

## Chapter 13

# SRO Notices and Disciplinary Proceedings

---

---

### 13.1.1 Notice and Request for Comment – ICE Futures U.S. Application for Exemption from Recognition and Registration as an Exchange and Related Registration Relief

#### A. Background

ICE Futures U.S. has applied to the Commission for an exemption from the requirement to be registered as an exchange pursuant to section 15 of the *Commodity Futures Act* (Ontario)(CFA) and the requirement to be recognized as an exchange pursuant to section 21 of the *Securities Act* (Ontario)(OSA).

ICE Futures U.S. is designated as a contract market (Designated Contract Market or DCM) by the United States Commodity Futures Trading Commission (CFTC), pursuant to section 5 of the U.S. Commodity Exchange Act. As a DCM, ICE Futures U.S. offers both electronic trading and floor trading of a variety of agricultural or soft commodity futures contracts and options on futures contracts as well as futures contracts and options on futures contracts on certain financial and equity indices and currencies (collectively, ICE Futures U.S. Contracts). ICE Futures U.S. proposes to offer direct electronic access to trading in ICE Futures Contracts to certain Ontario residents (Ontario Participants).

As ICE Futures U.S. will be carrying on business in Ontario, it is required to be recognized as an exchange under the OSA and registered as an exchange under the CFA or apply for exemptions from both requirements. ICE Futures U.S. has applied for an exemption from the registration and recognition requirements on the basis that it is already subject to regulatory oversight by the CFTC.

In assessing the ICE Futures U.S. application, staff followed the process set out in OSC Staff Notice 21-702 *Regulatory Approach for Foreign-Based Stock Exchanges*. As discussed in that notice, a similar approach is applicable to commodity futures exchanges as well.

#### B. Related Relief

ICE Futures U.S. expects that the potential Ontario Participants will be (i) dealers that are engaged in the business of trading commodity futures and commodity options in Ontario (Futures Commission Merchants or FCMs) and (ii) commercial enterprises that are exposed to risks attendant upon fluctuations in the price of an agricultural commodity or certain financial indices (Hedgers, as defined in section 1 of the CFA). ICE Futures is requesting exemptive relief from the registration requirements under section 22 of the CFA for trades in ICE Futures U.S. Contracts by the Hedgers, in order for Hedgers to be able to access ICE Futures U.S. directly and not “through a dealer” as required under the existing CFA exemption.

#### C. Draft Recognition Order

In the application, ICE Futures U.S. has outlined how it meets each of the criteria for exemption from recognition and from registration. Subject to comments received, staff intend to recommend that the Commission grant an exemption order with terms and conditions based on the proposed draft order attached.

The draft exemption order requires that ICE Futures U.S. notify staff of the Commission of any material changes to the facts in its application and establishes terms and conditions in the following areas:

1. Regulation of ICE Futures
2. Access
3. Submission to Jurisdiction and Agent for Service
4. Disclosure
5. Filing Requirements
6. Financial Viability
7. Information Sharing

**D. Comment process**

The Commission is publishing for comment the application of ICE Futures U.S. and the proposed draft exemption order. We are seeking comment on all aspects of ICE Futures U.S.' application for an exemption, as well as the draft exemption order.

You are asked to provide your comments in writing and delivered on or before **July 6, 2009** to the following address:

John Stevenson, Secretary  
Ontario Securities Commission  
20 Queen Street West  
Suite 1903, Box 55  
Toronto, Ontario, M5H 3S8  
Fax: (416) 593-8145  
e-mail: [jstevenson@osc.gov.on.ca](mailto:jstevenson@osc.gov.on.ca)

We request that you email an electronic copy of your submission. The confidentiality of submissions cannot be maintained as a summary of written comments received during the comment period will be published.

Questions may be referred to:

Barbara Fydell  
Senior Legal Counsel, Market Regulation  
(416) 593-8253  
email: [bfydell@osc.gov.on.ca](mailto:bfydell@osc.gov.on.ca)

Yves Cloutier  
Trading and Derivatives Specialist, Market Regulation  
(416) 204-8988  
email: [ycloutier@osc.gov.on.ca](mailto:ycloutier@osc.gov.on.ca)

Dirk de Lint  
Senior Legal Counsel, Registrant Legal Services  
(416) 593-8090  
e-mail: [ddelint@osc.gov.on.ca](mailto:ddelint@osc.gov.on.ca)

**Osler, Hoskin & Harcourt LLP**  
Box 50, 1 First Canadian Place  
Toronto, Ontario, Canada M5X 1B8  
416.362.2111 MAIN  
416.862.6666 FACSIMILE

Jacob Sadikman  
Direct Dial: 416.862-4931  
jsadikman@osler.com  
Our Matter Number: 1101855

May 15, 2009  
Ontario Securities Commission  
20 Queen Street West  
Suite 800, Box 55  
Toronto, ON M5H 3S8

Attention: Barbara Fydell, Senior Legal Counsel, Market Regulation

Dear Sirs and Mesdames:

**ICE Futures US – Application for Exemption from Recognition as a Stock Exchange and Registration as a Commodity Futures Exchange**

We are acting as counsel to and are filing this application with the Ontario Securities Commission (the “OSC”) on behalf of ICE Futures U.S., Inc. (the “Applicant” or “ICE Futures U.S.”), formerly known as the Board of Trade of the City of New York, Inc. (“NYBOT”), for the following decisions (collectively, the “Requested Relief”):

- (a) a decision under Section 147 of the *Securities Act* (Ontario) (the “OSA”) exempting the Applicant from the requirement to be recognized as a stock exchange under Section 21 of the OSA;
- (b) a decision under Section 80 of the *Commodity Futures Act* (Ontario) (the “CFA”) exempting the Applicant from the requirement to be registered as a commodity futures exchange under Section 15 the CFA; and
- (c) a decision under Section 38 of the CFA exempting trades in contracts on ICE Futures U.S. by “hedgers” (as defined in Section 1 of the CFA) from the registration requirement under Section 22 of the CFA (the “Hedger Relief”).

The OSA, CFA and all regulations, rules, policies and notices of the OSC made thereunder are collectively referred to as the “Legislation”.

**Approval Criteria**

OSC Staff has prescribed criteria that it will apply when considering applications by foreign-based commodity futures exchanges for registration (or exemption from registration) under Section 15 of the CFA. These criteria are similar to those prescribed in OSC Staff Notice 21-702 *Regulatory Approach for Foreign Based Stock Exchanges* (“Staff Notice 21-702”) in relation to applications for recognition (or exemption from recognition) by foreign stock exchanges under Section 21 of the OSA. For convenience, this Application is divided into the following Parts, Part II of which describes how the Applicant satisfies OSC Staff’s criteria for registration (or exemption from registration) of foreign-based commodity futures exchanges.

- Part I Background
- Part II Application of Approval Criteria to the Applicant
  - 1. Regulation and Oversight
  - 2. Corporate Governance
  - 3. Fees
  - 4. Regulation of Products
  - 5. Access

6. Rulemaking
7. Systems And Technology
8. Financial Viability
9. Clearing And Settlement
10. Trading Practices
11. Compliance, Surveillance and Enforcement
12. Information Sharing and Oversight Arrangements
13. IOSCO Principles

Part III Submissions

Part IV Other Matters

**Background**

1. The Applicant is a Delaware corporation, designated as a contract market by the United States Commodity Futures Trading Commission (the "CFTC") pursuant to Section 5 of the U.S. Commodity Exchange Act (the "CEA"). The Applicant is owned by the IntercontinentalExchange, Inc. ("ICE, Inc.") in accordance with a merger agreement consummated on January 12, 2007. ICE, Inc. is a public company governed by the laws of the State of Delaware and listed on the New York Stock Exchange. ICE Inc. and its affiliates are collectively referred to as the "ICE Group".
2. The Applicant is, in turn, the sole shareholder of ICE Clear U.S., Inc. (formerly known as the New York Clearing Corporation or NYCC) ("ICE Clear U.S."), the New York Futures Exchange, Inc. ("NYFE") and eCOPS, LLC.
3. ICE Clear U.S. is a New York corporation and is a registered derivatives clearing organisation ("DCO") as set forth in Section 5b of the CEA. As such, ICE Clear U.S. is subject to the regulatory oversight of the CFTC and must remain in compliance with all of the core principles of Section 5b of the CEA (the "DCO Core Principles"). ICE Clear U.S. clears the trades executed on ICE Futures U.S.
4. ICE Futures U.S. traces its history to 1870, when the New York Cotton Exchange ("NYCE") was founded in 1882, when the Coffee Exchange of New York City ("Coffee Exchange") was founded. In 1914 the Coffee Exchange began trading sugar futures (currently ICE Futures U.S.'s largest market) and in 1916 became the New York Coffee and Sugar Exchange. In 1925, the New York Cocoa Exchange was founded to trade cocoa futures, and merged with the New York Coffee and Sugar Exchange in 1979 to form the Coffee, Sugar & Cocoa Exchange, Inc. ("CSCE"). In 1998, the CSCE and the NYCE formed the Board of Trade of the City of New York, Inc. ("NYBOT") as their parent company. In 2004, the two exchanges merged formally into NYBOT, thereby establishing one exchange known as the Board of Trade of the City of New York, Inc., a not-for-profit membership organization. On September 14, 2006, ICE, Inc. announced that it had entered into an agreement to acquire NYBOT for consideration of approximately \$1 billion. On December 11, 2006, the merger was approved by the members of NYBOT and on January 12, 2007, the merger was consummated and NYBOT became a wholly-owned subsidiary of ICE, Inc.
5. As a Designated Contract Market (a "DCM"), the Applicant offers a variety of agricultural or soft commodity futures contracts and options on futures contracts as well as futures contracts and options on futures contracts on certain financial and equity indices and currencies (collectively, "ICE Futures U.S. Contracts"). Historically the Applicant only offered trading of its contracts via open outcry floor trading. In 2007, the Applicant continued to offer floor trading, but also commenced electronic trading on a platform owned and operated by ICE, Inc. (known as the "ICE Platform") in its core agricultural futures products alongside traditional open outcry access. The contract terms of contracts available for electronic trading are the same as the contract terms of their equivalent floor traded contracts, and therefore fully fungible. Since that time the Applicant has continued to transition more of its contracts towards electronic trading. Although the Applicant has either commenced or will be commencing electronic trading for most of its commodity futures contracts, the applicant continues to maintain a floor trading operation for open outcry trading in respect of all of its listed commodity futures options contracts as well as with respect to certain of its less liquid commodity futures contracts. In addition to being a DCM in the United States, the Applicant has secured relevant regulatory approvals or statements of non-objection, or has satisfied itself that it does not require regulatory approvals, to allow direct access to ICE Futures U.S. over the ICE Platform from Australia, Bermuda, Canada (Provinces of British Columbia and Manitoba, application in process in Alberta), Columbia, China, the Czech Republic, Denmark, France, Germany, Gibraltar, Iceland,

Ireland, Japan, Latvia, Luxembourg, Malta, Mexico, Poland, Singapore, South Africa, Spain, Switzerland and the United Kingdom. No jurisdiction has denied a request by the Applicant for an approval or a statement of non-objection of this type.

6. The Applicant proposes to offer direct electronic access to trading in ICE Futures U.S. Contracts through the ICE Platform to prospective participants in Ontario ("Ontario Participants"), either by way of (i) membership in ICE Futures U.S., (ii) via direct access sponsored by a member of ICE Clear U.S. (a "Clearing Member") (such non-Clearing Member participants "Direct Access Users"), or (iii) through order-routing arrangements where orders are routed through a Clearing Member onto the exchange.
7. The Applicant expects that potential Ontario Participants that may seek to become members, Direct Access Users or order-routing clients of a Clearing Member will be (i) dealers that are engaged in the business of trading commodity futures and commodity options in Ontario and (ii) commercial enterprises that are exposed to risks attendant upon fluctuations in the price of an agricultural commodity or certain financial indices, including financial institutions.
8. By offering ICE Futures U.S. membership and providing direct trading access to Ontario Participants, the Applicant may be carrying on business in Ontario as a stock exchange for the purposes of Section 21 of the OSA and as a commodity futures exchange for the purposes of Section 15 of the CFA.
9. The Applicant does not require relief from the requirement under Section 33 of the CFA, which prohibits trading in all contracts (other than by hedgers) except contracts that are (a) traded on a registered or recognized commodity futures exchange, (b) qualified by prospectus under the OSA or (c) traded on an exchange situated outside of Ontario as a result of an unsolicited order placed by a dealer that does not carry on business in Ontario, as a result the Rule entitled *In the Matter of Trading in Commodity Futures Contracts and Commodity Futures Options Entered into on Commodity Futures Exchanges in the United States of America*.

#### **Application of Approval Criteria to ICE Futures U.S.**

##### **1. REGULATION AND OVERSIGHT**

##### **1.1 Regulation of the Exchange – The Exchange is regulated in an appropriate manner in another jurisdiction by a Foreign Regulator. The regulatory scheme of the Foreign Regulator is transparent and generally comparable to that in Ontario.**

1.1.1 The Applicant is regulated as a DCM by the CFTC. The Applicant has never been declared to be in breach of its regulatory responsibilities by the CFTC.

1.1.2 The CFTC has access to all trade information, compliance data and other operational information as it relates to the Applicant's operations. The CFTC's Division of Market Oversight, Market Compliance Section conducts regular in-depth reviews of each DCM's ongoing compliance with the CFTC regulations in order to enforce its rules, prevent market manipulation and customer and market abuses, and to ensure the recording and safe storage of trade information. The results of these rule enforcement reviews (RERs) are in most cases summarized in reports by the CFTC which are made available to the public and posted on the CFTC's website. The Applicant's most recent RER was completed in October of 2005 and the CFTC's report of such RER did not identify any material deficiencies.

##### **1.2 Authority of the Foreign Regulator – The Foreign Regulator has the appropriate authority and procedures for oversight of the Exchange. This oversight includes regular, periodic regulatory examinations of the Exchange by the Foreign Regulator.**

1.2.1 The CFTC has been charged with administering and enforcing the CEA. Accordingly, the CFTC is the U.S. government agency that has direct regulatory and oversight responsibility over DCMs. To implement the CEA, the CFTC has promulgated regulations and guidelines (the "CFTC Regulations") that further interpret the DCM Core Principles (described below) and govern the conduct of U.S. DCMs, such as ICE Futures U.S. The CFTC monitors trading on ICE Futures U.S. and receives daily transaction and other reports from the Applicant. The CFTC also undertakes periodic in-depth audits or "rule reviews" of the Applicant's compliance with certain of the statutory Core Principles.

