UNIVERSITY OF MARYLAND
SCHOOL OF LAW

December 17, 2010

David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581

Re: ICE Trust U.S. LLC – Application for Registration as a Derivatives Clearing Organization Pursuant to Section 5b of the Commodity Exchange Act and Part 39 of the Regulations of the Commission

Dear Mr. Stawick:

These comments are submitted in response to ICE Trust U.S. LLC's ("ICE Trust") Application for Registration as a Derivatives Clearing Organization[1] ("Application") to the Commodity Futures Trading Commission ("CFTC" or "Commission") under the Commodity Exchange Act[2] ("CEA") as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act[3] ("Dodd-Frank Act").

For purposes of context to the ICE Trust Application at issue, it should be remembered that one of the main principals shaping derivatives regulation under the Dodd-Frank Act is to provide *free and open access* to clearing and exchange trading (including alternate swaps

[1] Letter and Application Prepared by Michael Philipp, Partner, Winston & Strawn LLP, on behalf of ICE Trust U.S. LLC, to David Stawick, Secretary, Commodity Futures Trading Commission, ICE TRUST U.S. LLC – APPLICATION FOR REGISTRATION AS A DERIVATIVES CLEARING ORGANIZATION PURSUANT TO SECTION 5B OF THE COMMODITY EXCHANGE ACT AND PART 39 OF THE REGULATIONS OF THE COMMISSION (Nov. 12, 2010), *available at* http://www.cftc.gov/stellent/groups/public/@otherif/documents/ifdocs/icetrustusdcoapplication.pdf [hereinafter collectively "Application"].

[2] Commodity Exchange Act, 7 U.S.C. 1 *et seq.*

[3] Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

execution facilities).[4] Specifically, Section 723(a)(3) of the Dodd-Frank Act amends the CEA to provide that "it shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing organization [("DCO")] that is registered under [the CEA] or a [DCO] that is exempt from registration under [the CEA] if the swap is required to be cleared."[5] Congress acknowledges the importance of the central clearing requirement in Section 745(b) of the Dodd-Frank Act by directing the Commission to prescribe criteria, conditions, or rules under which the Commission will determine the initial eligibility or the continuing qualification of a DCO to clear swaps.[6] In light of this, the Commission proposed a set of rules[7] for DCOs that would further promote free and open access to clearing and exchange trading. Particularly, Section 725(c) of the Dodd-Frank Act sets forth core principles with which a DCO must comply to be registered and to maintain good standing as a DCO.[8]

Here, the applicant, ICE Trust U.S. LLC ("ICE Trust"), is an over-the-counter ("OTC") CDS clearinghouse that has "cleared over $7.4 trillion of gross notional value"[9] since its inception on March 4, 2009. ICE Trust is has been referred to as a "Derivatives Dealers' Club"[10]

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[4] *See*, e.g., S. REP. 111-176, at 32–35 (2010) (noting that draft provisions concerning OTC derivatives were designed to minimize non-cleared, off-exchange trades); [4] *See* Letter from Stephen F. Lynch, U.S. House of Representatives, to the Commodity Futures Trading Commission (Oct. 18, 2010), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26291&SearchText ("clearing is at the heart of reform"); Transcript of Public Roundtable on Governance and Conflicts of Interest in the Clearing and Listing of Swap, Aug. 20, 2010, at 33, *available at* http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/derivative9sub082010.pdf (statement of Randy Kroszner, University of Chicago, Booth School of Business, "And the law is clear: Open access is the fundamental principle.") [hereinafter "Roundtable Tr."].

[5] *See* Section 2(h) of the CEA, 7 U.S.C. 2(h).

[6] *See* Section 5c(c)(5)(C)(iii) of the CEA, 7 U.S.C. 7a-2(c)(5)(C)(iii).

[7] *See e.g.*, Financial Resources Requirements for Derivatives Clearing Organizations, 75 Fed. Reg. 63113 (Oct. 14, 2010) [hereinafter "Financial Resources Rules"], Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 Fed. Reg. 63732 (Oct. 18, 2010) [hereinafter "Conflicts of Interest Rules"], and General Regulations and Derivatives Clearing Organizations, 75 Fed. Reg. 77576 (Dec. 13, 2010) [hereinafter "General Rules"].

