Futures Canada), which first received no-action relief in 2004

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In 2006, ICE Futures Europe listed an electronic crude oil contract that settled upon the West Texas Intermediate crude oil contract listed by the New York Mercantile Exchange. Later that year, ICE worked with the CFTC in order to provide trade data to allow the CFTC to monitor its related markets. In 2008, the CFTC amended its no action relief for ICE Futures Europe to add certain conditions with respect to any ICE Futures Europe contract which settles against any price, including the daily or final settlement price, of (1) a contract listed for trading on a DCM or DTEF, or (2) a contract listed for trading on an exempt commercial market (ECM) that has been determined to be a significant price discovery contract (collectively, "linked contracts"). The purpose of the conditions was to ensure ICE Futures Europe applied comparable regulation to its contracts as applicable to the U.S. DCM contracts against which the linked contracts settled, including the daily publication of trading information and the imposition of position limits or accountability levels for speculators. The conditions also ensured that FBOTs listing linked contracts provide the Commission with information regarding the extent of speculative and non-speculative trading in linked contracts that is comparable to the information provided to the Commission by U.S. regulated markets for publication of the CFTC's Commitments of Traders Reports.

Passage of the Financial Reform Legislation

The current no action regime is based upon Section 4(a) of the Commodity Exchange Act (CEA) which provides that a futures contract may be traded lawfully in the U.S. only if, among other things, it is traded on or subject to the rules of a board of trade that has been designated as a contract market. Section 4(a) excludes from the designation requirement contracts made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories or possessions." In the absence of no-action relief, a board of trade, exchange or market that permits direct access by U.S. persons might be subject to Commission action for violation of, among other provisions, section 4(a) of the CEA if it were not found to qualify for the exclusion from the DCM designation or DTEF registration requirement. Section 4(b) of the CEA, which authorizes the Commission to adopt rules governing the offer and sale of foreign futures and options contracts, explicitly prohibits the Commission from adopting rules pursuant to that section which (1) require Commission approval of any contract, rule, regulation, or action of any foreign board of trade, exchange, or market, or clearinghouse for such board of trade, exchange, or market, or (2) govern in any way any rule or contract term or action of any foreign board of trade, exchange, or market, or clearinghouse for such board of trade, exchange, or market. This legislative scheme is the underpinning of the CFTC's no action regime.

On July 21, 2010, President Obama signed the Dodd/Frank Wall Street Reform and Consumer Protection Act (the "Financial Reform Act") into law. The Financial Reform Act creates a new regulatory scheme for foreign boards of trade. In particular,

Section 738 creates a registration scheme for foreign boards of trade. In addition, Section 738 imposes specific conditions on registration of FBOTs that list "linked contracts." This section mirrors the Commission's 2008 revisions to the ICE Futures Europe no action letters, requiring FBOTs that list linked contracts to adopt a regulatory structure comparable to the regulatory structure of the U.S. regulated market to which its contract is linked.

Rulemaking on Foreign Boards of Trade

Faced with the globalization of markets, the goal of the CFTC should be to foster cross-jurisdictional regulatory cooperation, high level comparability and regulatory coordination. Thus far, the no-action review process for FBOTs that wish to place terminals in the United States has served these purposes well. It is based on an evaluation of whether the FBOT is subject to a comparable, comprehensive regulatory regime and whether the CFTC has adequate information-sharing agreements with the foreign regulator of the FBOT. The general guidelines for no-action relief used by the CFTC staff for reviewing the rules and procedures of the FBOT are similar to the core principles in the Act applicable to designated contract markets. To the extent that the CFTC has concerns about the particular manner in which a core principle is met under the foreign regulatory scheme, it makes additional arrangements with the FBOT and foreign regulator to remedy the problem by imposing additional conditions on the no-action relief granted to the FBOT.