1.2.2 ICE Futures U.S. was (and its predecessor exchanges, CSCE and NYCE, were) designated as a contract market for each of the particular commodity futures contracts and options contracts they traded, pursuant to the CEA. Prior to the 2000 amendments to the CEA, such designations were made on a contract by contract basis upon receipt of specific approval from the CFTC to list each contract. Today, pursuant to the Commodity Futures Modernization Act of 2000 ("CFMA"), an entity is designated as a DCM under the CEA and may thereafter introduce new contracts without prior CFTC approval by a process of self-certification by the DCM in respect of such new contracts. The contract market designation criteria contained in the CFMA reflect the types of factors that the CFTC formerly took into consideration in

deciding whether to approve a particular futures contract for trading upon application by an exchange. These designation criteria are set forth in Section 5(b) of the CEA as interpreted and implemented by the CFTC in Part 38 (Designated Contract Markets) of the CFTC Regulations. The criteria for designation include demonstrating that the exchange has the capacity to prevent market manipulation; can ensure fair and equitable trading; has the capacity to detect, investigate and discipline any person that violates its rules; can ensure the financial integrity of transactions entered into through its facilities; and has the authority to obtain any necessary information to perform its regulatory functions, including the capacity to carry out international information-sharing agreements.

- 1.2.3 The Applicant is required to demonstrate its compliance with various core principles (the "DCM Core Principles") applicable to all U.S. DCMs. The statutory core principles are described in Section 5 of the CEA and include requirements that the Applicant monitor and enforce compliance with its Rules; only list contracts that are not readily susceptible to manipulation; monitor trading to prevent manipulations, price distortion and disruptions of the delivery or cash-settlement process; adopt position limitations or position accountability for speculators, where necessary and appropriate; make available to the regulators, market participants and the public certain market information; provide a competitive, open and efficient mechanism for executing transactions; create and maintain necessary records; establish rules to ensure the financial integrity of its contracts and the financial integrity of the brokers and the protection of customer funds; protect market participants from abusive practices; provide dispute resolution as appropriate for market participants and intermediaries; establish and enforce appropriate fitness standards; minimize conflicts of interest in the decision-making process and establish a process for resolving such conflicts; and avoid anti-competitive actions.
- 1.2.4 The CEA, the CFTC Regulations, the CFMA and particularly the Core Principles reflect standards set by the International Organisation of Securities Commissions ("IOSCO"), such as "Objective and Principles of Securities Regulation" (1998 and 2002) and "Report on Co-operation between Market Authorities and Default Procedures" as well as the "Standards for Regulated Markets" published by the Forum of European Securities Commissions in December 1999.

## **2. CORPORATE GOVERNANCE**

### **2.1 Fair Representation – The governance structure of the Exchange provides for:**

- i. appropriate, fair and meaningful representation on its Board and any committee thereof; and**
- ii appropriate representation by independent directors on the Board and any committee thereof.**

- 2.1.1 The Applicant has a Board of Directors (the "Board"), whose organisation and constitution is governed by the ICE Futures U.S. By-Laws, in particular Article IV of the Applicant's amended by-laws. The ICE Futures U.S. By-Laws, along with all of the Applicant's rules and regulations governing the operation of ICE Futures U.S. (the "ICE Futures U.S. Rules") are available on the Applicant's website at [www.theice.com](http://www.theice.com). Chapter 3 of ICE Futures U.S. Rules (Committees) governs the organization and constitution of all operating committees of the Applicant. The ICE Futures U.S. By-Laws and the ICE Futures U.S. Rules help ensure the integrity and competence of the Board, and prevent breaches of any relevant law, regulation or code of practice.
- 2.1.2 The size and composition of the Board has been reviewed by the CFTC in the context of Core Principle 14 (Governance Fitness Standards), which regulates governance fitness requirements and with which the Applicant's Board structure complies. The CFTC is interested in ensuring that the Board is large enough to deal with conflicts as required by the Core Principles and has the ability to act independently. The CFTC recently adopted practices for minimising conflicts of interest in decision-making by DCMs under Core Principle 15, which are intended to recognise their public-interest responsibilities as self-regulatory organisations. These acceptable practices require 35% of the directors of a DCM's Board, or any committee having similar powers, meet a "public director" test that prohibits any person having a material relationship with the DCM from being deemed a public director. Bylaw Section 4.1 requires that four of the Applicant's nine-person Board meet the CFTC's definition of a "public director".
- 2.1.3 Sections 6(a) and 8(a)(1) of the CEA give the CFTC the authority to review the organisation and structure of ICE Futures U.S., including the ICE Futures U.S. By-Laws establishing the corporate governance and composition of the Board to ensure that ICE Futures U.S. will be able to comply with U.S. statutory standards. Through ICE Futures U.S. By-Law Section 4.3 and Article IX of the ICE Futures U.S. By-Laws, the Board and senior management, respectively, are empowered with all the powers and duties of managers of a Delaware corporation and are able to delegate those powers.
- 2.1.4 The Applicant's Board is comprised of nine directors, including the chief executive officer and chief financial officer of ICE, the President of the Applicant, two members who served on NYBOT's board of governors prior to the merger and who are designated by ICE to serve on the ICE board of directors, referred to as "ICE Futures U.S. designees," and

four directors who qualify as “public directors” under the CFTC Core Principles and who, to the extent possible, were initially selected from the previous public governors on NYBOT’s board of governors. The CFTC’s definition of “Public Director” is set out in Regulation 1.64(b)(1)(ii) of the CEA<sup>1</sup>. According to the CFTC, “Public Directors” are persons who have no “material relationship” with their DCM, i.e., any relationship which could reasonably affect their independent judgment or decision making. Given that the Applicant is wholly owned by ICE, Inc. and no longer member-owned, the fact that more than 75% of the Applicant’s directors are not associated with ICE, Inc. and are all otherwise qualified and experienced professionals in the exchange-traded derivatives industry suggests that the Applicant’s Board provides appropriate, fair and meaningful representation to all those with an interest in the stewardship of the Applicant. The Applicant does not currently have any plans to change the composition of its board following the second anniversary of the merger between NYBOT and ICE.

**2.2 Appropriate Provisions for Directors and Officers – There are appropriate qualifications, remuneration, limitation of liability and indemnity provisions for directors and officers.**

2.2.1 The remuneration of directors and officers of the Applicant is reviewed on an annual basis by the Compensation Committee of ICE, Inc., which is comprised entirely of directors that are independent of ICE, Inc. and the Applicant.

2.2.2 The ICE Group’s global insurance program provides professional indemnity and directors and officers coverage to all directors and executive officers of the Applicant. The Applicant and ICE, Inc. hold quarterly insurance review meetings during which such issues are discussed with the ICE Group’s insurance brokers.

**2.3 Fitness – The Exchange takes reasonable steps to ensure that each officer and director is a fit and proper person and past conduct of each officer or director affords reasonable grounds for belief that the officer or director will perform his or her duties with integrity.**

2.3.1 Section 5 of the CEA requires that the Applicant establish and enforce appropriate fitness standards for directors. Accordingly, the CFTC reviews the fitness requirements applicable to the Applicant’s directors. A director also has fiduciary duties set forth under Delaware state law. Fitness and qualifications are addressed in further detail by Core Principle 14 (Governance Fitness Standards) of Section 5 of the CEA and Part 38 (Designated Contract Markets) of CFTC Regulations. All of the members of the Board are over the age of majority and are of sound mind. All of the members of the Board have experience in the field of the provision of futures exchange services, and are regarded in the market as being persons with integrity and competence. Section 8(a) of the CEA provides for statutory disqualification criteria with respect to Commission registrants. CFTC Regulation 1.63 separately provides, in general, that a person who has been the subject of disciplinary proceedings brought by the CFTC, an exchange or other self-regulatory organisation is barred (either permanently or for a prescribed period) from serving on an exchange’s board of directors or any of its disciplinary or arbitration panels. ICE Futures U.S. Rule 6.40 reflects the provisions of CFTC Regulation 1.63.

2.3.2 In addition, ICE Futures U.S. Rule 6.40 provides that any ICE Futures U.S. member who has been found guilty of rule violations or has settled charges relating to, or arising from, trades subject to the ICE Futures U.S. Rules which resulted in an expulsion suspension or a fine which equals or exceeds the maximum fine which may be imposed by the Applicant’s disciplinary committee or \$25,000, whichever is less, may not serve on any ICE Futures U.S. disciplinary or arbitration committee. In December 2005, the Applicant adopted a Board of Governors Code of Ethics and Professionalism as Standing Resolution R-5. Standing Resolution R-5 obligates Board members to discharge their duties as members of the Board in compliance with all applicable laws, rules and regulations and with the highest standards of professional ethics. Standing Resolution R-5 provides general guidance on such issues as participation in decision-making, loyalty, confidentiality and conflicts of interest. Persons found to be in violation of the Code may be subject to appropriate action under the Applicant’s Disciplinary Rules and/or removal from the Board.

2.3.3 All employees and officers of the Applicant are subject to detailed pre-employment screening which is conducted by an external, independent agency and includes, *inter alia*, credit review, verification of academic qualifications and employment history and a review of the information supplied in support of the individual’s application (including references). In addition, senior management appointees are subject to further checks on their professional memberships, qualifications and directorships and, where appropriate, checks of any criminal records.

---

<sup>1</sup> This section requires that the director not be: a member of the DCM; an employee of a member of the DCM; not primarily performing services for the DCM in a capacity other than as a member of the organization’s governing board; or an officer, principal or employee of a firm which holds a membership at the DCM either in its own name or through an employee on behalf of the firm.

**2.4 Conflicts of Interest – The Exchange has appropriate conflict of interest provisions for all directors, officers and employees.**

2.4.1 No Director may take any action on any matter that involves a Named Party in Interest (as defined in the CFTC Regulations), if that Director is a Named Party in Interest, is an employee of a Named Party in Interest, or has a business or family relationship with a Named Party in Interest. ICE Futures U.S. Rules 6.05 and 6.06 contain the provisions concerning conflicts of interest involving Named Parties in Interest (ICE Futures U.S. Rule 6.05) and involving emergency and other significant actions (ICE Futures U.S. Rule 6.06). The provisions apply to members of the Board and to members of all ICE Future U.S. committees which are authorised to take action for and in the name of the Applicant, for example, the Business Conduct Committee or the Membership Committee.

**3. FEES**

**3.1 The Exchange's process for setting fees is fair, transparent and appropriate. Any and all fees imposed by the Exchange on its participants are equitably allocated, do not have the effect of creating barriers to access and are balanced with the criteria that the Exchange has sufficient revenues to satisfy its responsibilities.**

3.1.1 The Applicant's trading fees are established based on an ongoing business analysis by the Board considering the implications of such fees on its customers and its volume-driven business. The Board considers various factors in the setting of fees including the fees of its competitor exchanges, the Applicant's own costs, the amount of volume and open interest in the applicable product, the temper and reactions of market participants and the impact of fee changes on the Applicant's various incentive programs set out in Annex B of the Applicant's By-Laws.

3.1.2 The Board may from time to time adopt resolutions that impose fees or charges for each commodity contract purchased or sold on ICE Futures U.S. In fixing the amount of any such fees or charges, the Board may establish different rates for transactions in different commodity contracts, or for different types of transactions involving the same commodity contract. The Board may also omit any fees or charges with respect to any type of transaction or may establish different rates based on such other factors as the Board may determine are appropriate (Section 4(a) of Annex A to the By-laws). A full list of transaction charges, subscriptions, entrance fees and other relevant charges is located on ICE's website at [www.theice.com](http://www.theice.com).

3.1.3 The Applicant was required to charge a \$1 surcharge (the "\$1 Surcharge") on electronic trades of physical delivery "core products" that were listed for trading on ICE Futures U.S. at the time of the completion of the merger between NYBOT and ICE, Inc. The \$1 Surcharge does not apply, however, to fees related to bona fide market making programmes (Section 4(b) of Annex A to the By-laws). The term "core products" refers to the commodity contracts that were traded on the NYBOT immediately prior to the completion of the merger.

3.1.4 However, Section 1 of Annex B to the By-laws provides for the elimination of the \$1 Surcharge in the event that: (i) certain competing exchanges, or any of their respective affiliates, introduce a cash-settled contract after September 14, 2006 that has the same contract terms as a core product except that it is cash-settled (other than any immaterially different terms); or (ii) the board of directors of ICE requests that the public directors of the Applicant, by a supermajority vote, determine whether the introduction of a physical delivery contract by a competing exchange is a "competitive contract" with respect to a core product and the public directors by a "supermajority vote of the public directors" determine that such contract is a competitive contract.

3.1.5 After September 14, 2006, certain competing exchanges introduced "cash-settled" contracts that having the same contract terms as six of the Applicant's core products except that said contracts are "cash-settled". Therefore, in accordance with Section 1 of Annex B to the By-laws, the \$1.00 Surcharge for electronic trading was eliminated when the Applicant introduced electronic trading. However, as of August 1, 2007, the Applicant commenced imposing a 25¢ surcharge on all trades executed electronically.

3.1.6 The Applicant is required to offer a 20% discount on exchange and clearing fees for proprietary trading by ICE Futures U.S. Members that are issued trading rights on ICE Futures U.S. and firms that were member firms of ICE Futures U.S. at the time of the merger ("ICE Futures U.S. Member Firms") for transactions in contracts traded on ICE Futures U.S. at the time the merger agreement was signed (other than for prices charged with respect to bona fide market making programs). These ICE Futures U.S. Members and Member Firms are entitled to such discount for as long as such contracts continue to be traded on ICE Futures U.S. Subject to certain exceptions, the right to receive this discount for electronic trading will terminate upon the transfer by such ICE Futures U.S. Member of his or her trading rights in ICE Futures U.S. (subject in each case to certain exceptions) (Section 4(a) of Annex B to the By-laws).

3.1.7 Former ICE Futures U.S. members and permit holders who have been issued new trading memberships and trading permits, as well as ICE Futures U.S. Member Firms and lessees will also benefit from a "most-favoured-nation" status that entitle them to pay the lowest fees payable to the Applicant for electronic transactions in contracts traded on ICE



Futures U.S. at the time of the signing of the merger agreement (other than for fees related to bona fide market making programs). They are entitled to this "most-favoured-nation" status for as long as such contracts continue to be traded on ICE Futures U.S. Subject to certain exceptions, the right to receive this "most favoured nation" status terminates upon the first transfer by such ICE Futures U.S. member or permit holder of his or her trading rights in ICE Futures U.S. (subject in each case to certain exceptions) (Section 4(b) of Annex B to the By-laws).

#### **4. REGULATION OF PRODUCTS**

##### **4.1 Approval of Products – The products traded on the Exchange are approved by the appropriate authority.**

4.1.1 Part 40 of the CFTC Regulations require that a DCM which seeks to list a new product for trading, list a product for trading that has become dormant, or accept for clearing a product that is not traded on a DCM or a registered derivatives transaction execution facility without prior CFTC approval, may do so only if the following conditions have been met: (1) it has filed its submission electronically with the CFTC and at the regional office having local jurisdiction over the registered entity, in a format specified by the CFTC; (2) the CFTC has received the submission at its headquarters by close of business on the business day preceding the product's listing or acceptance for clearing, and; (3) the submission includes: (i) a copy of the submission cover sheet completed in accordance with CFTC Regulations; (ii) a copy of the product's rules, including all rules related to its terms and conditions, or the rules establishing the terms and conditions of the listed product that make it acceptable for clearing; (iii) the intended listing date; and (iv) a certification by the registered entity that the product to be listed complies with the CEA and regulations thereunder.