[8] "To be registered and to maintain registration as a derivatives clearing organization, a derivatives clearing organization shall comply with each core principle described in this paragraph […]." Section 725(c) of the Dodd-Frank Act, *supra* note 3.

[9] *See* Press Release, IntercontinentalExchange, *ICE CDS Clearing Reaches $12 Trillion in Notional Cleared; ICE Clear Europe Announces New CDS Clearing Member* (Sept. 22, 2010), *available at* http://ir.theice.com/releasedetail.cfm?ReleaseID=509797 (last visited on Dec. 3, 2010).

[10] *See* Robert E. Litan, THE DERIVATIVES DEALERS' CLUB AND DERIVATIVES MARKETS REFORM: A GUIDE FOR POLICY MAKERS, CITIZENS AND OTHER INTERESTED PARTIES 3 (The Brookings Institution 2010), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2010/0407_derivatives_litan/0407_derivatives_litan.pdf.

because it is dominated by swap dealers, such as Goldman Sachs, Citigroup Inc., JPMorgan, Credit Suisse Group AG, Bank of America Corp., and other large dealers.[11] It has been criticized in some quarters for excluding competitors from its dealings and for following inadequate risk management policies.[12]

Without any reference to the concerns that have been expressed about its operation, ICE Trust requests the Commission to approve its Application to be a registered DCO on an *expedited* basis (90 days) pursuant to Regulation 39.3(a)(3).[13] Unlike under the *ordinary* 180-day review process governed by Regulation 39.3(a)(1). Approval under the expedited 90-day review process *requires* that the application *not* raise novel or complex issues that require additional time for review.[14] However, as explained below, ICE Trust's clearing rules and operation procedures raise complex issues related to Core Principles C and L. Furthermore, ICE Trust's Application is questionable under Core Principles N and P.

As such, the Application should not be approved because in order to receive expedited review, an applicant must demonstrate that it is able to be incompliance with the core principles for DCOs and that its application does not raise novel or complex issues. Here, the Commission is authorized to take any of three approaches in approaching ICE Trust's request. First, the Commission may decide to terminate reviewing the Application under the expedited basis and notify ICE Trust that the Commission will review the Application under the 180-day time period, because the Application (ii) fails in form or substance to meet the requirements of this part; and (iii) raises novel or complex issues that require additional time for review.[15] This would allow ICE Trust to amend its Application so as to ensure that, upon further review, it is deemed in compliance with the core principles put forth in the CEA.

Secondly, the Commission may decide to register ICE Trust as a DCO subject to conditions.[16] If the Commission chooses this second option, it should require ICE Trust (1) to set

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[11] "Bank of America, Barclays Capital, Citi, Credit Suisse, Deutsche Bank, Goldman Sachs, J.P. Morgan, Merrill Lynch, Morgan Stanley and UBS … are the initial clearing members of ICE Trust." Press Release, IntercontinentalExchange, *ICE Trust to Begin Processing and Clearing Credit Default Swaps* (March 9, 2009), *available at* http://ir.theice.com/releasedetail.cfm?ReleaseID=369373.

[12] *See* Dawn Kopecki, *U.S. Derivatives Bill Bars Dealers From Owning Clearinghouses*, BLOOMBERG (Oct. 16, 2009) *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=agLyUl0aqYuk. *See also* Transcript of Public Roundtable on Governance and Conflicts of Interest in the Clearing and Listing of Swap, Aug. 20, 2010, *available at* http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/derivative9sub082010.pdf.

[13] *See* 17 C.F.R. 3(a)(3).

[14] *Id.*

[15] *See* 17 C.F.R. 39.3.

[16] "The Commission may approve or deny the application or, if deemed appropriate, register the applicant as a derivatives clearing organization subject to conditions." *See* 17 C.F.R. 39.3.

its minimum capital criteria for Participants at a comparable level as other registered DCOs; (2) to prohibit itself from conditioning clearing business on mandatory use of ICE's exchange trading business; (3) to provide a thorough explanation as to how ICE Trust is planning to mitigate its apparent conflicts of interest; and (4) to disclose each clearing fee and other fees that ICE Trust charges its clearing Participants. Thirdly, the Commission may decide simply to deny the Application.

