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Mercantile Exchange

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April 13, 2006

The Honorable Reuben Jeffery III  
Chairman  
Commodity Futures Trading Commission  
1155 21<sup>st</sup> St., N.W.  
Washington, D.C. 20581

Dear Chairman Jeffery:

Previously, by our letter to you dated January 27, 2006, the New York Mercantile Exchange, Inc. (NYMEX or Exchange) submitted a response (the January 27 Letter) to express our deep concerns about the plans announced by the Intercontinental Exchange, Inc. (ICE) to list a new West Texas Intermediate (West Texas) crude oil futures contract on its US trading facility. The West Texas contract currently is listed by ICE Futures, its wholly-owned subsidiary futures exchange that is not subject to regulation by the Commodity Futures Trading Commission (CFTC or Commission). (As you know, ICE Futures was formerly known as the International Petroleum Exchange Ltd).

We want to renew our concerns about the issues raised in the prior letter on the ICE Futures West Texas contract. Moreover, the main purpose of this letter is to express similar concerns about two additional US-based futures contracts to be listed by ICE Futures that have an even stronger nexus to the US economy and to US markets. Specifically, ICE Futures has announced that, beginning on or around the week of April 17, in addition to various related spread products, it will begin listing two new cash-settled, electronically traded futures contracts, the ICE New York Harbor Unleaded Gasoline Blendstock (RBOB) Futures and the ICE New York Harbor Heating Oil Futures.

In the January 27 Letter, NYMEX observed that the announced listing by ICE Futures of the West Texas futures contract appeared to be the first instance (since foreign terminals had been permitted in the US under CFTC staff no-action relief) that the product offered on the electronic terminal of the foreign market was not a foreign product, but was instead a US product that directly involved physical energy markets in the US. We then noted various factors that supported a finding that the West Texas futures contract to be listed by ICE Futures is a US product, including:

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*The New York Mercantile Exchange, Inc., is composed of two divisions. The NYMEX Division offers trading in crude oil, heating oil, unleaded gasoline, natural gas, electricity, propane, platinum and palladium. The COMEX Division offers trading in gold, silver, copper, aluminum, and the FTSE Eurotop 100<sup>®</sup> index, and the FTSE Eurotop 300<sup>®</sup> index.*

- An energy product drilled and produced in the US;
- An energy product transported throughout the US via an extensive domestic pipeline;
- An energy product that has a substantial and profound impact on virtually every facet and stream of US interstate commerce;
- An energy product whose daily and final settlement is derived from the settlement prices issued by a US contract market that is fully regulated by the CFTC; and
- An energy product that targets US traders, such that the majority of the trading volume in that contract originates in the US.

Significantly, the West Texas product is traded on an exchange with operations solely in the US because its London facility has been closed. Moreover, the West Texas product is made available to US traders during US regular business hours on an electronic trading platform located in the US.

The no-action relief granted by the CFTC for placement of foreign terminals in the US was premised upon permitting access to foreign exchanges whose activities are otherwise primarily located in a foreign country. Thus, except for certain incidental contacts with the US, the exchange would be present in the US only by virtue of being accessible via its automated trading system. Clearly, the extent of the physical presence of ICE Futures in the US exceeds any rational notion of incidental contacts within the US.

Interested parties have disputed the fact that NYMEX's Light, Sweet Crude Oil futures contract is a "US product" noting that the contract allows various crude grades that are drilled overseas (but, we would note, nonetheless "domesticated" to comply with U.S. market specifications) to be delivered in satisfaction of a delivery obligation for that contract. Apparently, the suggestion was that somehow this turned the NYMEX contract into some manner of foreign contract. This suggestion, of course, ignores the commercial realities of US energy markets.

While NYMEX, as a prudential matter, has included provisions in its rules allowing for delivery under the contract of several domesticated foreign crudes as a possible "safety valve" in the delivery process, the reality is that these domesticated crudes have been delivered on the Exchange in only a handful of instances over the last dozen years or so. Moreover, NYMEX consciously selected the Light, Sweet Crude Oil name for its contract to make clear that such delivery was theoretically possible. By contrast, ICE Futures, by branding its crude contract as a West Texas Intermediate contract, is making a clear statement that its product is a "US-only" contract.

However, it is not possible to use the “red herring” of delivery of foreign crudes as a distraction and as a delaying tactic in the case of the two new ICE Futures contracts. We presume that the product specifications for these two new futures contracts will be based upon the specifications of competing contracts that are currently listed on other markets. The specifications of existing contracts make clear that these types of products must be blended so as to satisfy US-based specifications.

In general, the factors supporting the finding of the ICE Futures West Texas contract as a US product also support the same finding for the two new ICE Futures contracts. Moreover, the overwhelming majority of the heating oil product moving through the New York harbor is intended for domestic consumption within the US. In addition, RBOB is *only* sold here in the U.S and it is widely understood that the US market is now the largest consumption market in the world for various energy products, particularly with respect to gasoline.

Furthermore, products delivered in the New York harbor generally are delivered pursuant to the specifications of one or more domestic pipelines. These specifications also must consequently be consistent with various state and federal requirements, including consistency with federal EPA and FERC policies and/or requirements.

The product specifications for an energy derivative product based upon such physical commodities necessarily will be premised upon and will be priced in a manner so as to reflect these requirements, even if the derivative product does not itself provide for physical delivery. There is thus a heavy overlay of US governmental regulation and federal interests that should make it clear and transparent to all that, in order to ensure consistency with US federal policies, such products should be traded only on a futures market that is directly regulated by the CFTC.

Finally, we understand that a Commission review is now underway in light of the “significant factual circumstances underlying” ICE Futures’ notice to the Commission on the listing of the West Texas contract. But we also hope that the Commission and Commission staff appreciate the urgency underlying this review.

Putting aside whatever impact there may be on markets competing with ICE, we would hope that the Commission would understand that it is now viewed by many as being immersed in the process of losing effective control over

markets that reasonable observers would expect to be subject to US federal oversight.

Should you have any questions or comments concerning the information in this letter, please do not hesitate to contact me at any time.

Sincerely,

*Christopher K. Bowen* / by *BR*

Christopher K. Bowen  
General Counsel and  
Chief Administrative Officer

cc: Commissioner Sharon Brown-Hruska  
Commissioner Walter Lukken  
Commissioner Fred Hatfield  
Commissioner Michael Dunn  
Rick Shilts