4.1.2 A DCM is required to provide, if requested by CFTC staff, additional evidence, information or data relating to whether the contract meets, initially or on a continuing basis, any of the requirements of the CEA or the regulations or CFTC policies thereunder which may be beneficial to the CFTC in conducting a due diligence assessment of the product and the entity's compliance with these requirements.

4.1.3 Part 40 of the CFTC Regulation provides that a DCM may request under Section 5c(c)(2) of the CEA that the CFTC approve new products. A submission requesting approval must include certain information, including an explanation, if not self-evident from the rules, as to how the specific terms and conditions satisfy the "acceptable practices" set forth in CFTC Guideline No. 1, Appendix A to Part 40. For physical delivery contracts, a DCM is required to provide an explanation as to how the terms and conditions as a whole will result in a deliverable supply such that the contract will not be conducive to price manipulation or distortion and that the deliverable supply reasonably can be expected to be available to short traders and saleable by long traders at its market value in normal cash marketing channels. For cash settled contracts, an explanation is required as to how the cash settlement of the contract reflects the underlying cash market, will not be subject to manipulation or distortion, and is based on a cash price series that is reliable, acceptable, publicly available and timely together with a brief description of the cash market for the commodity, instrument, index or interest that underlies the contract. Materials considered by the CFTC include studies by industry trade groups, academics, governmental bodies or other entities, reports of consultants, or other materials, which provide a description of the underlying cash market. Any agreements or contracts entered into with other parties that enable the DCM to carry out its responsibilities, such as agreements with index data producers, must be supplied.

##### **4.2 Product Specifications – The terms and conditions of trading the products are in conformity with normal commercial business practices for the trade in the product.**

4.2.1 Extensive market consultation and Board approval processes to which all ICE Futures U.S. Contracts are subject ensures that the terms and conditions of ICE Futures U.S. Contracts are in conformity with normal business practices for trades in such products, that they meet the needs of the relevant commodity sector and have widely acceptable specifications.

##### **4.3 Risks Associated with Trading Products – The Exchange maintains adequate provisions to measure, manage and mitigate the risks associated with trading products on the Exchange, including, but not limited to, margin requirements, intra-day margin calls, daily trading limits, price limits, position limits, and internal controls.**

4.3.1 Core Principle 11 (Financial Integrity of Contracts) of the CEA requires that an exchange provide for the financial integrity of contracts traded on its contract market and ensure the financial integrity of intermediaries trading on its system. The Applicant must also demonstrate that other risks relating to market manipulation, price distortions or trading abuses, systems security and trade execution must be assessed and controlled in order to remain in compliance with U.S. law.

4.3.2 All ICE Futures U.S. Contracts are cleared and settled by ICE Clear U.S., which is recognized by the CFTC as a DCO under Section 5b of the CEA. ICE Clear U.S. acts as counterparty and guarantor to each transaction executed on ICE Futures U.S. The Applicant therefore cooperates with ICE Clear U.S. when developing new ICE Futures U.S. Contracts to ensure that all potential risks have been thoroughly evaluated and can be managed. ICE Clear U.S. sets margin

requirements for and makes margin calls of ICE Futures U.S. Members that are also members of ICE Clear U.S. ("ICE Futures U.S. Clearing Members"). Registered DCO's are subject to their own set of core principles promulgated by the CFTC (the "DCO Core Principles"). In relation to ICE Clear U.S.'s responsibility for risk management, DCO Core Principle D (Risk Management) provides that a DCO must have the ability to manage the risks associated with discharging the responsibilities of a DCO through the use of appropriate tools and procedures.

- 4.3.3 The Compliance arm of the Applicant's Market Regulation Department has a unit devoted to member firm financial surveillance. This group is responsible for conducting special audits and reviewing member financial reports and subordinated loan agreements. It also performs ongoing daily surveillance of member firms to identify those firms with potential financial difficulties.
- 4.3.4 The surveillance conducted by the Applicant includes regular review of pay and collect data, price movements and market volatility; monitoring of member firms identified as high-risk. Separately, ICE Clear U.S. undertakes clearing member surveillance to monitor the financial soundness of ICE Futures U.S. Clearing Members. Risk and capital-based position limits are established for each firm pursuant to ICE Clear U.S. By-Laws. Positions established on ICE Clear U.S. are margined (collateralised) daily (and, depending on market movements, intra-day). Variation margin is required based on any adverse changes in market price. ICE Clear U.S. also has the necessary authority (under ICE Clear U.S. By-Law 5.6) to require an ICE Futures U.S. Clearing Member to reduce or transfer positions or post additional collateral if they determine that market integrity requires it. ICE Clear U.S. generally requires enough original margin to cover 97% of the daily market movements of the previous 10, 30 or 60 day period (depending on historical volatility). Original margin requirements are reviewed daily by ICE Clear U.S. and the Applicant's staff and can be altered to address rapidly changing market conditions or a risk from a particular clearing member. Acceptable collateral includes cash, US government securities and letters of credit.

## 5. ACCESS

### 5.1 Fair Access – The requirements of the Exchange relating to access to the facilities of the Exchange, the imposition of limitations or conditions on access and denial of access are approved by the Foreign Regulator and are fair and reasonable, including in respect of notice, an opportunity to be heard or make representations, the keeping of records, the giving of reasons and the provisions for appeals.

- 5.1.1 Pursuant to Core Principle 14, the Applicant is required to establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the DCM, and any other persons with direct access to the facility (including any parties affiliated with any of the persons described in this paragraph). To ensure that access to ICE Futures U.S. is subject to criteria designed to protect the orderly functioning of its market and the interests of investors the Applicant has developed a rigorous membership approval process supervised by its Member Services Department, the details of which are outlined in Section 5.2 below. This process is designed to ensure that all ICE Futures U.S. Members are appropriately identified, are qualified to trade in commodity futures in their jurisdiction, have adequate financial resources and have exhibited proper conduct in other capital markets activities.
- 5.1.2 The Member Services Department reviews each application and either approves the application or refers it to the Membership Committee. Membership applications must be referred to the Membership Committee whenever the application contains, or the Applicant learns of, information that is the type specified in the ICE Futures U.S. Rules as constituting a condition for denial or the applicant is a suspended or expelled Member seeking reinstatement. The determination of whether or not the applicant may become a member of ICE Futures U.S. is based on objective and discretionary criteria. The Membership Committee's determination is the final determination of the Applicant (ICE Futures U.S. Membership Rule 2.07). If the Member Services Department refers the application to the Membership Committee, the applicant is given notice of the referral and the reasons. The applicant may request an opportunity to be heard by the Membership Committee, or a subcommittee of the Membership Committee designated for this purpose by the chairman of the Membership Committee, and present evidence as to why his application should not be denied (Exchange Membership Rule 2.07). If the final determination is to deny membership to the applicant, the applicant may appeal the finding to the CFTC.

### 5.2 Details of Access Criteria – In particular, the Exchange

- i. has written standards for granting access to trading on its facilities to ensure users have appropriate integrity and fitness;
- ii. has and enforces financial integrity standards for those persons who enter orders for execution on the system, including, but not limited to, credit or position limits and clearing membership;
- iii. does not unreasonably prohibit or limit access by a person or company to services offered by it;

- iv. **keeps records of each grant and each denial or limitation of access, including reasons for granting, denying or limiting access; and**
- v. **restricts access to adequately trained system users who have demonstrated competence in the functions that they perform.**

### ***ICE Futures U.S. Membership***

- 5.2.1 ICE Futures U.S. Membership Rules 2.01 et seq. set forth the qualifications, requirements and duties of ICE Futures U.S. Members. ICE Futures U.S. Rule 2.01 provides that all members must be "a natural person, twenty-one (21) years of age, of good character, reputation and business integrity with adequate finances to assume the responsibilities and privileges of Membership." Individuals wishing to become members are required to complete and submit a membership application. The Member Services Department then conducts an investigation into the business reputation and financial standing of all applicants. When the application and investigation are complete, the Member Services Department reviews each application and determines whether or not the applicant may become a Member or refers the application to the Membership Committee.
- 5.2.2 Once a member, the individual may decide that he wishes to obtain direct access to the trading floor and become a member with floor trading privileges or "Floor Member" (ICE Futures U.S. Membership Rules 2.18 to 2.21). To qualify as a Floor Member, the member must be registered with the CFTC as a floor broker or trader, be sponsored by two (2) Floor Members, attend an ethics course as required by the CFTC and successfully complete the Applicant's Floor Trading Course administered by the Floor Trading Privileges Committee. The Floor Trading Privileges Committee assesses the technical competence of members in determining whether or not the Member has the adequate experience to warrant floor trading privileges and become a Floor Member. Floor Member Applicants must attend classroom session during which trading rules are discussed by experienced Floor Members and compliance staff. In addition, they must participate in mock floor trading sessions at which the applicant practices the art of open outcry trading. After attending the required sessions, the applicant must pass the written exam and show competence at a mock trading session. Every Floor Member granted access to the trading floor is required to have an agreement with an approved Clearing Member guarantor (ICE Futures U.S. Rule 2.16). The agreement obligates the Clearing Member guarantor to: (i) accept for clearance any trade executed by the Floor Member on ICE Futures U.S.; and (ii) timely pay (A) any claim by an ICE Futures U.S. Member against the guaranteed Floor Member arising from any order or trade executed, or to be executed, on ICE Futures U.S. and (B) any claim by the Applicant or ICE Clear U.S. against the Floor Member arising under the rules, except for assessments, dues or disciplinary fines imposed pursuant to ICE Futures U.S. Disciplinary Rules.
- 5.2.3 ICE Futures U.S. Membership Rule 2.08 lists the conditions for which the Applicant may deny membership to an applicant. These conditions are that the applicant: (a) does not meet any of the qualifications for membership, or does not follow the procedures for application, set forth in the ICE Futures U.S. Membership Rules; (b) has been denied registration or whose registration has been revoked or is currently suspended by the CFTC or by the Securities and Exchange Commission; (c) has been convicted of any felony or misdemeanor; (d) has been enjoined by order, judgment or decree of any court of competent jurisdiction or of the CFTC or the Securities and Exchange Commission or of any state securities authority or agency from engaging in or continuing any conduct or practice in connection with the purchase or sale of any Commodity, security, option or similar instrument; (e) is or has been subject to an order of the CFTC denying trading privileges on any contract market to the applicant, or suspending or expelling the applicant from membership on any contract market; (f) has ever been or is suspended or expelled from any commodity or securities exchange, related clearing organisation, the National Futures Association, the National Association of Securities Dealers, Inc., or any other self-regulatory organisation or other business or professional association for violation of any rule of such organisation; (g) has accumulated a disciplinary or arbitration record at any exchange, association or similar tribunal which record is judged by the Membership Committee to be such that membership for the applicant would not be in the best interests of the Exchange; (h) is subject to any material unsatisfied liens or judgments; (i) has made any false statement in or in connection with any application filed with the Exchange; (j) has been individually, or as a Principal of a Firm that has been, subject to any liquidation, arrangement, reorganisation, receivership, assignment for the benefit of creditors or other bankruptcy or insolvency proceeding, under state or federal law, within the past ten (10) years; (k) has engaged in an established pattern of failure to pay just debts; or (l) fails to meet such other qualifications as the Board may from time to time determine are in the best interests of the Applicant.
- 5.2.4 Each ICE Futures U.S. Member conducting customer business as either a futures commission merchant ("FCM") or an introducing broker ("IB") on ICE Futures U.S., is required to be a member of a "Designated Self-Regulatory Organisation" which undertakes periodic financial and sales practice audits of its members to ensure that they are properly handling their customer business and acting in compliance with CFTC and U.S. commodity law requirements. There is also a CFTC registration process in place for employees who work for FCMs and IBs and who handle customer business to ensure fitness. Under this regulatory scheme, each FCM and IB must have processes,

procedures and controls in place to ensure that each individual employee is properly supervised. In addition, there is a CFTC registration process for floor brokers and floor traders to ensure fitness for those who transact business on the floor of exchanges.

- 5.2.5 All ICE Futures U.S. Members must be clearing members of ICE Clear U.S. or have entered into clearing arrangements with an ICE Futures U.S. Clearing Member. The compliance arm of the Applicant's Market Regulation Department has a unit devoted to member firm financial surveillance. This group is responsible for conducting special audits and reviewing member firm financial reports and subordinated loan agreements. It also performs ongoing daily surveillance of member firms to identify those firms with potential financial difficulties. The surveillance conducted by the Applicant includes:
- 5.2.5.1 **Daily Review of Pay and Collect Data** - the Applicant uses a computerised report, known as the Members Early Warning System ("MEWS") to monitor clearing members' pay and collect data on a daily basis. ICE Futures U.S. Clearing Members whose net pay to the Applicant is 20% or more of their adjusted net capital are identified and contacted to determine material undermargined or deficit accounts.
  - 5.2.5.2 **Daily Review of Price Movements and Market Volatility** - The net change in the settlement price of the Exchange's futures contracts are reviewed on an ongoing basis during each day. A volatile market is deemed to have occurred (and resulting risk management steps are taken) when the price for a contract has moved up or down by a number equal to the contract's maintenance margin divided by the contract's tick value (defined as the minimum price fluctuation) and in this instance, staff will input the price move into a computerized Position Risk Report ("PRR"). The clearing members whose loss is 20% or more of their adjusted net capital are then contacted by the Applicant to determine material undermargined or deficit accounts.
  - 5.2.5.3 **Monitoring of Member Firms Identified as High-Risk** - A member-FCM is considered "high risk" if any of the following circumstances exist or events have occurred: (a) failure to meet minimum capital requirements; (b) adjusted net capital below the early warning level; (c) failure to meet CFTC segregation requirements; (d) failure to maintain current books and records; (e) other conditions considered by the Applicant to indicate potential problems. Where a member is deemed to be "high risk," the Applicant will obtain the following additional data relating to the member via facsimile on a daily basis in order to perform more surveillance: (a) total amount of funds required to be segregated and in CFTC Regulation 30.7 separate accounts; (b) total amount of funds in segregated accounts and CFTC Regulation 30.7 separate accounts; (c) total amount of unsecured debit balances and deficit balances in customer and non-customer accounts; and (d) aggregate proprietary futures and options trading losses since the previous financial report.
  - 5.2.5.4 **Clearing Member Surveillance by ICE Clear U.S.** - ICE Clear U.S. only admits as ICE Futures U.S. Clearing Members firms that meet certain objective financial standards (ICE Clear U.S. By-Law Section 5.2). The financial soundness of ICE Futures U.S. Clearing Members is reviewed, updated and monitored on a regular basis. Risk and capital-based position limits are established for each firm pursuant to ICE Clear U.S. By-Laws. Positions established on ICE Futures U.S. are margined (collateralised) daily (and, depending on market movements, intra-day). Variation margin is required based on any adverse changes in market price. ICE Clear U.S. also has the necessary authority (pursuant to ICE Clear U.S. By-Law Section 5.6) to require an ICE Futures U.S. Clearing Member or other market participant to reduce or transfer positions or post additional collateral if determined to be necessary for market integrity purposes.
- 5.2.6 In addition to non-clearing ICE Futures U.S. Members, a market participant that is not an ICE Futures U.S. Member may seek to obtain direct access to ICE Futures U.S. via the ICE Platform by obtaining authorization from and entering into clearing arrangements with an ICE Futures U.S. Clearing Member. For each user for whom a clearing member has authorized direct access (whether such user is an ICE Futures U.S. Member or not), the clearing member must execute a Clearing Member Guaranty Agreement. The Clearing Member Guaranty Agreement obligates the clearing member to accept for clearance all trades effected by the user on any day on the ICE Platform. For non-member users for whom the clearing member has authorized direct access, the clearing member must (i) provide the user with information concerning the use of the ICE Platform and the ICE Futures U.S. Rules and obtain a written agreement from the non-member user that the use of the ICE Platform is governed by such ICE Futures U.S. Rules and that the non-member user is subject to the jurisdiction of the Applicant; (ii) take any and all actions requested or required by the Applicant with respect to such non-member user, including but not limited to, assisting the Applicant in any investigation into potential violations of ICE Futures U.S. Rules or the CEA and require such user to produce documents and provide information; and suspend or terminate the non-member user's direct access if the Applicant determines that the actions of such user threaten the integrity or liquidity of any ICE Futures U.S. Contract, violate ICE Futures U.S. Rules or the CEA or if such user fails to cooperate in any investigation.

