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By Electronic Mail

June 1, 2011

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street NW
Washington DC 20581

Re: Petition for Exemption Pursuant to Section 4(c) of the Commodity Exchange Act

Dear Mr. Stawick:

The Futures Industry Association (“FIA”),¹ on behalf of its member futures commission merchants (“FCMs”) and their affiliates (“Affiliates”), and similarly situated firms, that are clearing members of ICE Clear Europe (collectively, “Clearing Members”), hereby requests the Commodity Futures Trading Commission (“Commission”) to adopt an order pursuant to section 4(c) of the Commodity Exchange Act (“CEA”) exempting such Clearing Members from the requirements of section 4d(f) of the CEA, as added by section 724 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), for a period of not less than 30 calendar days, beginning July 16, 2011, the effective date of many provisions of the Dodd-Frank Act,² and ending not before August 15, 2011. New section 4d(f)(1) provides:

¹ FIA is the leading trade organization for the futures, options and over-the-counter cleared derivatives markets. It is the only association representative of all organizations that have an interest in the listed derivatives markets. Its membership includes the world’s largest derivatives clearing firms as well as leading derivatives exchanges from more than 20 countries. As the principal members of the derivatives clearing organizations, our member firms play a critical role in the reduction of systemic risk in the financial markets. They provide the majority of the funds that support these clearinghouses and commit a substantial amount of their own capital to guarantee customer transactions.

² Section 754 of the Dodd-Frank Act provides: “Unless otherwise provided in this title, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle [*i.e.*, July 16, 2011] or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle.” We understand that the Commission staff has initially taken the position that, unless a provision by its terms specifically requires the Commission to adopt rules, that provision of Title VII, Subtitle A, must take effect on July 16, 2011. Further, staff believes section 724 is one such section. We suggest it is not necessary to read section 754 so narrowly. To the contrary, we believe this section gives the Commission authority, in its reasonable discretion, to determine that rules are required to implement a particular provision of Subtitle A properly, even if Congress did not specifically provide that rules be adopted.

It shall be unlawful for any person to accept any money, securities, or property (or to extend any credit in lieu of money, securities, or property) from, for, or on behalf of a swaps customer to margin, guarantee, or secure a swap cleared by or through a derivatives clearing organization (including money, securities, or property accruing to the customer as the result of such a swap), unless the person shall have registered under this Act with the Commission as a futures commission merchant, and the registration shall not have expired nor been suspended nor revoked.

New section 4d(f)(2)-(4) provides for the segregation of collateral deposited by swaps customers.

We respectfully submit that the requested exemption would be consistent with the public interest. In addition, although we are requesting an exemption for not less than 30 days, for the reasons explained below, FIA member FCMs and their Affiliates believe that the minimum amount of time that they would need to comply with the registration requirements of section 724 or otherwise assure a prudent and efficient transfer of customer positions, as appropriate, is 90 days.³

By filing this petition for temporary exemptive relief, FIA is not waiving its right to request the Commission, in a separate petition, to exercise its authority under various sections of the CEA, including those described herein, to adopt a regulatory program with respect to swaps cleared on foreign derivatives clearing organizations that will result in more permanent relief for such foreign clearing organizations and their clearing members that clear swaps “for, by, or on behalf of a swaps customer” located in the US. We anticipate that any such request would encourage the Commission to adopt a program for foreign clearing organizations and their clearing members that is modeled after the Commission’s highly successful regulatory regime for foreign futures and foreign options, found in Part 30 of the Commission’s rules.

Relevant Provisions of the Commodity Exchange Act as Amended by the Dodd-Frank Act

Section 725 of the Dodd-Frank Act amends section 5b(a) of the CEA to provide that it is unlawful for any clearing organization “directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a derivatives clearing organization with respect to . . . a swap,” unless that clearing organization is registered with the Commission as a derivatives clearing organization (“DCO”). On its face, therefore,

³ Although this request for exemption is filed in connection with energy swaps cleared on ICE Clear Europe, we expect that other foreign clearing organizations and their clearing members may require similar relief. However, it is possible that such clearing organizations may not be aware of the Commission staff interpretation or that their clearing members are clearing swaps for US customers. To the extent appropriate, and as will be evident from this letter, FIA would not object if the Commission were to grant more global relief.