With the passage of the Financial Reform Act, the CFTC now has the ability to require FBOTs to register with the Commission, providing the CFTC with a formal framework for monitoring exchanges offering direct market access to U.S. customers and formalizing the framework for ensuring comparable levels of regulation where markets are linked. ICE welcomes this change as registration provides FBOTs with greater legal certainty to operate in the United States while also recognizing that FBOTs are regulated in their home countries and requiring full and duplicative regulation as a U.S. regulated market is unnecessary and counter-productive. In addition, a registration scheme puts the CFTC in line with other regulators, like the United Kingdom's Financial Services Authority, which has a Recognized Overseas Investment Exchange category for boards of trade that are located outside of the U.K.

In general, ICE believes that the CFTC strikes the right balance in the proposed rulemaking by largely codifying the existing no action process and the provisions of Section 738 into a formal registration scheme. However, the proposed rulemaking contains several areas where the CFTC prescribes rules that impinge upon the authority of the FBOT's home regulator. In addition, the proposed rulemaking places certain burdens on FBOTs that are not required on U.S. regulated markets currently. These areas include clearing every swap and compliance with IOSCO standards for clearinghouses.

In this regard, the CFTC may be attempting to pre-emptively harmonize the FBOT rulemaking with other rulemakings under consideration for domestic regulated markets that are being considered under a different and longer comment process. Given that it is not clear that these requirements will ultimately be imposed on domestic markets– the comment process will overlap the timetable for the FBOT rule making – ICE requests that these additional requirements be eliminated from the rules and subjected to a future rulemaking, or that their application to FBOTs be staying pending ultimate adoption of these requirements for domestic markets.

The CFTC Should Not Supersede Foreign Regulatory Authorities by Adopting Prescriptive Rules

A cooperative relationship with foreign regulatory authorities has been central to the CFTC's oversight of the global derivatives markets. The proposed rule contains prescriptive rules that impinge on foreign regulatory authorities. Specifically, the proposed rule requires foreign clearing organizations clearing for FBOTs to comply with the current (and future) Recommendations for Central Counterparties issued by the International Organization of Securities Commissions (IOSCO). In the alternative, the FBOT's clearing organization must register with the Commission as a DCO. While IOSCO recommendations are certainly a best practice, this binary option for recognition allows no middle ground for foreign regulators to regulate their own clearinghouses. For example, in the future, a foreign regulator may adopt higher or better standards than the IOSCO recommendations for its clearing organizations.

A better solution would be for the CFTC to rely on the expertise of the foreign regulator to regulate its own clearing organizations. As part of the registration process, the CFTC performs a comparability analysis of the foreign regulator.[1] The CFTC analysis requires the FBOT to demonstrate "regulation that is comparable to the comprehensive supervision and regulation to which DCMs and DCOs are subject to the U.S."[2] Prescribing strict compliance with the IOSCO standards for clearing houses is unnecessary given this FBOT requirement.

Likewise, the CFTC should not issue prescriptive trading rules for FBOTs. In a request for comment, the CFTC asks whether it should require registered FBOTs to adopt automated safety features such as trading pauses, or protection against mistaken order entry. In addition, footnote 29 in the proposed rule suggests that FBOTs may need pre-trade risk controls in order to certify that its contracts are not subject to manipulation. Pre-trade risk controls and automatic safety features are best practices for exchanges and ICE is a leader in implementing these protections. However, the foreign regulator, not

[1] Registration of Foreign Boards of Trade, Proposed Rule, 75 Fed. Reg. 223 at 70979 (November 19, 2010).
[2] *Id.*

the CFTC, has the primary interest in adopting rules in this area and it, rather than the CFTC, should adopt rules for these practices. In addition, to date, the CFTC has not prescribed pre-trade risk controls or automatic safety features for domestic regulated markets. The CFTC should work through international regulatory groups like IOSCO to implement consistent controls, instead of prescriptive rules.

FBOTs Offering Swaps

Given that the derivatives markets are global, the CFTC should be commended on its thoughtful approach to allowing FBOTs to offer swaps to U.S. customers. Allowing FBOTs to offer swaps will foster cooperation with international regulators in the OTC markets and will prevent countries from creating silos that serve as barriers to effective regulation. ICE has three recommendations to improve the CFTC's proposed rule governing swaps traded on a FBOT.