- 5.2.7 Rather than seeking direct access to ICE Futures U.S. via the ICE Platform, market participants may seek to access trading on ICE Futures U.S. indirectly by becoming an order-routing client of an ICE Futures U.S. Clearing Member. Under this approach, clients' orders are routed to ICE Futures U.S. via the trader mnemonic (or "eBadge") of a responsible individual registered with the applicable ICE Futures U.S. Clearing Member (a "Responsible Individual"). The applicable ICE Futures U.S. Clearing Member takes responsibility for such trades and accepts all contingent liabilities for those orders when routed onto the ICE Platform. The ICE Futures U.S. Clearing Member must conduct its own due diligence of prospective order-routing clients to ensure that they satisfy relevant regulatory, financial resource, risk and anti-money laundering standards.
- 5.2.8 Pursuant to the Responsible Individual Registration and Clearing Member Guaranty Agreement, ICE Futures Clearing Members are responsible for all acts and conduct on the ICE Platform of each Responsible Individual registered to it and any person acting through such Responsible Individual. ICE Futures U.S. Rule 27.11 also prohibits a Clearing Member or a non-clearing ICE Futures U.S. Member who is an FCM or introducing broker from accepting an order from, or on behalf of, a customer for entry onto the ICE Platform, unless such customer is first provided with the Uniform Electronic Trading and Order Routing System Disclosure Statement required by the National Futures Association.
- 5.2.9 Only ICE Futures U.S. Clearing Members and Direct Access Users designate a "responsible individual," sign the ICE Futures U.S. Electronic User Agreement and are responsible for compliance with the Applicant's exchange rules. Order routing clients are the responsibility of ICE Futures U.S. Clearing Members submitting orders for their order routing customers. Order routing customers of ICE Futures U.S. Clearing Members will not be able to obtain *direct* access to the ICE Platform, but rather will be able to send order messages, verbally or electronically, to such ICE Futures U.S. Clearing Members for routing onto ICE Futures U.S. Other than requiring certain electronic formats and specifications for orders, the Applicant does not have any direct involvement with order-routing customers of ICE Futures U.S. Clearing Members. Only ICE Futures U.S. Clearing Members are permitted to provide front-end, *indirect* access to their customers for purposes of those customers routing their orders through the ICE Futures U.S. Clearing Member Firm's connection (using the clearing member firm's "eBadge"). Such customers are specifically identified and known to the Applicant per ICE Futures U.S. Rule 27.09. Where an order routing customer uses electronic applications to send its orders to an ICE Futures U.S. Clearing Member for routing onto the ICE Platform, the Applicant does not impose any specific eligibility criteria for such persons.
- 5.3 Access for Ontario Persons – The Exchange provides direct access, either through terminals, data feeds or third party provided interfaces, to only those Ontario persons that are duly registered or licensed under Ontario laws.**
- 5.3.1 The Applicant expects that most Ontario Participants seeking ICE Futures U.S. membership and/or to become Direct Access Users will not seek to become ICE Futures U.S. Clearing Members due to the capital and other requirements imposed on applicants for clearing membership of ICE Clear U.S. as described in Section 9.4 below. However, Ontario Participants that satisfy the ICE Clear U.S. membership requirements would be permitted to become ICE Futures U.S. Clearing Members.
- 5.3.2 The Applicant expects that most Ontario Participants that will be interested in trading on ICE Futures U.S. will be engaged in the business of trading commodity futures or commodity futures options in Ontario and will, therefore, be registered as FCMs under Section 22 of the CFA. However, the Applicant also seeks to provide trading access to non-market intermediary commercial enterprises that are exposed to risks attendant upon fluctuations in the price of a soft commodity, an equity index or a currency product. Therefore, the Applicant has requested exemptive relief from the registration requirement under Section 22 of the CFA for trades in ICE Futures U.S. Contracts by "hedgers" (as defined in Section 1 of the CFA). Submissions in support of our request for the Hedger Relief are set out under "Submissions" below.
- 6. RULEMAKING**
- 6.1 Purpose of Rules – The Exchange maintains rules, policies and other similar instruments as are necessary or appropriate to govern and regulate all aspects of its business and affairs and that such rules are designed to, in particular,**
- i. **ensure compliance with the rules of the Exchange and securities legislation;**
  - ii. **prevent fraudulent and manipulative acts and practices;**
  - iii. **promote just and equitable principles of trade;**

- iv. **foster cooperation and coordination with persons or companies engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in, the products traded on the Exchange;**
  - v. **provide for appropriate discipline;**
  - vi. **ensure a fair and orderly market; and**
  - vii. **ensure that the Exchange business is conducted in a manner so as to afford protection to investors.**
- 6.1.1 The Applicant and its members are required to comply with all provisions of the CEA and CFTC Regulations regarding the integrity of its markets. Each ICE Futures U.S. Member has agreed in writing to comply with the ICE Futures U.S. Bylaws and the ICE Futures U.S. Rules. Certain of the ICE Futures U.S. Rules oblige the ICE Futures U.S. Members to comply with CFTC requirements and regulations, such as ICE Futures U.S. Floor Trading Rules 4.01 et seq., which require trades to be executed by open outcry, and which list and describe the procedures for permissible non-competitive transactions such as exchange for physical ("EFP") or transfer trades, and implement the trading standards for floor brokers as required by the CFTC. Separately, ICE Futures U.S. Regulatory Requirement Rules 6.07 through 6.31 require Members to keep and maintain records, file reports and comply with prescribed position limits and accountability. ICE Futures U.S. Membership Rule 2.29 makes it a violation of ICE Futures U.S. Rules to engage in various practices that are prohibited by the CEA.
- 6.1.2 The ICE Futures U.S. Rules (see ICE Futures U.S. Membership Rule 2.29(b)) prohibit an exchange member from disseminating false or misleading or knowingly inaccurate information concerning a contract, underlying commodity or market information or conditions; from manipulating or attempting to manipulate the market (ICE Futures U.S. Membership Rule 2.29(c)); from entering bids or offers not in good faith or for an improper purpose (ICE Futures U.S. Membership Rule 2.29(o)); from executing non-competitive transactions (ICE Futures U.S. Floor Trading Rule 4.03(a)(i)); from engaging in any conduct or practice that is inconsistent with just and equitable principles of trade (ICE Futures U.S. Membership Rule 2.29(e)); or otherwise from violating the rules or procedures of ICE Futures U.S. or the clearing organisation (ICE Futures U.S. Membership Rule 2.29(e)). ICE Futures U.S. Membership Rules 2.29(j) and (k) prohibit wash trades, and fraudulent or misleading conduct in connection with commodity trading. The ICE Futures U.S. Rules also prohibit trading by employees on the basis of inside information and disclosing non-public information for personal gain. (ICE Futures U.S. Regulatory Requirement Rule 6.47)
- 6.1.3 The Applicant has extensive disciplinary procedures set forth in its ICE Futures U.S. Rules with respect to disciplining or terminating memberships for violation of its ICE Futures U.S. Rules. The CFTC's Designation Criterion 6 (Disciplinary Procedures) requires the Applicant to establish and enforce disciplinary procedures that authorise the Applicant to discipline, suspend or expel members or market participants that violate the ICE Futures U.S. Rules, and DCM Core Principle 2 (Compliance with Rules) requires that the Applicant monitor and enforce ICE Futures U.S. Rules, including the terms and conditions of any contract to be traded and any limitations on access to ICE Futures U.S. (as further described in Appendix B to Part 38 of the CFTC Regulations). DCO Core Principle H (Rule Enforcement) requires ICE Clear U.S. (i) to maintain adequate arrangements and resources for the effective monitoring and enforcement of compliance with the rules applicable to ICE Clear U.S. (the "ICE Clear U.S. Rules") and for the resolution of disputes, and (ii) to have the authority and ability to discipline, suspend or terminate a member's or participant's activities for violations of ICE Clear U.S. Rules, as described further in Appendix A to Part 39 of the CFTC Regulations.
- 6.2 No Discrimination or Burden on Competition – The rules of the Exchange do not**
- i. **permit unreasonable discrimination among issuers and participants; or**
  - ii. **impose any burden on competition that is not reasonably necessary or appropriate.**
- 6.2.1 ICE Futures U.S. Rules apply equally to all ICE Futures U.S. Members, ICE Futures U.S. Clearing Members and any non-member Direct Access Users. They differ for ICE Futures U.S. Clearing Members and ICE Futures U.S. non-clearing members *only* in relation to membership criteria (largely driven by financial resource requirements and clearing arrangements). In addition, floor trading privileges are only available to ICE Futures U.S. Members who satisfy certain proficiency and other requirements in the ICE Futures U.S. Rules.
- 6.2.2 In addition, DCM Core Principle 18 requires that "unless necessary or appropriate to achieve the purposes of the CEA, the DCM is required to endeavour to avoid: adopting any rules or taking any actions that result in any unreasonable restraints of trade; or imposing any material anticompetitive burden on trading on the contract market."

**7. Systems and Technology**

**7.1 System Capability/Scalability – For each of its systems that support order entry, order routing, execution, data feeds, trade reporting and trade comparison, capacity and integrity requirements, the Exchange:**

- i. makes reasonable current and future capacity estimates;**
- ii. conducts capacity stress tests of critical systems to determine the ability of those systems to process transactions in an accurate, timely and efficient manner;**
- iii. reviews the vulnerability of those systems and data centre computer operations to internal and external threats, including physical hazards and natural disasters;**
- iv. ensures that safeguards which protect a system against unauthorized access, internal failures, human errors, attacks and natural catastrophes that might cause improper disclosures, modification, destruction or denial of service are subject to an independent and ongoing audit which should include the physical environment, system capacity, operating system testing, documentation, internal controls and contingency plans;**
- v. ensures that the configuration of the system has been reviewed to identify potential points of failure, lack of back-up and redundant capabilities;**
- vi. maintains reasonable procedures to review and keep current the development and testing methodology of those systems; and**
- vii. maintains reasonable back-up, contingency and business continuity plans, disaster recovery plans and internal controls.**

7.1.1 All ICE Futures U.S. Contracts are traded by either (i) open outcry on a trading floor, or by electronic trading on the ICE Platform, which is owned and operated by ICE, Inc, or (ii) by open outcry and electronic trading.

7.1.2 ICE, Inc. developed the ICE Platform technology in compliance with the Principles for the Oversight of Screen-Based Trading Systems for Derivative Products developed by the Technical Committee of IOSCO.

7.1.3 ICE, Inc. subjects the ICE Platform's critical systems to regular stress tests based on reasonable current and future capacity estimates. The ICE Platform is also tested for a range of externalities which may damage or impair the operation of the system, including, but not limited to, vulnerability to internal and external threats, including physical hazards and natural disasters and safeguarded against unauthorized access, internal failures, human errors, attacks and natural catastrophes that might cause improper disclosures, modification, destruction or denial of service. The ICE Platform is subject to independent and ongoing audit review by ICE, Inc.'s auditors and an annual Statement of Auditing Standards 70 ("SAS 70") review by an independent auditing firm. These reviews cover the physical environment, system capacity, operating system testing, documentation, internal controls and contingency plans, business contingency/disaster recovery arrangements and other matters.

7.1.4 Core Principle 9 (Execution of Transactions) addresses business continuity in the event that an information technology system fails and the CFTC reviews the Applicant's systems to ensure adequate back-up systems are available in the event that the primary system fails. The Applicant leases physical space which houses a managed data centre at a recovery facility owned by a major disaster recovery services provider, Sungard. At this site, which is located in Long Island City, Queens, the Applicant owns and maintains back-up servers to support its business applications and user desk top services and networking gear to maintain its internal and external network. In addition to the data centre, the Applicant also maintains at this location a back-up trading floor to be used in the event of a disruption at the primary site. The back-up site is manned 24/7 by Sungard's security staff, and all ICE Futures U.S. servers and equipment are remotely monitored 24/7 by the Applicant's staff. The back-up site utilizes an emergency diesel generator to ensure the availability of electrical power in the event of an outage. This arrangement with Sungard is not considered by the Applicant to amount to an outsourcing of a material function because the equipment is owned and serviced by the Applicant.