I. Core Principle C: Participant and Product Eligibility

> "*In theory, this group [of the nine members of an elite Wall Street society] exists to safeguard the integrity of the multitrillion-dollar market. In practice, it also defends the dominance of the big banks*."[17]

As discussed above, one of the main principals of the Dodd-Frank Act is to provide *free and open access* to clearing and exchange trading.[18] This necessitates that traders and investors not be excluded by "the control of clearing and trading facilities by entities such as swap dealers and major swap participants."[19] Chairman Gensler recently testified before the House Agriculture Subcommittee hearing as follows: "Currently, clearing houses are closed clubs. [The membership requirements] are very high and not inclusive."[20] Indeed, ICE Trust effectively excludes the majority of market participants by imposing unreasonably high minimum capital requirements that far exceed that which is needed to ensure capital adequacy of its clearing members. Therefore, it raises novel and complex issues as to the eligibility of its membership under Core Principle C - Participant and Product Eligibility, which specifically states: "The participation and membership requirements of each derivatives clearing organization shall *permit*

[17] *See* Louise Story, *A Secretive Banking Elite Rules Trading in Derivatives*, N.Y. TIMES (Dec. 11, 2010), *available at* http://www.nytimes.com/2010/12/12/business/12advantage.html?src=me (last visited on Dec. 14, 2010).

[18] *See*, e.g., S. REP. 111-176, at 32–35 (2010) (noting that draft provisions concerning OTC derivatives were designed to minimize non-cleared, off-exchange trades); *see also* Transcript Tr. at 33, s*upra* note 4 (statement of Randy Kroszner, University of Chicago, Booth School of Business, "And the law is clear: Open access is the fundamental principle.").

[19] *See* Dodd-Frank Act, §§ 726, 765, *supra* note 3. *See also* (Cong. Record, June 30, 2010, H5217) (in a colloquy with Rep. Lynch, House Financial Services Chair Barney Frank agreeing that Sections 726 and 765 of the Dodd-Frank Act require the SEC and CFTC to adopt rules eliminating the conflicts of interest arising from the control of clearing and trading facilities by entities such as swap dealers, security-based swap dealers, and major swap and security-based swap participants).

[20] Oral Testimony of Gary Gensler, Chairman, Commodity Futures Trading Commission, *Before the U.S. House Agriculture Committee, Subcommittee on General Farm Commodities and Risk Management, Hearing to Review Implementation of Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act Relating to position Limits,* December 15, 2010, *available at* http://agriculture.house.gov/singlepages.aspx?NewsID=70&LSBID=71|72|73 (last visited on Dec. 15, 2010).

fair and open access."[21] Therefore, the existing Commission regulations anticipate the statutory "free and open access" mandate of Dodd-Frank.

According to Provision 201(b) of ICE Trust's Clearing Rules, "no applicant shall be admitted or permitted to remain, as applicable, as a Participant unless, in ICE Trust's sole determination […] it has a minimum of **$1 billion of Adjusted Net Capital** … and its Excess Net Capital exceeds the amount of its Required Contribution of the General Guaranty Fund."[22] The Clearing Rules further state: "In the case of a Participant is not an FCM […], it has a minimum of **$5 billion of Tangible Net Worth**."[23] These minimum capital requirements are unreasonably high compared to other clearinghouses' minimum requirements and therefore self evidently exceed the requirements needed for clearinghouse capital adequacy. For example, NYMEX Clearing House, now a division of CME Group, has financial requirements, which state that "all clearing members, including non-FCMs, must maintain minimum capital requirements of at least $5 million."[24] Also, CME Clearing Europe Limited's recent application for registration as a DCO states "Among other requirements, these standards require that the applicant must … meet minimum capital requirements of £10 million; have made a contribution to the Guarantee Fund (currently a minimum of $2.5 million)."[25] Therefore, ICE Trust's capital requirement of $1 billion for FCMs and $5 billion for non-FCMs is unreasonable.

