



Atlanta Calgary Chicago Houston London New York Singapore

February 12, 2012

Federal Deposit Insurance  
Corporation  
550 17th Street, N.W.  
Washington, DC 20429

Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

Board of Governors of the Federal  
Reserve System  
20th Street & Constitution Avenue, N.W.  
Washington, DC 20581

Department of Treasury  
Office of the Comptroller of the  
Currency  
250 E Street, SW  
Washington, DC 20219

RE: *Restrictions on Proprietary Trading and Certain Relationships with Hedge Funds  
& Private Equity Funds ("Volcker Rule")*

Ladies and Gentlemen:

The IntercontinentalExchange, Inc. ("ICE") appreciates the opportunity to comment on the regulatory agencies (the "Agencies") proposed rulemaking addressing restrictions on proprietary trading, commonly referred to as the "Volcker Rule". As background, ICE operates four regulated futures exchanges: ICE Futures Europe; ICE Futures Canada, the Chicago Climate Exchange and ICE Futures US. ICE also owns and operates five derivatives clearinghouses: ICE Clear US, a Derivatives Clearing Organization under the Commodity Exchange Act, located in New York and serving the markets of ICE Futures US; ICE Clear Europe, a Recognized Clearing House and Derivatives Clearing Organization located in London that serves ICE Futures Europe, ICE's OTC energy markets and operates as ICE's European CDS clearinghouse; ICE Clear Canada, a recognized clearing house located in Winnipeg, Manitoba that serves the markets of ICE Futures Canada; The Clearing Corporation, a U.S. Derivatives Clearing Organization and ICE Clear Credit, a U.S.-based CDS clearing house. As the operator a diverse set of exchanges and clearinghouses based in three countries, ICE has a unique perspective on the Volcker Rule.

ICE recognizes the effort of the Agencies to implement Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Section 619 prohibits "covered banking entities" from engaging in "proprietary trading" with certain statutory exemptions. The proposed regulations implement the Volcker rule by



clarifying the definitions and establishing some additional exceptions. Pursuant to Section 619, the Agencies are required to implement the "Volcker Rule;" however, ICE believes the Agencies should refine its rules which unnecessarily extend the extraterritorial reach of the Dodd-Frank Act and could impact liquidity on U.S. markets.

### *Extraterritorial Reach of the Volcker Rule*

The policy underpinning the Volcker Rule is banks operating in the United States have access to Federal Reserve discount loans and deposit insurance coverage; therefore, proprietary trading by these banks is effectively subsidized by the U.S. taxpayer. Further, these entities help maintain the stability of the financial system and thus, proprietary trading may undermine a key pillar of the U.S. financial system if it is too risky. These principles present a valid argument for applying the Volcker Rule to a U.S. bank, but they present an equally valid argument for *not applying the rule* to foreign bank entities.

In January 2011, the Financial Stability Oversight Council ("FSOC") published a study on the impact of the Volcker Rule and its impact on foreign banks.<sup>1</sup> The study states:

The Volcker Rule applies to domestic banking operations of foreign institutions. However, because of U.S. extra-territorial regulatory constraints, the statute does not restrict proprietary trading conducted by non-U.S. entities outside the United States. These entities are not eligible for discount window loans or federal deposit insurance.<sup>2</sup>

The Agencies' proposed rule's definition of "banking entity" is much broader than anticipated by the FSOC study. Any foreign bank with even a minimal U.S. presence (for example, one U.S. branch) would be subject to the Volcker Rule. This leads to absurd results where multinational banks with one U.S. branch will be forced to change their business in order to comply with U.S. law even though the foreign bank itself is not eligible to access the Federal Reserve discount window or the insurance coverage. This will likely lead to foreign banks exiting U.S. markets, to the detriment of the U.S. economy. ICE suggests that the Agencies amend the definition of banking entity to only apply the Volcker Rule to U.S. branches of foreign banks while excluding the foreign banks themselves.

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<sup>1</sup> Financial Stability Oversight Council, *Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds and Private Equity Funds* (January 2011).

<sup>2</sup> *Id.* at pg 46.



In addition to modifying the definition of banking entity, the Agencies should expand the exemptions for non-U.S. trading. The statutory language of the Volcker Rule exempts transactions that take place "solely outside of the U.S." Under the proposed rules, two additional factors are added to the test as to whether activity occurs "solely outside of the U.S.":

- The transaction must be executed "wholly outside of the U.S."; and
- No party to the transaction may be a resident of the U.S.

Given these requirements, foreign banking entities entering into trades in reliance on the "solely outside the U.S." exemption could not execute those trades on U.S. exchanges or trading platforms.<sup>3</sup> Currently, U.S. exchanges serve as the international marketplace for many derivatives contracts, including such global contracts as LIBOR, Eurodollars, and agricultural products such as sugar and coffee. The Agencies' interpretation of the Volcker Rule will serve as a material disadvantage to U.S. exchanges, precluding foreign banks from participating in U.S. markets. ICE suggests the Agencies define the scope of transactions solely outside of the U.S. to exclude transactions if the transaction is entered into by a foreign banking entity that is not organized under U.S. law and not recorded as an asset by a U.S. branch of the foreign banking entity.

### *Market Making*

Section 619 of Dodd-Frank provides an exemption from the law's proprietary trading prohibition for the "purchase, sale, acquisition, or disposition of securities or other instruments...in connection with underwriting or market-making activities." The Agencies' proposed rule implements this exemption through a complicated test requiring covered banking entities to prove that their trading is a market making activity.

The U.S. financial markets are broad, complex markets with varied participants and liquidity. A one size fits all rule, even as detailed as the proposed rule, will inevitably not work for all markets or market participants. Banks acting as market makers will be unduly constricted by the proposed rule. In addition, just to comply with the exemption, banks will have to incur substantial costs while still facing uncertainty over whether their trading complies with the exemption. These two factors are likely to cause many banks

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<sup>3</sup> Note that trading on many exchanges and platforms is anonymous, thus the banking entity would have to avoid the trading platform or exchange entirely to avoid transactions with U.S. based participants.



to exit markets which will lower liquidity and increase transaction costs, ultimately creating a regulatory environment that achieves directly the opposite of the intent of Dodd-Frank.

ICE believes that regulatory capital and liquidity requirements for market making is a better approach. These requirements will serve as a buffer against any risk undertaken by banks to provide market making services while keeping flexibility. This will help achieve the Agencies' goal to protect liquidity in the financial markets while deterring unnecessarily risky behavior.

*Conclusion*

Again, ICE recognizes the Agencies' efforts to implement the Volcker Rule, but asks that the Agencies tailor their rules to make certain foreign banking entities are not precluded from trading on U.S. markets. In addition, we ask that the Agencies give banks more flexibility to make markets. We appreciate the opportunity to comment on the proposed rules.

Sincerely,

A handwritten signature in black ink that reads "Trabue Bland". The signature is written in a cursive style with a large, sweeping initial "T".

Trabue Bland  
Vice President, Regulatory Affairs and Assistant  
General Counsel  
IntercontinentalExchange, Inc.