**7.2 Information Technology Risk Management Procedures – Procedures are in place that:**

- i. handle trading errors, trading halts and circuit breakers;**
- ii. ensure the competence, integrity and authority of system users; and**

**iii. ensure that the system users are adequately supervised.**

- 7.2.1 ICE Futures U.S. Clearing Members, non-clearing ICE Futures U.S. members and Direct Access Users may connect to the ICE Platform by using a front-end application provided by the Applicant and ICE, Inc., by using an application provided by an independent software vendor ("ISV") which has been approved and authorized by the Applicant or by developing their own application program interface ("API") which has been approved and authorized by the Applicant (ICE Futures U.S. Rule 27.03(d)). All ISVs must execute an ISV Development and Maintenance Agreement prior to being approved and authorized, and Clearing Members, non-clearing ICE Futures U.S. members and Direct Access Users who develop their own API must execute a Direct Access Interface Development and Maintenance Agreement ("DAI"). Prior to gaining access, the ISV or API developer must obtain a Certificate of Conformance, which is issued upon the successful completion of conformance testing, from the Applicant.
- 7.2.2 As discussed above in paragraph 5.2.8 each ICE Futures U.S. Clearing Member, non-clearing ICE Futures U.S. member and Direct Access User is assigned an "eBadge" by the Applicant which identifies that ICE Futures U.S. Clearing Member and Direct Access User and the "Responsible Individual" for orders and transactions entered into the ICE Platform with that eBadge (ICE Futures Rules 27.02(iii) and (vii) and 27.07). In addition, all individuals utilizing the ICE Platform on behalf of the ICE Futures U.S. Clearing Members and Direct Access Users are assigned a log-in identification (ICE Futures U.S. Rule 27.09).
- 7.2.3 ICE Futures U.S. Rule 27.11 prescribes the types of orders that may be entered into the ICE Platform. The ICE Platform also uses "Reasonability Limits" to determine if an order is executable. A "Reasonability Limit" is the amount by which the price of a commodity contract may increase or decrease in one trading sequence from the last traded price (ICE Futures U.S. Rule 27.02(vi)). A trade will be executed on the ICE Platform when all of the following conditions occur: (i) one order is a bid and the other order is an offer, (ii) the two orders are for the same commodity contract and delivery month and (iii) the price of the bid (offer) equals or is greater (less) than the price of the offer (bid) (ICE Futures U.S. Rule 27.19). ICE Futures U.S. Rule 27.28 and Appendix I to ICE Futures U.S. Rule 27 describe the Applicant's procedures for invalidating trades and for cancelling trades as a result of a user's error. Those errors that occur within the "No Cancellation Range" may not be cancelled except in extraordinary circumstances as determined by the Applicant's Market Supervision Department (ICE Futures U.S. Rule 27.02(v)). The "No Cancellation Range" is defined as the price range above and below the Anchor Price for each commodity contract within which an error trade may not be cancelled. The "Anchor Price" is defined as the price set by the Applicant based on the front delivery month from which Reasonability Limits and No Cancellation Ranges are determined (ICE Futures U.S. Rule 27.02(i)).
- 7.2.4 The ICE Futures U.S. Rules impose appropriate sanctions for breaches of any of the applicable trading rule and procedures (whether in respect of floor trading or electronic trading on the ICE Platform).
- 7.2.5 ICE Inc. provides various training materials and instruction manuals relating to the operation of the ICE Platform and operates an around-the-clock help desk to support customers. The Applicant also operates a market supervision support desk each trading day to support its market participants.

**8. FINANCIAL VIABILITY**

**8.1 The Exchange has sufficient financial resources for the proper performance of its functions.**

- 8.1.1 Designation Criterion 5 of Section 5(b) of the CEA requires that the Applicant ensure the financial integrity of transactions entered into by or through the facilities of ICE Futures U.S. If the CFTC determines that the Applicant has insufficient financial resources to ensure the financial integrity of its marketplace, it will not approve its contract market application. Likewise, once designated, the CEA requires in Core Principle 11 that the Applicant provide for the financial integrity of contracts traded on it in order to maintain its contract market designation. To satisfy this Core Principle, the CFTC does not generally require that the Applicant maintain a particular level of capital or maintain any specific insurance policy, but instead insists, with certain exceptions not relevant here, that all transactions on ICE Futures U.S. be cleared by a derivatives clearing organisation registered and supervised by the CFTC. Appropriate minimum financial standards have been established by ICE Clear U.S. for all ICE Futures U.S. Clearing Members, and the Applicant conducts financial surveillance by routinely reviewing financial and other materials relating to its member firms who are clearing members and/or Futures Commission Merchants.
- 8.1.2 Section 5b(c)(2)(B) of the CEA requires a designated clearing organisation to demonstrate that it has adequate financial resources to discharge its responsibilities. No specific requirements in terms of ratios between capital, liquid financial assets and operating costs, insurance policies or other protections exist under this regime. However, this is a continuing obligation and is not discharged upon the registration of the clearing organisation with the CFTC.
- 8.1.3 In order to retain its contract market designation, the Applicant must continuously comply with the Core Principles, including Core Principle 11 relating to ensuring the financial integrity of its contracts and market intermediaries and



customer funds. If due to a change in the Applicant's financial resources it was no longer able to ensure compliance with its obligations as reflected in Core Principle 11, the CFTC could require that the Applicant comply with this Core Principle and if it did not, the CFTC could suspend or revoke its designation. There are no explicit capital requirements, however, applicable to designated contract markets, as there are for Futures Commission Merchants and the clearing members.

- 8.1.4 The Applicant's accounts are prepared in accordance with U.S. GAAP. Audited accounts of the Applicant are not publicly available. Accounts are required to be published annually pursuant to ICE Futures U.S.'s By-laws, which require the Applicant to present annually audited financial statements to its members. The Applicant's accounts are not subject to CFTC approval or notification. However, ICE Clear U.S.'s accounts are subject to CFTC scrutiny. The profit and loss accounts of the Applicant and ICE Clear U.S. are consolidated. Separate income and expenditure data for the Applicant is therefore not available. For the year ended 31 December 2006, the Applicant recorded an income of \$27.6 million, earnings before interest and tax of \$13.5 million, a net profit of \$14.1 million and had an average of 200 full-time equivalent employees.

## **9. CLEARING AND SETTLEMENT**

### **9.1 Relationship with Clearing House – The Exchange has a clearing relationship with an established clearing house and all transactions executed on the Exchange are cleared through the Clearing House.**

- 9.1.1 As described in Section 4.3 above, all trades in ICE Futures U.S. Contracts are settled and cleared through ICE Clear U.S. and all Exchange Clearing Members must also be members of ICE Clear U.S. Exchange Non-Clearing Members must have clearing agreements in place with Exchange Clearing Members. ICE Clear U.S. acts as counterparty and guarantor to each transaction executed on the Exchange.

- 9.1.2 The Applicant is the sole shareholder of ICE Clear U.S.

### **9.2 Regulation of Clearing House – The Clearing House and direct clearing members are subject to acceptable regulation.**

- 9.2.1 ICE Clear U.S. is recognized by the CEA as a derivatives clearing organization and is subject to the regulation and oversight of the CFTC.

### **9.3 Authority of the Foreign Regulator – The Foreign Regulator has the appropriate authority and procedures for oversight of the Clearing House. This oversight includes regular, periodic regulatory examinations of the Clearing House by the Foreign Regulator.**

- 9.3.1 The CFTC is also charged with administering and enforcing the CEA as it relates to clearing houses. Accordingly, the CFTC is also the U.S. government agency that has direct regulatory and oversight responsibility over ICE Clear U.S. To implement the CEA, the CFTC has promulgated the DCO Core Principles applicable to DCOs and governing the conduct of all DCOs

- 9.3.2 ICE Clear U.S. is registered with the CFTC as a DCO pursuant to Section 5b of the CEA. To maintain registration as a DCO, ICE Clear U.S. is required to satisfy the DCO Core Principles set forth in Section 5b(c)(2) of the CEA as interpreted and implemented by the CFTC in CFTC Regulation Part 39 including Appendix A thereof (Application Guidance and Compliance with Core Principles).

### **9.4 Restrictions on Access to a Foreign Member – Any restrictions on access to the clearing system by a foreign member are adequately disclosed and justified by the legislation of the home jurisdiction, are not anti-competitive and do not unreasonably impose barriers to access.**

- 9.4.1 A foreign applicant seeking membership with ICE Clear U.S. is subject to the same application process and requirements as U.S. applicants, including financial resource, capital, risk management and fitness requirements, as well as requirements to confirm regulatory status and compliance.

### **9.5 Sophistication of Technology of Clearing House – The Exchange has assured itself that the information technology used by the Clearing House has been adequately reviewed and tested and provides at least the same level of safeguards as required of the Exchange.**

- 9.5.1 Because ICE Clear U.S. and the Applicant are both regulated by the CFTC, the Applicant takes comfort that the CFTC subjects the technology and risk management systems of ICE Clear U.S. to the same degree of scrutiny and oversight to which the technology and risk management systems of ICE Futures U.S. is subject.

9.5.2 One of the DCO Core Principles (DCO Core Principle I) specifically relates to system safeguards and requires a DCO to demonstrate that it (i) has established and will maintain a program of oversight and risk analysis to ensure that its automated systems function properly and have adequate capacity and security; and (ii) has established and will maintain emergency procedures and a plan for disaster recovery, and will periodically test back-up facilities sufficient to ensure daily processing, clearing and settlement of transactions.

**9.6 Risk Management of Clearing House – The Exchange has assured itself that the Clearing House has established appropriate risk management policies and procedures, contingency plans, default procedures and internal controls.**

9.6.1 As described in above, the Applicant takes comfort that the CFTC subjects the risk management systems of ICE Clear U.S., including policies and procedures, contingency plans, default procedures and internal controls, to the same degree of scrutiny and oversight to which the risk management systems of ICE Futures U.S. is subject. Furthermore, DCO Core Principle D requires that a DCO manage the risks associated with discharging the responsibilities of a DCO through the use of appropriate tools and procedures.

**10. TRADING PRACTICES**

**10.1 Trading practices are fair, properly supervised and not contrary to the public interest.**

10.1.1 The CFTC has a detailed regulatory scheme designed to protect users of DCMs. It starts with registration of all intermediaries who solicit and accept orders for contracts on DCMs. These intermediaries, referred to as Futures Commission Merchants (FCMs) are subject to specific net capital, disclosure, record-keeping, reporting, sales practices and customer protection regulations. The handling of customer funds is also subject to specific requirements regarding margining, segregation of customer funds from proprietary funds of the FCM, permissible investments and approved depositories. FCMs are subject to oversight and audit by designated self-regulatory organisations and the CFTC. The CFTC also has prohibitions against fraud, manipulation, wash trading, non-competitive trading and other abusive practices. In addition to the oversight over the intermediaries, the CFTC also maintains direct oversight over the Applicant and ICE Clear U.S. The regulations applicable to the Applicant and clearinghouses are further intended to ensure that market participants are fairly treated and that their funds are safeguarded. Statutory and regulatory standards are enforced not only by the self-regulatory organisations, including the Applicant through its disciplinary and compliance staff, but through the Division of Enforcement of the CFTC with substantial enforcement and market surveillance staff in Washington, D.C., Chicago and New York.

10.1.2 Core Principle 12 of Part 38 of the CFTC Regulations requires DCMs to have rules prohibiting conduct that is fraudulent, non-competitive, unfair or abusive, to have rules providing for the discipline of engaging in such conduct and the appropriate systems in place to detect such violations. ICE Futures U.S. Rule 2.29 makes it a violation of Exchange rules for any member to engage in, among other things, market manipulation, wash trading, non-competitive trading and/or fraud. In addition, ICE Futures U.S. Rule Chapter 27 (Electronic Trading) includes various rules and policies regarding abusive trading practices. For instance, ICE Futures U.S. Rule 27.24 provides that participants shall not knowingly enter, or cause to be entered, bids or offers other than in good faith for the purpose of executing bona fide transactions. ICE Futures U.S. Rule Chapter 27 also broadly prohibits participants from: trading against their customers' orders (ICE Futures U.S. Rule 27.20); dual trading or "wash trading" (ICE Futures U.S. Rule 27.23); and engaging in certain pre-execution communications (ICE Futures U.S. Rule 27.22).

**10.2 Market Making Provisions – Market making provisions and other provisions to ensure market liquidity, if any, are fair and equitable to all market participants.**

10.2.1 No specific U.S. legislative provision requires that the Applicant maintain arrangements to support and encourage market liquidity. However, general principles which protect consumers and the financial safeguards described above serve to preclude plans that would disadvantage customers. The Applicant conducts surveillance for any potential improper "volume pumping activity" by those participating in market maker or other incentive programmes. These arrangements are designed to support competition and be consistent with a reliable, undistorted price-formation process, as required by DCM Core Principle 18 (Antitrust Considerations) and are designed to increase liquidity and the value of the market for all exchange users. ICE Futures U.S. Rule 4.01 et seq. (Floor Trading) detail the requirements and prohibitions for executing trades on the trading floor. ICE Futures U.S. Rule 27 et seq. (Electronic Trading) detail the requirements and prohibitions for executing trades electronically. These rules are designed to promote transparency and give all market participants equal opportunity to participate. ICE Futures U.S. Membership Rule 2.29 prohibits members from engaging in any unlawful trading abuse, such as wash sales ("volume pumping activity"), accommodation trades, fictitious sales or prearranged trades and market manipulation.

**10.3 Orders – Rules pertaining to order size and limits are fair and equitable to all market participants and the system for accepting and distinguishing between and executing different types of orders is fair, equitable and transparent.**

10.3.1 As discussed in paragraph 4.3.4 above, ICE Clear U.S. has detailed procedures for establishing risk and capital-based position limits for participant firms pursuant to its by-laws. The Applicant has no particular rules limiting the size of an order (that is, the number of contracts in a particular buy or sell order). Particularly large trades, referred to as “Block trades”, which are permissible non-competitive trades negotiated off-exchange (see Exchange Rule 4.31, CFTC Regulation 1.38 and Core Principle 9 of Part 38 of the CFTC Regulations.), may be executed as long as the trade size meets certain minimum volume requirements as determined by the Board from time to time and the participants meet the CFTC requirements of an “eligible contract participant” as defined in Section 1a(12) of the CEA.

10.3.2 The Applicant's Market Surveillance Department is responsible for monitoring market prices and trading volumes to prevent price distortion or manipulation, and for monitoring position limits and accountability. To guard against corners or squeezes, the Market Surveillance Department examines total open interest for each ICE Futures U.S. Contract by contract month and a listing of large traders with their respective holdings. The Market Surveillance Department pays particular attention to causes of changes in open interest, inverted markets, spread differentials, the total exposure by a large trader in a given market, the cash price information and the current basis. The Market Surveillance Department also reviews any exchange-for-physical (“EFP”) or exchange-for-swap (“EFS”) transactions. As contract delivery approaches, the Market Surveillance Department will analyse open positions and contact large speculative traders to determine their intentions. The Market Surveillance Department refers potential problems to the Applicant's Compliance Department for follow-up investigations and possible disciplinary action.

10.3.3 The ICE Platform uses the same trade matching algorithm for all ICE Futures U.S. Contracts. The trading server will match orders on the basis of a price and time priority algorithm. The algorithm is a first-in first-out (“FIFO”) system that matches orders in a strict time sequence. The “oldest” order in the system at any time has the highest priority and is filled prior to any subsequently placed orders. Once a standing order is completely filled, the remaining orders will be filled based upon the time of entry of the order, in accordance with the FIFO algorithm. This means that the “best” price will always have the highest order priority. If more than one order is in the market at a specific price then the trading server will give the highest priority to the order that arrived at the trading server first (regardless of volume).

10.3.4 Before a market in respect of an ICE Futures U.S. Contract opens, all limit orders that are in such market are eligible to be part of an uncrossing algorithm. The purpose of this algorithm is to ensure that the market opens in an orderly fashion and that the maximum possible volume of trades is generated upon the opening of the market. The algorithm cycles through all orders in the market identifying the best bid and offer and producing matches where there is price crossing. All orders that are traded within a month, whether fully or partially, as part of the uncrossing algorithm trade at the same trade price, which is determined by a mathematical formula using the limit prices of the eligible orders.