Notably, ICE Trust's Application states that it established the Participant eligibility in accordance with regulatory guidance from the Bank of International Settlements ("BIS") and International Organization of Securities Commissions ("IOSCO") and that it is consistent with the requirements of other significant central counterparties for OTC derivatives. ICE Trust cites Recommendation 2 from "Recommendations for Central Counterparties" published by BIS and IOSCO, which states: "A CCP's participation requirements should be objective, publicly disclosed, and *permit fair and open access*."[26] However, the Application fails to demonstrate the manner in which ICE Trust will permit fair and open access to its clearing house.

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[21] *See* Section 725(c) of the Dodd-Frank Act, *supra* note 3 (emphasis added).

[22] *See* Provision 201, ICE Trust U.S. LLC Clearing Rules (Nov. 11, 2010 Draft), *available at* http://www.cftc.gov/stellent/groups/public/@otherif/documents/ifdocs/icetrustclearingrules.pdf [hereinafter "ICE Trust Clearing Rules"].

[23] *Id.*

[24] *See* Provision 970, NYMEX Rulebook (2009), *available at* http://www.cmegroup.com/rulebook/NYMEX/.

[25] *See* CME CLEARING EUROPE LIMITED APPLICATION FOR REGISTRATION AS A DERIVATIVES CLEARING ORGANIZATION COMPLIANCE WITH CORE PRINCIPLES, 3 (2010), *available at* http://services.cftc.gov/sirt/sirt.aspx?Topic=ClearingOrganizationsAD&Key=20006&Organization=CME%20Clearing%20Europe%20Limited&Type=DCO&Status=Pending.

[26] *See* Application, ft. 17 at 6, *supra* note 1.

ICE Trust has argued that high minimum capital requirements are necessary in order to ensure that clearing participants have sufficient financial resources, operational capabilities and risk management experience.[27] However, each of the founding members had to be rescued by the American taxpayer to the tune of $387 billion to survive financial calamity.[28] They certainly have no expertise on how to accumulate adequate capital to protect against financial failure.

Moreover, having only 14 large swap dealers as Participants to guarantee each other's obligations widely exposes ICE Trust to significant systemic risk as those Participants are closely interconnected. In fact, the solution is not limiting the membership to the largest banks. Rather the membership should be diversified among many banks, hedge funds, mutual funds, and institutional investors. This way, systemic risk would be minimized. Also, more importantly the magnitude of a default would be significantly minimized because there would be more members to absorb the failure, instead of 14 interconnected banks whose life lines are dependent on each other, as we have seen in the 2008 credit and financial crisis.

Surprisingly, it is recently reported that ICE Trust rejected the clearing membership application of the Bank of New York Mellon, one of the leading asset management and securities service firms that has $24.4 trillion in assets under custody or administration and $1.14 trillion under management.[2930] Conversely, the CME Group, which operates the largest central counterparties in the world, recently stated that "[i]n its 110-plus years of existence, *CME has never defaulted on an obligation* to its clearing members, nor have its clearing members defaulted on their obligations to CME."[31] CME has 69 clearing members listed.[32] Again, a division of CME Group, NYMEX Clearing House, sets the capital requirement of $5 million for both FCMs and non-FCMs.

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[27] Statement of Jonathan Short, Senior Vice President of ICE, "I think when we're assessing good governance and who should sit on boards, who should sit on risk committees, the idea of excluding the very people that have the most visibility into the market is not a very wise decision from a risk-management perspective." Roundtable Tr. at 78, *supra* note 4.

[28] *See Credit Crisis — Bailout Plan (TARP)*, N.Y. TIMES (Dec. 7, 2010), *available at* http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/bailout_plan/index.html?inline=nyt-classifier (last visited on Dec. 17, 2010).

[29] *See* Bank of New York Mellon's Official Website, *About BNY Mellon*, *available at* http://www.bnymellon.com/about/ (last visited on Dec. 15, 2010).

[30] *See* Louise Story, *A Secretive Banking Elite Rules Trading in Derivatives*, N.Y. TIMES (Dec. 11, 2010), *available at* http://www.nytimes.com/2010/12/12/business/12advantage.html?src=me (last visited on Dec. 14, 2010).