First, the CFTC should not mandate that all swaps transactions on a FBOT be cleared. Globally, regulators are reworking their regulatory structure of OTC derivatives. Most of the new regulatory structures mandate or encourage clearing of OTC derivatives, but in the rulemaking, the CFTC is requiring that all FBOT swap transactions be cleared. This mandate differs from requirements applicable to swaps transactions that occur on U.S. regulated markets. For example, the CFTC will not require SEFs to clear transactions that are not subject to mandatory clearing. Therefore, the CFTC should not place a greater burden on FBOTs than it does on U.S. regulated markets.

Second, the CFTC should not require all FBOTs to report swaps transactions to a swap data repository (SDR). Again, most regulators are considering SDRs as a method to encourage transparency in the OTC markets. However, the SDR rules for domestic markets have not been finalized and SDRs are not yet operational. The CFTC should delay implementation of this requirement until SDR rules are finalized and SDRs are operational. In the interim, the CFTC could rely on reporting to the CFTC from the FBOT, the foreign clearing organization, or the foreign regulator under an information sharing arrangement.

Finally, the CFTC proposes to require equivalent or comparable regulation of foreign swaps dealers or major swaps participants. This requirement is premature as most jurisdictions are revisiting their regulatory structure of OTC derivatives, and regulation of foreign market participants should be the primary responsibility of foreign regulators rather than the CFTC. Again, the proper course for the CFTC is to work with foreign regulators to ensure high-level comparable regulation of market participants.

The CFTC Should Allow Firms Exempt from Registration to Offer Clearing Services

As the Commission notes, currently U.S. participants can access a foreign market through a FCM or a firm exempt from registration as a FCM pursuant to Commission Rule 30.10.[3] As noted above, the CFTC is allowing FBOTS to offer swaps to U.S. customers; however, without a conforming change to Rule 30.10, certain U.S. customers may not have access to these markets. As with futures, the CFTC should allow U.S. participants to access FBOTs for swaps through firms exempt from registration pursuant to Rule 30.10 by amending the rule to include swaps.

Existing FBOTs

For FBOTs with existing no action letters, the CFTC proposes a shortened registration process after passage of the final rule. While this is better than a full registration process, the Financial Reform Act gives the CFTC the ability, but not the mandate, to require registration for FBOTs, and ICE submits that the CFTC should grandfather existing FBOTs into registration. As noted above, the CFTC has largely codified the current "no action" regime in its proposed rulemaking and thus it will gain very little by requiring FBOTs to resubmit materials already submitted through the no action process. For FBOTs with current no-action letters, the Commission should identify information it needs to fill any gaps from the proposed registration process and then require FBOTs with existing no action relief to submit the additional relevant information necessary to update the Commission's understanding of the foreign regulatory regime.

Grandfathering existing FBOTs would lessen the strain on the CFTC in implementing the Financial Reform Act. As the Commission has noted, the Financial Reform Act mandates that the Commission consider any previous Commission findings that the FBOT is subject to comprehensive supervision and regulation by its domestic regulator.[4]

If the Commission determines that all FBOTs should reapply for registration, then it should reconsider the time limit of 120 days to submit a completed application to the Commission. Given that the CFTC will be taxed with reviewing nearly 20 applications, the CFTC will likely be unable to determine whether a FBOT application is sufficient in a timely manner. This will lead to regulatory uncertainty for the FBOT and its U.S. based participants. The CFTC should therefore expand the application deadline to at least a year after issuance of the final rules.

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[3] *Id.* at 70975.
[4] Id. at 70977

Conclusion

As with other rulemakings, the CFTC should consider the impact of its registration scheme against the broader impact of the Financial Reform Act and similar financial reform measures taken by other countries. The exchange traded derivatives markets performed very well in the recent financial crisis and undue experimentation in these markets may hamper their ability to offer efficient risk management. Many of the rulemakings under consideration are dramatic changes to these markets and may have unintended consequences. A reasoned, reserved approach to implementing the Financial Reform Act will allow the CFTC to indentify these consequences and take corrective action.

Thank you for the opportunity to comment.

Sincerely,

R. Trabue Bland
IntercontinentalExchange, Inc.