**10.4 Transparency – Adequate provision has been made to record and publish details of pricing and trading.**

10.4.1 CFTC Designation Criterion 7 (Public Access) and DCM Core Principle 7 (Availability of General Information) and 8 (Daily Publication of Trading Information) regulate the provision of information by the Applicant to enable users of its facilities to monitor their use of the facilities. CFTC Designation Criterion 7 (Public Access) requires that the Applicant provide the public with access to the ICE Futures U.S. Rules, regulations and contract specifications. DCM Core Principle 8 (Daily Publication of Trading Information) mandates that daily information on settlement prices, volume, open interest and opening and closing ranges for contracts be distributed. DCO Core Principle E requires that ICE clear U.S. have the ability to complete settlements on a timely basis and maintain an adequate record of the flow of funds associated with each transaction. The ICE Futures U.S. Rules and the Applicant's procedures and arrangements for monitoring and overseeing the use of its facilities thus provide appropriate information to enable users of its facilities to monitor their use of the facilities. The Applicant's trading system provides to each Floor Member a list of any trades that the Floor Member has transacted and to each ICE Futures U.S. Clearing Member a list of all trades given up to the ICE Futures U.S. Clearing Member for clearing and a list of all trades cleared by such ICE Futures U.S. Clearing Member. The system also collects and distributes price changes and other market information. The Applicant's rulebook and contract specifications are available to the public on its website in accordance with Appendix A to Part 38 of the CFTC's regulations. Settlement Prices, volume, open interest and the opening and closing ranges are available on the Applicant's Daily Market Report (“DMR”) which is the official report of the Applicant. The DMR is available after 6:00 pm (New York Time) each business day and is posted on the Applicant's website. Individuals without internet access may request the DMR and contract specifications from the Applicant's staff who will fax or mail the documents to the requestor. In addition, a Time & Sales Report (“TAR”) which lists the time and price of every trade executed in seriatim for each commodity contract is available upon request from the Applicant's Compliance Department. The Applicant also makes its price data available in real time by allowing the public to purchase the price data feed through NYBOTLive or through a quote vendor, such as Reuters.

**10.5 Market Limits – Market limits have been established as to ensure the integrity of the Exchange during times of volatility.**

10.5.1 As discussed above, the position limits and margin requirements imposed by ICE Clear U.S., and the monitoring and enforcement of trading rules and procedures by the Applicant's Market Surveillance Department provide robust safeguards against market distortion, manipulation and failure and are designed to promote and protect market integrity.

**11. COMPLIANCE, SURVEILLANCE AND ENFORCEMENT**

**11.1 Jurisdiction – The Exchange or the Foreign Regulator has the jurisdiction to perform member and market regulation, including the ability to set rules, conduct compliance reviews and perform surveillance and enforcement.**

11.1.1 As a DCM, the Applicant is a "front-line regulator" with jurisdiction over its markets and ICE Futures U.S. Members, extending to rulemaking, compliance, market supervision and enforcement. As described in paragraphs 6.1 and 6.2 above, ICE Futures U.S. Rules are applicable to all participants of ICE Futures U.S. without regard to jurisdictional boundaries.

**11.2 Member and Market Regulation – The Exchange or its Foreign Regulator maintains appropriate systems, resources and procedures for evaluating compliance with the Exchange and legislative requirements and disciplining participants.**

11.2.1 Core Principle 12 (Protection of Market Participants) requires that the Applicant implement measures to prevent the use of its facilities for abusive or improper purposes. Exchange Membership Rules 2.27-2.34 detail the duties of all Members and make certain specified conduct violations of the ICE Futures U.S. Rules. ICE Futures U.S. Floor Trading Rules 4.01 et seq. detail the requirements and prohibitions for executing trades on the trading floor and submitting the trades to the comparison and clearing system. ICE Futures U.S. Regulatory Requirements Rules 6.01 et seq. contain CFTC regulatory requirements, including but not limited to conflict of interest provisions, position limits and various record keeping rules. ICE Futures U.S. Disciplinary Rules 21.00 et seq. provide for the procedures for investigating rule violations and taking disciplinary action. The Applicant's rules, procedures and the arrangements for monitoring and overseeing the use of its facilities include appropriate measures to prevent the use of its facilities for abusive or improper purposes. As a designated contract market, the Applicant maintains a Market Regulation Department, comprised of three subgroups, the Compliance Department, the Market Supervision Department and the Market Surveillance Department, which detect any abusive or improper trading practices, monitor electronic trading on a real-time basis and conduct market surveillance, respectively.

11.2.2 The Compliance Department is responsible for monitoring and investigating trading in ICE Futures U.S. Contracts to detect abusive and improper trading practices, and for prosecuting rule violators before the Applicant's Business Conduct Committee ("BCC"). The Compliance Department maintains an automated surveillance system which identifies suspicious trades and has a team of trained investigators who monitor the market and conduct follow-up investigations relating to suspicious trades. In addition, numerous sophisticated software programs are utilised as a means of detecting and investigating potential trade practice abuses. The systems are able to generate reports which monitor for a variety of trade practice violations, including, but not limited to trading ahead, accommodation trading, large cross trades, direct and indirect cross trading opposite customer accounts, wash trading and money passing. The Compliance Department also reviews error trades, trade adjustments, trade cancellations and block trading.

11.2.3 The Applicant's Market Supervision Department is responsible for monitoring on a real time basis all trades executed electronically. The Market Supervision Department has access to view all trade activities including an order book displaying all order information and a deal book displaying all transactions and the Direct Access Users and applicable ICE Futures U.S. Clearing Members from both the buyer's and seller's perspective for a given ICE Futures U.S. Contract. Additionally, the department has the ability and responsibility to force Direct Access Users and ICE Futures U.S. Clearing Members off the system when necessary, kill individual orders, send out market notifications and resolve error trades.

11.2.4 The Applicant's Compliance Department, Market Supervision Department and Market Surveillance Department are periodically subject to Rule Enforcement Reviews by the CFTC to ensure the adequacy of the Applicant's affirmative regulatory programs.

**11.3 Record Keeping – The Exchange maintains adequate provisions for keeping of books and records, including operations of the Exchange, audit trail information on all trades and compliance and/or violations of the Exchange requirements and securities legislation.**

11.3.1 DCM Core Principle 8 (Daily Publication of Trading Information) governs post-trade transparency and mandates that the Applicant make public daily information on settlement prices, volume, open interest and open and closing ranges for its actively traded contracts. As discussed above, the Applicant's settlement prices are available at 6:00 pm in the DMR or in real time through NYBOTLive or a via quote vendors.

11.3.2 The Applicant is obligated to maintain a record of all transactions executed on ICE Futures U.S. which shows for each trade: the contract, date, time, quantity, price or premium, (for options the strike prices, put or call), delivery month or expiration date, the buying and selling floor brokers and the buying and selling clearing members (per CFTC Regulation 1.35(e)). Such records are stored electronically by the Applicant for a period of five years. The Exchange is also obligated to prepare and maintain a record showing all changes in the price of futures and options transactions. (CFTC Reg. 1.35(h)) ICE Futures U.S. Rules 4.26 and 6.08 specifically require exchange members to prepare and maintain trading cards and order tickets, and ICE Futures U.S. Rule 6.07 generally requires all members to make and file with the exchange all reports and maintain all records as required by CFTC regulations.

11.3.3 Records relating to compliance and violations of the ICE Futures U.S. Rules and applicable legislation are kept pursuant to the Applicant's procedures relating to disciplinary matters set out in ICE Futures U.S. Rule 21. A brief summary of the disposition of each investigation undertaken pursuant to ICE Futures U.S. Rule 21, as well as any hearing, appeal, and the imposition of any penalty, are kept permanently in the file of the applicable market participant. The record of any disciplinary hearing, together with all of the papers, including the final decision on any appeal, is retained for a period of five (5) years.

**11.4 Availability of Information to Regulator – The Exchange has mechanisms in place to ensure that the information necessary to conduct adequate surveillance of the system for supervisory and enforcement purposes is available to the relevant regulatory authorities on a timely basis.**

11.4.1 Instances of financial crime or market abuse would result in a disciplinary case against the relevant member or user, as described above. Section 8c of the CEA and CFTC Regulation 9.11 requires the Applicant to notify the CFTC if it takes disciplinary action against an ICE Futures U.S. Member, thus leading to a notification to the CFTC. Furthermore, books and records of the Applicant must be made available to the CFTC and the U.S. Department of Justice pursuant to Section 8c of the CEA. CFTC Interpretative Letter No. 77-4, '77-'80 CCH Dec. 20,405 provides further that the CFTC Division of Enforcement (which is delegated CFTC investigative authority pursuant to CFTC Regulations 11.1 and 11.2) does not need to use a subpoena to obtain immediate and unreserved compliance with a request for access to the books and records of persons required by law to register with the CFTC, such as the Applicant, since such access is required by the broad inspection powers granted to the CFTC under the CEA.

**12. INFORMATION SHARING AND OVERSIGHT ARRANGEMENTS**

**12.1 Satisfactory information sharing and oversight agreements exist among the OSC and the Foreign Regulator.**

12.1.1 The Applicant is required to provide information about it and its activities to the CFTC pursuant to Section 5c(c) of the CEA and Parts 38 and 40 of the CFTC Regulations, which require that any changes to the Applicant's constitutional provisions, by-laws and rules, including trading protocols, agreements, interpretations or resolutions, must be either certified to the CFTC as being in compliance with the CEA and CFTC Regulations or submitted to the CFTC for its approval. Any emergency action of the Applicant must be immediately reported to the CFTC. The CFTC may investigate any action of the Applicant, alter or supplement its rules, suspend or revoke its registration, direct the Applicant to take whatever action the CFTC determines is necessary to maintain or restore orderly trading in the event of an emergency and suspend, expel or discipline any member of ICE Futures U.S. These requirements thus ensure that the Applicant shares information openly with the CFTC and pursues CFTC enquiries diligently.

12.1.2 The Applicant is not required by U.S. law to participate in international information sharing agreements. CFTC Designation Criterion 8 (Ability to Obtain Information) requires that Filer has the capacity to carry out such international information-sharing agreements as the CFTC may require. The CFTC has required that Applicant sign to the Declaration on Co-operation and Supervision of International Futures Exchanges and Clearing Organisations as amended, March 1998 (commonly known as the "Boca Declaration") and the OSC is a signatory to the Boca Declaration. The Applicant is also a party to the Intermarket Surveillance Group information sharing agreement which calls for the sharing of information among securities and commodities exchanges in the United States and other countries. Further, ICE Futures U.S. Rule 6.50 authorizes the Applicant to disclose information to the regulatory authority of any foreign jurisdiction in which the Applicant has been approved to conduct business to the extent that the consent of Applicant to make such disclosure was a condition of such approval.

### 13. IOSCO PRINCIPLES

#### 13.1 The Exchange adheres to the IOSCO principles to the extent consistent with the law of the foreign jurisdiction.

13.1.1 The Applicant adheres to IOSCO principles by virtue of the fact that it must comply with the CEA and the CFTC Regulations, which reflects those principles.

#### Submissions

The Applicant satisfies all criteria for recognition (or exemption from recognition) as an exchange set out in Staff Notice 21-702, as described above under "Application of Approval Criteria to ICE Futures U.S.". Ontario market participants that trade in commodity futures and commodity futures options would benefit from the ability to trade on ICE Futures U.S., as they would have access to a range of exchange-traded commodity derivative products that are not currently available in Ontario. The ICE Platform offers a transparent, efficient and liquid market for Ontario market participants to trade in ICE Futures U.S. Contracts. Stringent CFTC oversight of the Applicant as well as the sophisticated information systems, regulations and compliance functions that have been adopted by the Applicant will ensure that Ontario users of the ICE Platform accessing ICE Futures U.S. are adequately protected in accordance with international standards set by IOSCO. We therefore submit that it would be in the public interest to grant the Requested Relief.

The Applicant seeks the Requested Relief for the following reasons:

#### ***Exemption from Recognition and Registration as an Exchange***

1. All contracts traded on ICE Futures U.S. fall under the definitions of "commodity futures contract" or "commodity futures option" set out in Section 1 of the CFA. ICE Futures U.S. is therefore considered a "commodity futures exchange" as defined in Section 1 of the CFA and is prohibited from carrying on business in Ontario unless it is registered or exempt from registration under Section 15 of the CFA. ICE Futures U.S. seeks to provide Ontario market participants with direct, electronic access to trading in ICE Futures U.S. Contracts and may therefore be considered to be "carrying on business as a commodity futures exchange" in Ontario.
2. The Applicant is not registered with or recognized by the OSC as a commodity futures exchange under the CFA, and no ICE Futures U.S. Contracts have been accepted by the Director (as defined in the OSA) under the CFA. Therefore, ICE Futures U.S. Contracts are considered "securities" under paragraph (p) of the definition of "security" set out in Section 1(1) of the OSA and the Applicant is therefore considered a "stock exchange" under the OSA and prohibited from carrying on business in Ontario unless it is recognized or exempt from recognition under Section 21 of the OSA. The Applicant seeks to provide Ontario market participants with direct, electronic access to trading in ICE Futures U.S. Contracts and may therefore be considered to be "carrying on business as a stock exchange" in Ontario.
3. We submit that the Requested Relief from the requirements to be recognized as a stock exchange under the OSA and to be registered as an exchange under the CFA is appropriate because the Applicant is regulated as a DCM by the CFTC under the CEA and regulated in its home jurisdiction by the CFTC. OSC Staff acknowledge in Staff Notice 21-702 that, in the case of foreign exchanges, "[f]ull regulation, similar to that applied to domestic exchanges, may be duplicative and inefficient when imposed in addition to the regulation of the home or another jurisdiction." If the OSC were to recognize the Applicant as a stock exchange under the OSA and/or register ICE Futures U.S. as an exchange under the CFA, this type of duplication and inefficiency would likely occur as the OSC would be required to oversee ICE Futures U.S. to the same extent as it oversees domestic exchanges in Ontario. CFTC oversight of ICE Futures U.S. as well as the sophisticated information systems, regulations and compliance functions that have been adopted by the Applicant will ensure that Ontario users of the ICE Platform accessing ICE Futures U.S. are adequately protected in accordance with international standards set by IOSCO. We therefore submit that it would be in the public interest to grant the Requested Relief from the requirements to be recognized and registered under the OSA and CFA respectively.

#### ***No Prospectus or Registration Relief under the OSA***

4. Provided that the OSC exempts the Applicant from registration as a commodity futures exchange under the CFA, ICE Futures U.S. will be an "exempt exchange" as defined in OSC Rule 91-503 *Trades in Commodity Futures Contracts and Commodity Futures Options Entered into on Commodity Futures Exchanges Situate Outside of Ontario* ("Rule 91-503") and ICE Futures U.S. Contracts will be "exempt exchange contracts" under Rule 91-503. Therefore, all trades in ICE Futures U.S. Contracts will be exempt from the registration requirement in Section 25 of the OSA and the prospectus requirement in Section 53 of the OSA pursuant to Part II of Rule 91-503 and no registration or prospectus relief will be required under the OSA for trades in ICE Futures U.S. Contracts in Ontario.