[31] Letter from CME Group to the Secretariat of the Basel Committee on Banking Supervision, *Consultative Document: Strengthening the resilience of the banking sector*, at 11 (Apr. 16, 2010), *available at* http://www.bis.org/publ/bcbs165/cmegroup.pdf.

[32] *See* Official Website of CME Group, Clearing Firms, *available at* http://www.cmegroup.com/tools-information/clearing-firms.html (last visited on Nov. 15, 2010) (emphasis added).

On December 16, 2010, the Commission held a public meeting to consider, *inter alia*, risk management requirements for DCOs. During the meeting, the Commission agreed that proposed rules should be issued concerning the capital requirements of a DCO. Particularly, one of the proposed rules states that a DCO must adopt commonly acceptable capital requirements, including the capital requirement of no more than $50 million for FCMs. As of September 30, 2010, there are 126 registered FCMs. Among them, 61 registered FCMs, almost half of the total number of FCMs, have at least $50 million in adjusted net capital. It is hard to find any reason as to why these 61 registered FCMs should be excluded from becoming a clearing member of ICE Trust.

As such, ICE Trust's membership eligibility requirements raise novel and complex issues. Evidently, finding the fine line between fair and open access and risk management is complex task. Therefore, at the minimum, the Commission should require ICE Trust to amend its Application to put forth a plan as to how it is planning to comply with "free and open" membership eligibility requirements within Core Principles C: Participant and Product Eligibility.

II. Core Principle N: Antitrust Considerations

Some market participants raised concerns during the August 20, 2010 roundtable that DCOs might bundle their clearing services with the execution services that is required by the Dodd-Frank Act.[33] This would seriously limit competition in both clearing and execution trading because a party to a swaps contract would be forced to use one particular execution facility as a precondition to using its clearing services. One market participant indeed confirmed that that is already happening in the current market: "I think the exchanges currently -- I think most if not all have this vertical model where if you trade on an exchange, you have to clear it through their clearinghouse […]."[34] Indeed, ICE Trust has its own trading (processing) facility, ICE Link. On July 8, 2010, ICE Link announced: "The unique combination of sophisticated electronic workflow, easy automation and market-leading connectivity allows ICE Link to power industry-wide access to clearing and real-time processing. […] The industry should take pride in the rapid transformation of post-trade processing for CDS."[35]

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[33] *E.g.*, Shawn Bernardo, Managing Director, Tullett Prebon Americas Corp. representing the Wholesale Markets Brokers Association stated, "having both the clearing and the execution definitely creates a problem. […] we experience that today in certain markets where the exchange also has an execution platform that competes with us, d we cannot submit our trades to that clearinghouse the same way the exchanges' customers, who are also our customers, executing the same type of trades can submit to the clearinghouse. So, that's without question a conflict of interest that goes on today. It's a major problem with having a variable." Roundtable Tr. at 84, *supra* note 4.

[34] Statement of James Hill, Managing Director and Global Credit Derivatives Officer, Morgan Stanley, representing the Securities Industry and Financial, Markets Association. Roundtable Tr. at 89, *supra* note 4.

[35] Press Release, IntercontinentalExchange's Official Website, *ICE Link Commemorates Five Year Anniversary; Pioneer in Electronic Allocation and Novation Workflows; Supporting Standardization and Clearing of CDS Market*, July 8, 2010, *available at* http://ir.theice.com/releasedetail.cfm?ReleaseID=485917.

ICE Trust has a rule, which is included in its Application, that states: "ICE Trust may impose (b) reasonable criteria to determine whether a trade processing platform has the capability to deliver the necessary quality of service to be granted access to ICE Trust and connected through the ICE Trust application programming interface; provided that in each case such criteria shall not unreasonably inhibit such open access."[36]

There are two serious problems with this rule. First, both the Commission and the public have no means of knowing what those "reasonable criteria" are since there are no other guidelines or explanations. More importantly, this rule requires that a trading execution facility have a trade processing platform that is compatible with ICE Trust's application programming interface. How can any trading (processing) facility meet this high requirement when there are no guidelines and when ICE Link has already adopted a unique processing platform?

