

From: Trabue Bland <Trabue.Bland@theice.com>
Sent: Monday, November 8, 2010 11:32 AM
To: FBOTRegistration <FBOTRegistration@CFTC.gov>
Subject: ICE Comment Letter on Foreign Boards of Trade
Attach: CFTCprecommentfbot.pdf

Attached is ICE's pre comment letter on Foreign Boards of Trade.

Thanks for the opportunity to comment.

Trabue

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Atlanta Calgary Chicago Houston London New York Singapore

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) upcoming 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.

Background

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 2006, ICE Futures Europe listed a crude oil contract based upon the West Texas Intermediate crude oil price. Later that year, ICE worked with the CFTC in order to provide trade data to allow the CFTC to monitor these 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 principles or requirements regarding the daily publication of trading information and the imposition of position limits or accountability levels for speculators on linked contracts as apply to the U.S. Exchange contract against which the linked contract settles. 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. exchanges 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 that: (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 Barack Obama signed the Dodd/Frank Wall Street Reform and Consumer Protection Act ("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. It also creates requirements for FBOTs that list "linked contracts." This section mirrors the Commission's 2008 revisions to the ICE Futures Europe no action letters, requiring foreign boards of trade to adopt a comparable regulatory structure to the linked contract's U.S. exchange.

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, comparability and 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 granting no-action relief with additional stipulation.

However, with the passage of the Financial Reform Act, the CFTC now has the ability to require foreign boards of trade to register with the Commission. ICE welcomes this change and recommends that the CFTC replace the no action regime with registration. Registration gives FBOTs greater legal certainty to operate in the United States, while recognizing that FBOTs are regulated in their home countries and requiring full regulation as a U.S. exchange is unnecessary and duplicative. In addition, a registration scheme puts the CFTC in line with other regulators, like the UK's Financial Services Authority, which has a Recognized Overseas Investment Exchange category for boards of trade that are located outside of the UK..

While ICE supports registration for FBOT, the CFTC should strive to codify the existing no action process into a registration scheme. As stated above, the current no action process gives the CFTC ample supervision of FBOTs, while recognizing that the CFTC cannot serve as the global regulator of derivatives markets. Creating a registration and regulation scheme for FBOTs that duplicates or usurps another foreign regulator will invite retaliation from foreign regulators. The international nature of the derivatives markets makes U.S. derivatives exchanges particularly susceptible to compensatory actions that foreign regulators may take if the CFTC determines to create a burdensome or duplicative regulatory regime. In addition, the CFTC should not adopt any anti-competitive or protectionist rules. U.S. derivatives exchanges list many commodities with a foreign nexus, such as foreign exchange contracts and commodities such as coffee and sugar. Again, considering the importance of the underlying commodities to foreign countries, foreign regulators will likely take a strong interest in how our markets are regulated by the CFTC and, specifically, how the CFTC treats FBOTs wishing to place terminals in the United States. It may be the case that some of those countries will accept the CFTC's regulation and not impose duplicative or retaliatory requirements. However, for other countries, the regulatory approach they may take is less predictable. Therefore, the Commission should carefully consider the possibility of unintended consequences in issuing its rules.

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 identify these consequences and take corrective action.

Thank you for the opportunity to comment.

Sincerely,

R. Trabue Bland
IntercontinentalExchange, Inc.