***Hedger Relief***

5. The Applicant seeks to provide direct, electronic access to trading in ICE Futures U.S. Contracts to Ontario Participants. The Applicant expects that many of its potential Ontario Participants will be engaged in the business of trading commodity futures or commodity futures options in Ontario and will, therefore, be registered as FCMs under Section 22 of the CFA. However, the Applicant also seeks to provide access to "hedgers" as defined in Section 1 of the CFA, which may not be registered as FCMs. Section 32(1)(a) of the CFA provides an exemption from registration for trades "by a hedger through a dealer". This exemption will be available for trades in ICE Futures U.S. Contracts by Ontario resident hedgers that route orders to ICE Futures U.S. through ICE Futures U.S. Clearing Members that are dealers, however, this exemption will not be available for trades in ICE Futures U.S. Contracts by Ontario resident hedgers that become Direct Access Users or non-clearing ICE Futures U.S. members since they will have direct electronic access to ICE Futures U.S. and will not send their orders through the trade desk of an ICE Futures U.S. Clearing Member dealer. In order to be granted direct access to ICE Futures U.S., any Ontario resident hedger would have to have an account with ICE Futures U.S. Clearing Member which ICE Futures U.S. Clearing Member would be obligated to settle any trades entered on ICE Futures U.S. by such Direct Access User.
6. We submit that the due diligence screening and account opening process that ICE Futures U.S. Clearing Members will be required to apply to prospective Direct Access Users will ensure that all Ontario resident hedgers that manage to become Direct Access Users will have been subject to appropriate credit checks, suitability analyses, know-your-client, account supervision, anti-money laundering and other anti-fraud procedures in accordance with CFTC and ICE Clear U.S. requirements. Moreover, the potentially significant financial risk that ICE Futures U.S. Clearing Members assume in respect of the trading activity of Direct Access Users they guarantee can be expected to ensure that the Ontario participants they agree to guarantee will have the requisite sophistication and proficiency in the trading of commodity futures to satisfy any investor protection concerns associated with such participants having direct access to ICE Futures U.S.
7. The Applicant also maintains a rigorous due diligence screening process for prospective exchange members. The Applicant maintains detailed membership application requirements which include a requirement for two business references, detailed financial information and regulatory information relating to the applicant all of which is reviewed and considered by the Applicant's Membership Committee pursuant to ICE Futures U.S. Rule 2.
8. ICE Futures U.S. intends to confirm that Ontario applicants that seek to rely on the Hedger Relief are "hedgers" as defined in Section 1 of the CFA by obtaining a representation to that effect from such applicants as a part of their application documentation. The documentation will specify that this representation is deemed to be repeated by the applicant each time it enters an order for an ICE Futures U.S. Contract and that the applicant must be a hedger for the purposes of each trade resulting from such an order.
9. The requested Hedger Relief is needed to allow sophisticated Ontario Participants who meet the definition of "hedgers" under the CFA to become Direct Access Users and gain the benefits of direct access such as improved execution speed, critical to so many traders in current electronic trading environments. Given the sophistication of such Ontario Participants and the fact that responsibility for their trading activity ultimately lies with the ICE Futures U.S. Clearing Members that guarantee their trades, it is not necessary for the protection of investors or the integrity of the market to require such participants to send their orders through a dealer rather than accessing ICE Futures U.S. directly.

**Other Matters**

10. Enclosed is a certificate of an officer of ICE Futures U.S. certifying the truth of the facts contained herein and authorizing us to prepare and file this Application.
11. The Applicant consents to the publication of this Application for public comment in the OSC Bulletin.

Thank you for your assistance with this matter.

Yours very truly,

Jacob Sadikman  
JS:mi  
Enclosure

c: Johnathan Short, ICE, Inc.  
Jill Fassler/Jason Fusco/Audrey Hirschfeld, ICE Futures U.S.  
Ward Sellers/Mark DesLauriers, Osler, Hoskin & Harcourt LLP

**IN THE MATTER OF  
THE SECURITIES ACT,  
R.S.O. 1990, CHAPTER S.5,  
AS AMENDED (OSA)**

**AND**

**IN THE MATTER OF  
THE COMMODITY FUTURES ACT,  
R.S.O. 1990, CHAPTER C.20,  
AS AMENDED (CFA)**

**AND**

**IN THE MATTER OF  
ICE FUTURES U.S., INC.**

**ORDER  
(Section 147 of the OSA and  
sections 38 and 80 of the CFA)**

**WHEREAS** ICE Futures U.S., Inc. (the "Applicant" or "ICE Futures U.S.") has filed an application dated May 15, 2009 (Application) with the Ontario Securities Commission (Commission) requesting:

- (a) an order pursuant to section 147 of the OSA exempting the Applicant from the requirement to be recognized as a stock exchange under section 21 of the OSA;
- (b) an order pursuant to section 80 of the CFA exempting the Applicant from the requirement to be registered as a commodity futures exchange under section 15 of the CFA; and
- (c) an order pursuant to section 38 of the CFA exempting trades in contracts on ICE Futures U.S. by "hedgers" from the registration requirement under section 22 of the CFA (Hedger Relief);

**AND WHEREAS** the term "hedger" has the meaning ascribed to it in section 1(1) of the CFA (Hedger);

**AND WHEREAS** Rule 91-503 *Trades in Commodity Futures Contracts and Commodity Futures Options Entered into on Commodity Futures Exchanges Situate Outside of Ontario* exempts trades of commodity futures contracts or commodity futures options made on commodity futures exchanges not registered with or recognized by the Commission under the CFA from sections 25 and 53 of the OSA;

**AND WHEREAS** the Rule entitled *In the Matter of Trading in Commodity Futures Contracts and Commodity Futures Options Entered into on Commodity Futures Exchanges in the United States of America*, provides that section 33 of the CFA does not apply to trades entered into on commodity futures exchanges designated by the U.S. Commodity Futures Trading Commission under the U.S. Commodity Exchange Act;

**AND WHEREAS** the Applicant has represented to the Commission that:

1. The Applicant is a Delaware corporation, designated as a contract market by the United States Commodity Futures Trading Commission (the "CFTC") pursuant to Section 5 of the U.S. Commodity Exchange Act (the "CEA"). The Applicant is owned by the IntercontinentalExchange, Inc. ("ICE, Inc.") in accordance with a merger agreement consummated on January 12, 2007. ICE, Inc. is a public company governed by the laws of the State of Delaware and listed on the New York Stock Exchange. ICE Inc. and its affiliates are collectively referred to as the "ICE Group";
2. The Applicant is, in turn, the sole shareholder of ICE Clear U.S., Inc. (formerly known as the New York Clearing Corporation or NYCC) ("ICE Clear U.S."), the New York Futures Exchange, Inc. ("NYFE") and eCOPS, LLC;
3. ICE Clear U.S. is a New York corporation and is a registered derivatives clearing organization ("DCO") as set forth in Section 5b of the CEA. As such, ICE Clear U.S. is subject to the regulatory oversight of the CFTC and must remain in compliance with all of the Core Principles of Section 5b of the CEA (the "DCO Core Principles"). ICE Clear U.S. clears the trades executed on ICE Futures U.S.;



4. ICE Futures U.S. traces its history to 1870 when the predecessor exchanges were founded that would eventually become the Board of Trade of the City of New York, Inc. ("NYBOT"). On September 14, 2006, ICE, Inc. announced that it had entered into an agreement to acquire NYBOT for consideration of approximately \$1 billion. On December 11, 2006, the merger was approved by the members of NYBOT and on January 12, 2007, the merger was consummated and NYBOT became a wholly-owned subsidiary of ICE, Inc.;
5. As a Designated Contract Market (a "DCM"), the Applicant offers a variety of agricultural or soft commodity futures contracts and options on futures contracts as well as futures contracts and options on futures contracts on certain financial and equity indices and currencies (collectively, "ICE Futures U.S. Contracts"). Historically the Applicant only offered trading of its contracts via open outcry floor trading. In 2007, the Applicant continued to offer floor trading, but also commenced electronic trading on a platform owned and operated by ICE, Inc. (known as the "ICE Platform") in its core agricultural futures products alongside traditional open outcry access. The contract terms of contracts available for electronic trading are the same as the contract terms of their equivalent floor traded contracts, and therefore fully fungible. Since that time the Applicant has continued to transition more of its contracts towards electronic trading. Although the Applicant has either commenced or will be commencing electronic trading for most of its commodity futures contracts, the applicant continues to maintain a floor trading operation for open outcry trading in respect of all of its listed commodity futures options contracts as well as with respect to certain of its less liquid commodity futures contracts.
6. Pursuant to its regulation by the CFTC, the Applicant is required to demonstrate its on-going compliance with various "Core Principles" applicable to all U.S. DCMs. The statutory Core Principles are described in Section 5 of the CEA and include requirements relating to, among others: fitness and properness; systems and controls; maintenance of an orderly market; investor protection; creation and maintenance of necessary records; the avoidance of anti-competitive actions; minimizing conflicts of interest in the decision-making process and establishing a process for resolving such conflicts; and rule-making and other matters including that the Applicant monitor and enforce compliance with its rules.
7. The CFTC monitors trading on ICE Futures U.S. and receives daily transaction and other reports from the Applicant. The CFTC also undertakes periodic in-depth audits or "rule reviews" of the Applicant's compliance with certain of the statutory Core Principles.
8. The Applicant is required under its regulations to provide to the CFTC on request access to all records. In addition, ICE Futures U.S. Rule 6.50 requires the disclosure of information to the regulatory authority of any foreign jurisdiction in which it has been approved to conduct business, if such disclosure is a condition of approval.
9. The Applicant proposes to offer direct electronic access to trading in ICE Futures U.S. Contracts through the ICE Platform to prospective participants in Ontario ("Ontario Participants"), either by way of (i) membership in ICE Futures U.S., (ii) via direct access sponsored by a member of ICE Clear U.S. (a "Clearing Member") (such non-Clearing Member participants, "Direct Access Users"), or (iii) through order-routing arrangements where orders are routed through a Clearing Member onto the exchange.
10. The Applicant expects that potential Ontario Participants that may seek to become members, Direct Access Users or order-routing clients of a Clearing Member will be (i) dealers that are engaged in the business of trading commodity futures and commodity options in Ontario and (ii) Hedgers.
11. ICE Futures U.S. Contracts fall under the definitions of "commodity futures contract" or "commodity futures option" set out in Section 1 of the CFA. The Applicant is therefore considered a "commodity futures exchange" as defined in Section 1 of the CFA and is prohibited from carrying on business in Ontario unless it is registered or exempt from registration as an exchange under Section 15 of the CFA.
12. The Applicant seeks to provide Ontario Participants with direct, electronic access to trading in ICE Futures U.S. Contracts and as a result, is considered by the Commission to be "carrying on business as a commodity futures exchange" in Ontario.
13. The Applicant is not registered with or recognized by the Commission as a commodity futures exchange under the CFA and no ICE Futures U.S. Contracts have been accepted by the Director (as defined in the OSA) under the CFA, therefore, ICE Futures U.S. Contracts are considered "securities" under paragraph (p) of the definition of "security" set out in Section 1(1) of the OSA and the Applicant is considered a "stock exchange" under the OSA and is prohibited from carrying on business in Ontario unless it is recognized or exempt from recognition under section 21 of the OSA.
14. As above, since the Applicant seeks to provide Ontario Participants with direct, electronic access to trading in ICE Futures U.S. Contracts it is considered by the Commission to be "carrying on business as a stock exchange" in Ontario.

15. The exemption from registration in section 32(1)(a) of the CFA applies for trades “by a hedger through a dealer”. This exemption will be available for trades in ICE Futures U.S. Contracts by Ontario resident hedgers that route orders to ICE Futures U.S. through ICE Futures U.S. Clearing Members that are dealers, however, this exemption will not be available for trades in ICE Futures U.S. Contracts by Ontario resident hedgers that become Direct Access Users or non-clearing ICE Futures U.S. members since they will have direct electronic access to ICE Futures U.S. and will not execute trades through dealers.
16. The Applicant maintains rigorous membership criteria that all applicants must satisfy before their applications are considered by its membership committee, including, among others: fitness criteria; suitable qualifications and experience; adequate training and supervision; proper authorizations, or exemptions to trade; and suitable financial standing.
17. All Clearing Members that guarantee a Direct Access User or provide order routing access to ICE Futures U.S. to an Ontario client will be registered futures commission merchants with the CFTC. Such clearing members are subject to the compliance requirements of the CEA, the CFTC and the National Futures Association as they relate to customer accounts, including various know-your-client, suitability, risk-disclosure, anti-money laundering and anti-fraud requirements. These requirements, in conjunction with the ICE Clear U.S. margin requirements that apply to all Clearing Members and subsequently to their clients whose trades they guarantee, ensure that Ontario firms seeking to become Direct Access Users or gain order routing access through a Clearing Member are subjected to appropriate due diligence procedures and fitness criteria. In addition, Direct Access Users are required to sign the ICE Futures U.S. Electronic User Agreement making them responsible for, among other things, compliance with the Applicant's exchange rules.
18. Each applicant for ICE Futures U.S. membership or for status as a Direct Access User of ICE Futures U.S. electronic trading that intends to rely on the Hedger Relief will be required, as part of the application documentation to:
  - (a) represent that it is a Hedger;
  - (b) acknowledge that the Applicant deems the Hedger representation to be repeated by the applicant each time it enters an order for an ICE Futures U.S. Contract, and that the applicant must be a Hedger for the purposes of each trade resulting from such an order;
  - (c) agree to notify the Applicant if the applicant ceases to be a Hedger;
  - (d) represent that it will only enter trades for its own account; and
  - (e) acknowledge that it is a market participant under the CFA and is subject to applicable requirements.
19. With respect to electronic trading via direct access or order-routing access, the Applicant will ensure that the guidance that it circulates to Clearing Members respecting the granting of such access to Ontario Participants indicates that the Clearing Member is permitted to grant direct access or order routing access to ICE Futures U.S. to an Ontario Participant provided that (i) the Ontario Participant is appropriately registered under the CFA to trade in ICE Futures U.S. Contracts or (ii) the Ontario Participant is a Hedger.
20. Based on the facts set out in the Application, the Applicant satisfies the criteria set out in Schedule “A” to this order;

**AND WHEREAS** based on the Application and the representations the Applicant has made to the Commission, the Commission has determined that the Applicant satisfies the criteria set out in Schedule “A” and that the granting of exemptions from recognition and registration to the Applicant would not be prejudicial to the public interest;

**IT IS HEREBY ORDERED** by the Commission that pursuant to section 147 of the OSA, the Applicant is exempt from recognition as a stock exchange under section 21 of the OSA, and pursuant to section 80 of the CFA, the Applicant is exempt from registration as a commodity futures exchange under section 15 of the CFA;

**AND IT IS FURTHER ORDERED** by the Commission that, pursuant to section 38 of the CFA, trades in ICE Futures U.S. Contracts by Hedgers who are ICE Futures U.S. Members or Direct Access Users are exempt from the registration requirement under section 22 of the CFA;

**PROVIDED THAT** the Applicant complies with the terms and conditions attached hereto as Schedule “B”.

**SCHEDULE "A"**

**Criteria for Exemption from Recognition/Registration as an Exchange**

**PART 1 REGULATION AND OVERSIGHT OF THE EXCHANGE**

**1.1 Regulation of the Exchange**

The Exchange is regulated in an appropriate manner in another jurisdiction by a Foreign Regulator. The regulatory scheme of the Foreign Regulator is transparent and generally comparable to that in Ontario.