Mr. David A. Stawick
June 1, 2011
Page 3

this section requires a foreign clearing organization to be registered as a DCO, if it clears just one swap for or on behalf of a U.S. participant.⁴

Section 724 of the Dodd-Frank Act amends section 4d of the CEA to add a new subsection (f), which provides that it is unlawful for any person to accept any money or securities “from, for, or on behalf of a swaps customer” to margin a cleared swap, unless that person is registered with the Commission as an FCM. We have been advised that the Commission staff interprets section 4d(f) to require a clearing member of a foreign clearing organization that clears swaps “from, for, on behalf” of one or more US swap participants to be registered with the Commission. Further, registration would be required, even if the clearing member carried only a US FCM’s customer omnibus account.

Taken together, and in the absence of a Commission exemption or interpretation providing appropriate relief, Commission staff interpretation of new sections 5b(a) and 4d(f) appears to require any clearing organization, wherever located, which clears swaps for participants located in the US to be registered with the Commission as a DCO and concomitantly requires any clearing member clearing swaps on behalf of U.S. participant to be registered as an FCM. We understand that Commission staff has taken the position that this is the case even if the Commission has not determined that the swap is required to be cleared. As noted earlier, we further understand that Commission staff has taken the position that, because section 724 of the Dodd-Frank Act, adding new section 4d(f) of the CEA, does not specifically require Commission rulemaking, this provision becomes effective on July 16, 2011.⁵

⁴ Section 725 of the Dodd-Frank Act also adds a new section 5b(h) to the CEA, which authorizes the Commission to exempt from registration as a DCO any foreign clearing organization that the Commission determines “is subject to comparable, comprehensive supervision and regulation by . . . the appropriate government authorities in the home country of the organization.”

In addition, section 722 of the Dodd-Frank Act amends section 2 of the CEA to add a new subsection (i), which provides that the provisions of the CEA relating to swaps do not apply to activities that take place outside of the US that do not “have a direct and significant connection with activities in, or effect on, commerce of the United States.” The Commission has the authority under section 2(i), therefore, to find that, as a result of the limited amount of swap transactions that are cleared on behalf of US customers, registration as a DCO is not required.

To date, the Commission has not exercised its authority under either section 2(i) or 5b(h). We are concerned that the Commission’s failure to adopt appropriate exemptive relief with respect to foreign clearing organizations may result in the balkanization of swaps clearing; at the least, foreign regulatory authorities may retaliate and make it more difficult for US FCMs and clearing organizations to conduct business globally.

⁵ By this letter, we are requesting the Commission to grant an exemption from the requirements of section 4d(f). We note, however, that section 1a(28) of the CEA, as amended by section 721 of the Dodd-Frank Act, authorizes the Commission to exclude any person from the definition of an FCM, if the Commission determines that such exclusion “will effectuate the purposes of the Act.” The Commission, therefore, could determine to exclude from the requirement to be registered as an FCM a clearing member of a foreign clearing organization that is subject to comparable regulation. We appreciate that such an exclusion would require rulemaking, which could not be completed before July 16, 2011.

As discussed above, we believe that the Commission staff is reading section 754 of the Dodd-Frank Act too narrowly and, in this regard, respectfully submit that section 724 “requires a rulemaking” to implement its provisions. As evidence thereof, we note that Commission recently proposed a new Part 22 of its rules “to implement the segregation requirements in [section 724 of] the Dodd-Frank Act.” Nowhere in the Federal Register release does the Commission suggest that FCMs will be required to comply with section 4d(f) prior to the effective date of final rules governing cleared swaps customer funds.

These proposed rules have not yet been published for comment in the Federal Register and, once published, will be subject to a 60-day comment period. Therefore, it is unlikely that the Commission will be in a position to adopt final rules in this regard until September 2011, with an effective date several months thereafter to provide FCMs and DCOs sufficient time to come into compliance.