During the Conflicts of Interest Roundtable, Lee Olesky, CEO and Co-Founder of Tradeweb, raised this concern: "I think that there's also a statement about equal access, and then *there's the reality of actually truly having equal access, and that gets down to really connectivity, technology, cooperation, cost differentials that are really the nuts and bolts of how do you actually really get equal access*. […] it really needs to be detailed so that there is not a bias that's applied subtly, which can happen and *happens today*. […] There's a conflict where we will be competing with a part of a clearing partner."[37] Imposing these technical hurdles under the guise of "equal access" seriously undermines the "free and open access" mandate.

Nevertheless, in its Application, ICE Trust makes a blanket promise that "ICE Trust has not adopted, and will not adopt, any regulations or take other actions that it believes would be an unreasonable restraint of trade or impose any additional anticompetitive burden." This blanket promise is unacceptable and is belied by the evidence of record. Therefore, the Commission should require ICE Trust to be prohibited from imposing "technical" hurdles and provide a detail explanation as to how it is planning to promote a competitive environment and open and free access to its clearing house.

Furthermore, the Commission should recognize the relationship between ICE Trust and Markit Group. Markit Group, which is majority-owned by Wall Street's largest banks, provides derivative and bond pricing data. It is reported that the Department of Justice's antitrust unit is actively investigating "the possibility of anticompetitive practices in the credit derivatives clearing, trading and information services industries."[38] According to a recent Bloomberg article: "Markit told a swaps clearinghouse customer to purchase a pricing service as a condition for

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[36] Provision 314, ICE Trust Clearing Rules, *supra* note 22.

[37] Roundtable Tr. at 88, *supra* note 4.

[38] Mathew Leising, *Markit Credit-Swap Services Said to Be Part of Antitrust Probe*, BLOOMBERG (Aug. 3, 2009), *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aY8qgf__wlNM (last visited on Dec. 14, 2010) (quoting Teresa Chick, a spokeswoman for the Department of Justice, from an e-mailed statement of July 13, 2010 in response to questions from Bloomberg News).

granting use of its benchmark indexes. [Also,] Markit permitted use of its indexes by another clearinghouse only if every swap guaranteed by the company included a dealer, such as one of its owners."[39] Robert Litan, who helped oversee the Justice Department's Nasdaq investigation back in the 1990s, has said in this regard: "When you limit participation in the governance of an entity to a few like-minded institutions or individuals who have an interest in keeping competitors out, you have the potential for bad things to happen. It's antitrust 101."[40]

III. Core Principle L: Public Information

Core Principle L states: "Each [DCO] shall disclose publicly and to the Commission information concerning each clearing and other fee that the [DCO] charges the members and participants of the [DCO]."[41] Here, ICE Trust makes another blanket promise that "ICE Trust *will make any information required by Core Principle L* or Commission Regulations publicly available on its website."[42] However, no such information accompanies ICE Trust's application. The Commission should require ICE Trust to supplement its Application with the required information under Core Principle L. Since the expedited 90-day review does not allow applicants to "amend or supplement the application except as requested by the Commission or for correction of typographical errors, renumbering or other nonsubstantive revisions,"[43] ICE Trust's Application cannot be reviewed by the Commission under the expedited 90-day basis.

The lack of publicly available information raises serious and complex problems for consumers and hedgers. It is reported: "banks don't disclose fees associated with the derivatives. […] Banks collect many billions of dollars annually in undisclosed fees associated with [derivatives] instruments – an amount that almost certainly would be lower if there were more competition and transparent prices."[44] There are two issues here. First, ICE Trust has a special profit sharing agreement with its founding members, which is not disclosed to the public. Second, there is apparently no public information available showing the fees to which each clearing member is subject.

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[39] *Id.*

[40] Louise Story, *A Secretive Banking Elite Rules Trading in Derivatives*, N.Y. TIMES (Dec. 11, 2010), *available at* http://www.nytimes.com/2010/12/12/business/12advantage.html?src=me (last visited on Dec. 14, 2010) (quoting Robert E. Litan, a former Deputy Assistant Attorney General, U.S. Department of Justice, and a Fellow, Kauffman Foundation).