**1.2 Authority of the Foreign Regulator**

The Foreign Regulator has the appropriate authority and procedures for oversight of the Exchange. This oversight includes regular, periodic regulatory examinations of the Exchange by the Foreign Regulator.

**PART 2 CORPORATE GOVERNANCE**

**2.1 Fair Representation**

The governance structure of the Exchange provides for:

- (i) appropriate, fair and meaningful representation on its Board and any committee thereof; and
- (ii) appropriate representation by independent directors on the Board and any committee thereof.

**2.2 Appropriate Provisions for Directors and Officers**

There are appropriate qualifications, remuneration, limitation of liability and indemnity provisions for directors and officers.

**2.3 Fitness**

The Exchange takes reasonable steps to ensure that each officer and director is a fit and proper person and past conduct of each officer or director affords reasonable grounds for belief that the officer or director will perform his or her duties with integrity.

**2.4 Conflicts of Interest**

The Exchange has appropriate conflict of interest provisions for all directors, officers and employees.

**PART 3 FEES**

**3.1 Fees**

The Exchange's process for setting fees is fair, transparent and appropriate. Any and all fees imposed by the Exchange on its participants are equitably allocated, do not have the effect of creating barriers to access and are balanced with the criteria that the Exchange has sufficient revenues to satisfy its responsibilities.

**PART 4 REGULATION OF PRODUCTS**

**4.1 Approval of Products**

The products traded on the Exchange are approved by the appropriate authority.

**4.2 Product Specifications**

The terms and conditions of trading the products are in conformity with normal commercial business practices for the trade in the product.

### **4.3 Risks Associated with Trading Products**

The Exchange maintains adequate provisions to measure, manage and mitigate the risks associated with trading products on the Exchange, including, but not limited to, margin requirements, intra-day margin calls, daily trading limits, price limits, position limits, and internal controls.

## **PART 5 ACCESS**

### **5.1 Fair Access**

The requirements of the Exchange relating to access to the facilities of the Exchange, the imposition of limitations or conditions on access and denial of access are approved by the Foreign Regulator and are fair and reasonable, including in respect of notice, an opportunity to be heard or make representations, the keeping of records, the giving of reasons and the provisions for appeals.

### **5.2 Details of Access Criteria**

In particular, the Exchange

- i. has written standards for granting access to trading on its facilities to ensure users have appropriate integrity and fitness;
- ii. has and enforces financial integrity standards for those persons who enter orders for execution on the system, including, but not limited to, credit or position limits and clearing membership;
- iii. does not unreasonably prohibit or limit access by a person or company to services offered by it;
- iv. keeps records of each grant and each denial or limitation of access, including reasons for granting, denying or limiting access; and
- v. restricts access to adequately trained system users who have demonstrated competence in the functions that they perform.

### **5.3 Access for Ontario Persons**

The Exchange provides direct access, either through terminals, data feeds or third party provided interfaces, to only those Ontario persons that are duly registered or licensed under Ontario.

## **PART 6 RULEMAKING**

### **6.1 Purpose of Rules**

The Exchange maintains rules, policies and other similar instruments as are necessary or appropriate to govern and regulate all aspects of its business and affairs and such rules are designed to, in particular,

- i. ensure compliance with the rules of the Exchange and securities legislation;
- ii. prevent fraudulent and manipulative acts and practices;
- iii. promote just and equitable principles of trade;
- iv. foster cooperation and coordination with persons or companies engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in, the products trade on the Exchange;
- v. provide for appropriate discipline;
- vi. ensure a fair and orderly market; and
- vii. ensure that the Exchange business is conducted in a manner so as to afford protection to investors.

## **6.2 No Discrimination or Burden on Competition**

The rules of the Exchange do not

- i. permit unreasonable discrimination among issuers, if applicable, and participants; or
- ii. impose any burden on competition that is not reasonably necessary or appropriate.

## **PART 7 SYSTEMS AND TECHNOLOGY**

### **7.1 System Capability/Scalability**

For each of its systems that support order entry, order routing, execution, data feeds, trade reporting and trade comparison, capacity and integrity requirements, the Exchange:

- i. makes reasonable current and future capacity estimates;
- ii. conducts capacity stress tests of critical systems to determine the ability of those systems to process transactions in an accurate, timely and efficient manner;
- iii. reviews the vulnerability of those systems and data centre computer operations to internal and external threats, including physical hazards and natural disasters;
- iv. ensures that safeguards which protect a system against unauthorized access, internal failures, human errors, attacks and natural catastrophes that might cause improper disclosures, modification, destruction or denial of service are subject to an independent and ongoing audit which should include the physical environment, system capacity, operating system testing, documentation, internal controls and contingency plans;
- v. ensures that the configuration of the system has been reviewed to identify potential points of failure, lack of back-up and redundant capabilities;
- vi. maintains reasonable procedures to review and keep current the development and testing methodology of those systems; and
- vii. maintains reasonable back-up, contingency and business continuity plans, disaster recovery plans and internal controls.

### **7.2 Information Technology Risk Management Procedures**

Procedures are in place that:

- i. handle trading errors, trading halts and circuit breakers;
- ii. ensure the competence, integrity and authority of system users; and
- iii. ensure that the system users are adequately supervised.

## **PART 8 FINANCIAL VIABILITY**

### **8.1 Financial Viability**

The Exchange has sufficient financial resources for the proper performance of its functions.

## **PART 9 CLEARING AND SETTLEMENT**

### **9.1 Relationship with Clearing House**

The Exchange has a clearing relationship with an established clearing house and all transactions executed on the Exchange are cleared through the Clearing House.

### **9.2 Regulation of the Clearing House**

The Clearing House and direct clearing members are subject to acceptable regulation.

### **9.3 Authority of the Foreign Regulator**

The Foreign Regulator has the appropriate authority and procedures for oversight of the Clearing House. This oversight includes regular, periodic regulatory examinations of the Clearing House by the Foreign Regulator.

### **9.4 Restrictions on Access to a Foreign Member**

Any restrictions on access to the clearing system by a foreign member are adequately disclosed and justified by the legislation of the home jurisdiction, are not anti-competitive and do not unreasonably impose barriers to access.

### **9.5 Sophistication of Technology of Clearing House**

The Exchange has assured itself that the information technology used by the Clearing House has been adequately reviewed and tested and provides at least the same level of safeguards as required of the Exchange.

### **9.6 Risk Management of Clearing House**

The Exchange has assured itself that the Clearing House has established appropriate risk management policies and procedures, contingency plans, default procedures and internal controls.

## **PART 10 TRADING PRACTICES**

### **10.1 Trading Practices**

Trading practices are fair, properly supervised and not contrary to the public interest.

### **10.2 Market Making Provisions**

Market making provisions and other provisions to ensure market liquidity, if any, are fair and equitable to all market participants.

### **10.3 Orders**

Rules pertaining to order size and limits are fair and equitable to all market participants and the system for accepting and distinguishing between and executing different types of orders is fair, equitable and transparent.

### **10.4 Transparency**

Adequate provision has been made to record and publish details of pricing and trading.

### **10.5 Market Limits**

Market limits have been established as to ensure the integrity of the Exchange during times of volatility.

## **PART 11 COMPLIANCE, SURVEILLANCE AND ENFORCEMENT**

### **11.1 Jurisdiction**

The Exchange or the Foreign Regulator has the jurisdiction to perform member and market regulation, including the ability to set rules, conduct compliance reviews and perform surveillance and enforcement.

### **11.2 Member and Market Regulation**

The Exchange or its Foreign Regulator maintains appropriate systems, resources and procedures for evaluating compliance with Exchange and legislative requirements and disciplining participants.

### **11.3 Record Keeping**

The Exchange maintains adequate provisions for keeping books and records, including operations of the exchange, audit trail information on all trades and compliance and/or violations of Exchange requirements and securities legislation.

**11.4 Availability of Information to Regulator**

The Exchange has mechanisms in place to ensure that the information necessary to conduct adequate surveillance of the system for supervisory and enforcement purposes is available to the relevant regulatory authorities on a timely basis.

**PART 12 INFORMATION SHARING AND OVERSIGHT ARRANGEMENTS**

**12.1 Information Sharing and Oversight Agreement**

Satisfactory information sharing and oversight agreements exist among the OSC and the Foreign Regulator.

**PART 13 IOSCO PRINCIPLES**

**13.1 IOSCO Principles**

The Exchange adheres to the IOSCO principles to the extent consistent with the law of the foreign jurisdiction.

**SCHEDULE "B"**

**Terms and Conditions**

**REGULATION OF ICE FUTURES U.S.**

1. The Applicant will maintain its status as a DCM with the CFTC and will continue to be subject to the supervision of the CFTC, or any successor regulatory body, as a DCM, or any successor category of recognition.
2. The Applicant will continue to comply with its ongoing compliance requirements set out in the Core Principles under section 5 of the CEA or any successor compliance requirements.
3. The Applicant will continue to meet the criteria for exemption from registration as an exchange, as set out in Schedule "A".

**ACCESS**

4. The Applicant will not allow Ontario Participants to become Direct Access Users or ICE Futures U.S. members unless they are appropriately registered to trade in ICE Futures U.S. Contracts or are Hedgers.
5. Each Ontario Participant that intends to rely on the Hedger Relief will be required, as part of the application documentation to:
  - (a) represent that it is a Hedger;
  - (b) acknowledge that the Applicant deems the Hedger representation to be repeated by the Ontario Participant each time it enters an order for an ICE Futures U.S. Contract and that the Ontario Participant must be a Hedger for the purposes of each trade resulting from such an order;
  - (c) agree to notify the Applicant if it ceases to be a Hedger;
  - (a) represent that it will only enter trades for its own account; and
  - (e) acknowledge that it is a market participant under the CFA and is subject to applicable requirements.
6. The Applicant will require Ontario Participants to notify it if their registration or exemption from registration has been revoked, suspended or amended by the Commission and, following notice from the Ontario Participant or the Commission and subject to applicable laws, the Applicant will promptly restrict the Ontario Participant's access to ICE Futures U.S. if the Ontario Participant is no longer appropriately registered with or exempted by the Commission.
7. ICE Futures makes available to Ontario Participants appropriate training for each person who has access to trade in ICE Futures U.S. Contracts on the ICE Platform.

**SUBMISSION TO JURISDICTION AND AGENT FOR SERVICE**

8. The Applicant submits to the non-exclusive jurisdiction of (i) the courts and administrative tribunals of Ontario and (ii) an administrative proceeding in Ontario, in a proceeding arising out of, related to or concerning or in any other manner connected with the activities of ICE Futures U.S. in Ontario.
9. The Applicant will file with the Commission a valid and binding appointment of an agent for service in Ontario upon whom may be served a notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal, penal or other proceeding arising out of or relating to or concerning the Applicant's activities in Ontario.

**DISCLOSURE**

10. The Applicant will provide to all Ontario Participants, and also require Ontario Participants that are registered FCMs under the CFA to distribute to Ontario clients, prior to the first trade by each client that is executed through the facilities of ICE Futures U.S., disclosure that states that:
  - (a) rights and remedies against the Applicant may only be governed by the laws of the United States, rather than the laws of Ontario and may be required to be pursued in the United States rather than in Ontario;



- (b) the rules applicable to trading on ICE Futures U.S. may be governed by the laws of the United States, rather than the laws of Ontario; and
- (c) ICE Futures U.S. is regulated by the CFTC, rather than the OSC.

## **FILING REQUIREMENTS**

### **Prompt Notice**

11. The Applicant will promptly notify staff of the Commission of any of the following:
- (a) any material change to the information provided in the Application, including, but not limited to:
    - (i) changes to the regulatory oversight by the CFTC,
    - (ii) the corporate governance structure of ICE Futures U.S.,
    - (iii) the access model, including eligibility criteria, for Ontario Participants,
    - (iv) systems and technology, and
    - (v) the clearing and settlement arrangements for ICE Futures U.S.;
  - (b) any change or proposed change in the ICE Futures U.S. rules or regulations or the laws, rules and regulations in the United States relevant to futures and options on futures where such change may materially affect the ability of the Applicant to meet the criteria set out in Schedule "A" to this order;
  - (c) any known investigations or disciplinary action by the CFTC or any other regulatory authority to which the Applicant is subject relating to the discharge by the Applicant of its regulatory obligations;
  - (d) any matter known to the Applicant that may affect the financial or operational viability of ICE Futures U.S., including, but not limited to, any significant system failure or interruption;
  - (e) any default, insolvency or bankruptcy of any ICE Futures U.S. Member, direct access user or Clearing Member known to ICE Futures or its representatives that may have a material, adverse impact upon ICE Futures U.S., ICE Clear U.S. or any Ontario Participant.

### **Quarterly Reporting**

12. The Applicant will maintain the following updated information and submit such information to the Commission on at least a quarterly basis, and at any time promptly upon the request of staff of the Commission:
- (a) a current list of all Ontario Participants that are either exchange members or Direct Access Users;
  - (b) a list of all Ontario Participants that are either exchange members or Direct Access Users against whom disciplinary action has been taken in the last quarter by the Applicant or the CFTC with respect to activities on ICE Futures U.S.;
  - (c) a list of all investigations by the Applicant relating to Ontario Participants that are either exchange members or Direct Access Users;
  - (d) a list of all Ontario applicants who have been denied access to ICE Futures U.S.; and
  - (e) for each ICE Futures U.S. Contract, the total trading volume originating from Ontario Participants that are either exchange members or Direct Access Users and the proportion of worldwide trading volume on ICE Futures U.S. conducted by such Ontario Participants.

### **Annual Reporting**

13. The Applicant will arrange to have the annual SAS 70 for ICE, Inc. filed with the Commission.

**FINANCIAL VIABILITY**

14. The Applicant will file with the Commission all annual financial statements required to be filed with the CFTC, within the same timeframes as required by the CFTC.

**INFORMATION SHARING**

15. The Applicant will, subject to applicable laws, share any and all information within the care and control of ICE Futures U.S. and otherwise co-operate wherever reasonable with the Commission or its staff.