The proposed rules would create a regulatory regime for the segregation of cleared swaps customer collateral that differs substantially from the regulations governing the segregation of customer funds held in connection with futures and options on futures transactions executed on a US designated contract market. Moreover, the Commission has specifically requested comments on alternative segregation schemes and has made clear that the final rules may look significantly different from the rules the Commission has proposed. In these circumstances, it is evident that the provisions of section 724 are not self-executing. FCMs and DCOs should not be required to guess which regulatory regime the Commission will adopt or to undertake to implement an interim scheme that may conflict with the rules the Commission ultimately elects to promulgate.

Activities on ICE Clear Europe

With limited exceptions, over-the-counter (“OTC”) energy derivatives entered into for or on behalf of US customers that are (i) customers of FIA member firms, and (ii) submitted for clearing on ICE Clear Europe are submitted through FIA member firms’ omnibus accounts carried by FIA member firms’ respective UK Affiliates. Therefore, in the absence of the exemption requested herein, or an interpretation of the relevant provisions of the CEA otherwise providing relief, as of July 16, 2011, either: (x) FIA member firms carrying OTC energy derivatives for US customers must become Clearing Members of ICE Clear Europe; or (y) the Affiliates must become registered with the Commission as FCMs. Neither alternative can be accomplished between the date hereof and July 16.

Although ICE Clear Europe had advised FIA member firms or their Affiliates that ICE Clear Europe Clearing Members clearing for US customers would be required to be registered as FCMs, certain key issues are unresolved. FIA member firms and their Affiliates cannot reasonably determine which alternative to pursue, or initiate an appropriate implementation plan, until these issues have been resolved. In particular, it will be important to understand the segregation requirements to which FCM Clearing Members will be subject, whether FCM

Clearing Members will be required to maintain section 4d(f) segregated accounts in the UK, and whether FCM Clearing Members will be required to maintain a presence in the UK.

If, after careful consideration of the rights and obligations it would assume, a US FCM elects to apply to become an ICE Clear Europe Clearing Member, there are considerable operational steps that will have to be completed before the firm can begin clearing trades. The FCM will be required to take time to understand the impact of, and determine the work necessary to support, the required regulatory changes; develop and implement modifications to numerous internal and vendor systems, including SunGard and Rolfe & Nolan, required to support such changes; and test the system modifications prior to implementation.

Such systems modifications would include but not be limited to: (i) establishing procedures for portfolio management, including reviewing collateral flows; (ii) amending banking, trade and position reports to reflect additional settlement accounts; (iii) establishing account identification and mapping; (iv) developing new reconciliation reports; and, (v) establishing procedures to handle deliveries. The FCM would also be required to establish new banking relationships and open new settlement accounts. FIA member firms estimate that these systems modifications and other operational tasks would normally take three to six months to complete.

If, on the other hand, the decision were made to have the UK Affiliate register as an FCM, we estimate that the registration process alone would be at least three months. For example; (i) the UK Affiliate would be required to have prepared a certified audit using US GAAP;⁶ (ii) applications would have to be prepared and filed with NFA on behalf of the Affiliate and its individual principals and associated persons, along with fingerprint cards for each individual principal and associated person; (iii) associated persons would have to take and pass the appropriate examination; and (iv) NFA would have to review and approve the Affiliate's compliance manual.

Concurrently, the Affiliate would have to negotiate and enter into account agreements with each customer whose account is currently carried in the US FCM's omnibus account. The UK Affiliate would also have to address many essentially all of the same operational issues described above.

We further submit that an FCM and its Affiliates cannot make a reasoned decision on the best way to proceed with respect to ICE Clear Europe and other foreign clearing organizations until the Commission's comprehensive regulatory regime for swaps is known. This regime will determine how these companies will structure their global businesses. A decision made solely based on staff's interpretation of section 724 of the Dodd-Frank Act may have to be reversed when the complete regulatory regime is adopted. As a result, FCMs, their Affiliates and, most important, their customers, will be exposed to unnecessary operational risk.

⁶ ICE Clear Europe's non-US Clearing Members maintain their financial books and records using International Financial Reporting Standards. Preparing a certified audit using US GAAP, therefore, may take a considerable amount of time.