[41] *See* Section 725(c) of the Dodd Frank Act, *supra* note 3.

[42] Application at 40, *supra* note 1.

[43] *See* 17 C.F.R. 3(a)(3)(ii).

[44] Louise Story, *A Secretive Banking Elite Rules Trading in Derivatives*, N.Y. TIMES (Dec. 11, 2010), *available at* http://www.nytimes.com/2010/12/12/business/12advantage.html?src=me.

Some experts have concluded that today's derivatives market is similar to the Nasdaq stock market in the 1990s where the market makers were secretly colluding to protect their own profits.[45] The transparency and the electronic trading systems reduced the Nasdaq trading costs to 1/20th of their former level.[46] The same savings should occur in the derivatives market once the fee information is publicly available.

IV. Core Principle P: Conflicts of Interest

It is informative to note that the CEA, as amended by the Dodd-Frank Act, includes "Conflicts of Interest" as one of the core principles.[47] Furthermore, Section 725(d) of the Dodd-Frank Act requires the Commission to adopt rules mitigating conflicts of interest in connection with the conduct of business by a swap dealer or a major swap participant with a DCO, in which the swap dealer or major swap participant has a material debt or material *equity investment*.[48] Although the Commission has not issued the final rules on this issue, there have been many hearings and meetings, including the public Roundtable on Governance and Conflicts of Interest in the Clearing and Listing of Swaps on August 20, 2010 in which ICE[49] actively participated. Following the Roundtable, the Commission issued a set of proposed rules in September, which include, *inter alia*, ownership restrictions on voting equity interests.

When ICE Trust submitted its Application on November 12, 2010, almost two months after the issuance of the proposed rules on Conflicts of Interest, one can only assume that ICE Trust must have known that there would ultimately be proposed ownership limitations of the kind dictated by Dodd-Frank. Where perhaps as a technical matter ICE Trust did not have to address apparent conflicts of interest in it present application, one would have thought given the proposed rule and the high level of concern about this issue, that ICE Trust would have advanced some reassuring commentary on what might very well be an impediment to its operation. To the contrary, ICE Trust merely states: "The limited partners of ICE Trust Holdings [which is ICE Trust's parent company located in Cayman Islands,] are entitled to an interest in the profits of ICE Trust Holdings. […] The Limited Partners of ICE Trust Holdings do not have any voting rights with respect to the governance or operations of ICE Trust."[50] In other words, ICE Trust claims that these Limited Partners who indirectly own 50% of ICE Trust, have major special financial interests in ICE Trust, but in some inexplicable manner still independent. These

[45] *Id.*

[46] *Id.*

[47] *See* Section 725(c) of the Dodd-Frank Act, *supra* note 3.

[48] *See* Conflicts of Interest Rules, *supra* note 7.

[49] Jonathan Short is Senior Vice President, General Counsel and Corporate Secretary of ICE. *See* IntercontinentalExchange, Inc.'s Official Website, Corporate Governance, *available at* http://ir.theice.com/governance.cfm (last visited on Dec. 16, 2010).

[50] Application at 1, *supra* note 1.

Limited Partners are of course the 14 largest swap dealers: Bank of America, Barclays Capital, Citi, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan Chase, Merrill Lynch, Morgan Stanley, Nomura, BNP Paribas, RBS and UBS.

Considering that the Commission has not issued the final rules, ICE Trust should not be required change its ownership structure to mitigate its apparent conflicts of interest. However, the Commission should not tolerate ICE Trust's repeated claim that "no Participant has any voting equity in ICE Trust,"[51] in an attempt to bypass the proposed ownership limitation rules. Rather, ICE Trust's Application should provide a plan as to how it is going to address these complex issues concerning conflicts of interest in a timely manner once final rules on this subject are adopted. Until an explanation concerning a long term impediment to its operation is forthcoming, the Commission should not approve its Application.

Sincerely,

Michael Greenberger, J.D.
Law School Professor
University of Maryland School of Law

[51] Application at 43, *supra* note 1.