The exemption is in the public interest

As the Commission is aware, ICE Clear Europe clears OTC energy derivatives that are entered into through the facilities of IntercontinentalExchange, Inc., an exempt commercial market under section 2(h)(3)-(7) of the CEA, subject to the Commission's oversight.⁷ IntercontinentalExchange lists over 370 contracts on its electronic platform that are available for clearing, as well as contracts that are available for trading bilaterally. A substantial portion of the trading volume in IntercontinentalExchange's OTC markets relates to approximately 35-40 highly liquid contracts in North American natural gas, North American power, and global oil. For the three months ended March 31, 2011, volume in OTC energy contracts on IntercontinentalExchange was 96,510, an average daily volume of approximately 1,550 contracts.⁸ ICE Clear Europe, therefore, is an active DCO clearing a significant number of OTC energy derivatives contracts "for, by or on behalf of" US customers. Moreover, many of these contracts call for physical delivery.

Thirteen natural gas and power swaps cleared on ICE Clear Europe are deemed to serve a significant price discovery purpose and, as such, are subject to Commission requirements regarding position limits and large trader reporting. Although IntercontinentalExchange has terminals in over 50 countries, we believe that a significant percentage of the transaction volume originates from the US.

It is essential, therefore, and in the public interest that no bulk transfer of US customer accounts to another clearing firm or other significant changes in the manner in which such customers' contracts are cleared be effected until ICE Clear Europe has adopted rules governing the rights and obligations of its FCM Clearing Members and its Clearing Members are confident that all necessary systems and other operational modifications have been made and are working properly. Forcing US customers to liquidate their positions if their clearing firm is not registered with the Commission as an FCM on July 16 is not an acceptable alternative and is not in the interest of market participants (whether US or non-US) ICE Clear Europe or the energy markets generally. Liquidity would be severely affected and prices would become more volatile, in particular, in those contracts that the Commission has determined are significant price discovery contracts.

⁷ Following the adoption of the Commission's Exempt Commercial Market Grandfather Order issued on September 10, 2010, IntercontinentalExchange filed a petition for relief pursuant to section 723(c)(2)(A) of the Dodd-Frank Act to continue to operate as an exempt commercial market in accordance with the provisions of section 2(h)(3)-(7) of the CEA, as in effect prior to the effective date of the Dodd-Frank Act, until July 15, 2012. "Orders Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade", 75 Fed.Reg. 56513 (September 16, 2010).

⁸ The information in this letter regarding OTC energy derivatives executed on or subject to the rules of IntercontinentalExchange, Inc. is drawn from its most recent Form 10-K (dated February 9, 2011) and Form 10-Q (dated May 4, 2011) filed with the Securities and Exchange Commission.

Mr. David A. Stawick
June 1, 2011
Page 7

Granting the requested exemption will not adversely affect US customers or the markets. ICE Clear Europe is registered with the Commission as a DCO and, therefore, the Commission will be able to obtain any records with respect to cleared energy derivatives that it may request. In particular, the thirteen natural gas and power swaps cleared on ICE Clear Europe that the Commission has deemed significant price discovery contracts are subject to Commission requirements regarding position limits and large trader reporting. Finally, ICE Clear Europe Clearing Members are licensed by the Financial Services Authority and are subject to FSA's Client Money and Client Asset Rules or such other regulatory requirements applicable to that clearing member.⁹

Conclusion

For all of the above reasons, FIA requests the Commission to adopt an order pursuant to section 4(c) of the Commodity Exchange Act exempting FIA member FCMs and their Affiliates, and similarly situated firms, that are Clearing Members of ICE Clear Europe, from the requirements of section 4d(f) of the CEA, as amended by section 724 of the Dodd-Frank Act, for a period of not less than 30 calendar days, beginning July 16, 2011, and ending not before August 15, 2011. If the Commission has any questions regarding this exemption request or needs any additional information, please contact Barbara Wierzynski, FIA's General Counsel and Executive Vice President, at 202.466.5460 or bwierzynski@futuresindustry.org.

Sincerely,



John M. Damgard
President

cc: Honorable Gary Gensler, Chairman
Honorable Michael Dunn, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner

Dan Berkovitz, General Counsel

Division of Clearing and Intermediary Oversight
Ananda Radhakrishnan, Director
John Lawton, Deputy Director
Robert Wasserman, Associate Director

⁹ Although funds held by non-FCM Clearing Members would not receive all of the protections of the Bankruptcy Code, this is the case now.