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AGENDA ITEM
For Meeting of: 04-16-09

April 9, 2009

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
General Counsel

Rosemary C. Smith *RC*
Associate General Counsel

Amy L. Rothstein *AR*
Assistant General Counsel

Joshua S. Blume *JSB*
Attorney

Subject: Draft AO 2009-03 (IntercontinentalExchange, Inc)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 16, 2009.

Attachment

2 **DRAFT**

3 Mr. Andrew J. Surdykowski, Esq.
4 Vice President & Associate General Counsel
5 IntercontinentalExchange, Inc.
6 2100 RiverEdge Parkway
7 Suite 500
8 Atlanta, GA 30328

9 Dear Mr. Surdykowski:

10 We are responding to your advisory opinion request on behalf of
11 IntercontinentalExchange, Inc. (“ICE, Inc.”), concerning the application of the Federal
12 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
13 a proposed change to ICE, Inc.’s current policy of matching voluntary contributions to
14 ICE, Inc.’s separate segregated fund (“SSF”), ICE-PAC, with charitable donations
15 (the “charity-match program”). ICE, Inc. proposes to increase the amount of its
16 charitable donation under the charity-match program from the current level of \$1 donated
17 for each \$1 contributed to ICE-PAC, to up to \$2 donated for each \$1 contributed to ICE-
18 PAC.

19 The Commission concludes that ICE, Inc. may modify its charity-match program
20 as proposed.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter dated
23 February 20, 2009, telephone conversations with Commission attorneys, and information
24 available on publicly accessible Internet websites.

1 ICE, Inc. is a Delaware corporation that operates regulated global futures
2 exchanges and over-the-counter markets for agricultural, energy, equity index and
3 currency contracts, as well as credit derivatives.¹ Twice each year, ICE, Inc.'s SSF,
4 ICE-PAC, solicits voluntary political contributions from both ICE, Inc.'s "restricted
5 class"² and from employees beyond the restricted class.³ ICE, Inc. currently operates a
6 charity-match program to encourage contributions to its SSF. Under this program, ICE,
7 Inc. matches contributions to ICE-PAC in the amount of \$100 or more with an equivalent
8 donation, out of its general treasury funds, to a charitable organization chosen by the
9 contributor, up to the maximum amount an individual can contribute to an SSF in a
10 calendar year.⁴ For example, if an employee contributes \$100 to ICE-PAC, that
11 employee may select the section 501(c)(3) charity that will receive a \$100 charitable
12 donation from ICE, Inc.

13 Contributors to ICE-PAC who participate in the charity-match program do not
14 realize any tax benefit as a result of their participation. Further, they do not receive any
15 kind of payment, reward, award, or premium from ICE, Inc., ICE-PAC, or from the
16 charities that they select as recipients of the charitable donations. Each letter that ICE,
17 Inc. sends to a potential ICE-PAC contributor includes a copy of ICE-PAC's Operating

¹ See www.theice.com/about.jhtml (Last visited 2/27/2009).

² "A corporation's restricted class is its stockholders and executive or administrative personnel, and their families, and the executive and administrative personnel of its subsidiaries, branches, divisions, and departments and their families." 11 CFR 114.1(j).

³ Copies of ICE-PAC's FEC Form 1, Statement of Organization, and other disclosure reports may be accessed at <http://images.nictusa.com/cgi-bin/fecimg/?C00443168> (Last visited 2/27/09).

⁴ To be eligible for inclusion in the charity-match program, ICE, Inc. requires the charitable organization to be described in section 501(c)(3) of the Internal Revenue Code, such that a donor to the charity would normally be eligible to take tax deductions.

1 Guidelines. The Operating Guidelines advise potential contributors that they may not
2 receive any financial or tangible benefit as a result of the matching charitable donation
3 that ICE, Inc. makes. ICE, Inc. also sends letters to the charities themselves, advising
4 them that ICE-PAC contributors cannot receive any tangible benefit from those charities
5 in exchange for the charitable donations made by ICE, Inc.⁵

6 ICE, Inc. wishes to modify its charity-match program to encourage increased
7 participation in ICE-PAC by its contributors and to provide additional funds to charities.
8 The modification would allow ICE, Inc. to make charitable donations that would exceed
9 the amounts contributed to ICE-PAC, up to a charitable donation of \$2 for each \$1
10 contributed to ICE-PAC. For example, ICE, Inc. might choose to donate \$1.50 to a
11 charity for each \$1 contributed to ICE-PAC for a total individual contribution under
12 \$1,000, and to donate \$2 for each \$1 contributed for a total individual contribution of
13 \$1,000 or more. All other aspects of ICE, Inc.'s charity-match program would remain the
14 same.

15 ***Question Presented***

16 *Would ICE, Inc.'s donation from its corporate treasury funds of up to \$2 to a*
17 *charitable organization chosen by a contributor to ICE-PAC for each \$1 contributed to*
18 *ICE-PAC be permissible as an "establishment, administration, and solicitation cost"*
19 *under 11 CFR 114.1(b)?*

⁵ A copy of ICE-PAC's Operating Guidelines and a sample letter that ICE, Inc. sends to each charity are included in the advisory opinion request, and may be accessed at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=2908>.

1 ***Legal Analysis and Conclusions***

2 Yes, ICE, Inc.'s donation from its corporate treasury funds of up to \$2 to a
3 charitable organization chosen by a contributor to ICE-PAC for each \$1 contributed to
4 ICE-PAC would be permissible as an "establishment, administration and solicitation
5 cost" under 11 CFR 114.1(b).

6 Generally, the Act and Commission regulations prohibit a corporation from
7 making contributions or expenditures in connection with any Federal election. 2 U.S.C.
8 441b(a); 11 CFR 114.2(a). The Act excludes from the definition of "contribution or
9 expenditure" those expenses that are paid by the corporation for "the establishment,
10 administration, and solicitation of contributions to a separate segregated fund to be
11 utilized for political purposes by a corporation" 2 U.S.C. 441b(b)(2)(C). *See also*
12 11 CFR 114.1(b) (referring to "[e]stablishment, administration, and solicitation costs").
13 A corporation may not, however, use this process as a means of exchanging treasury
14 monies for voluntary contributions to its SSF, such as through a bonus, expense account,
15 or other form of direct or indirect compensation. 11 CFR 114.5(b)(1).⁶

16 The Commission has previously approved a corporation's provision of charity-
17 match donations as a permissible solicitation expense related to fundraising for the
18 corporation's SSF, subject to certain conditions. *See, e.g.* Advisory Opinions 2003-33
19 (Anheuser-Busch), 2003-04 (Freeport-McMoRan), 1994-07 (GEON PAC), 1989-09
20 (General Dynamics), 1987-18 (Texas Industries PAC), and 1986-44 (EdPAC). The

⁶ The Act and Commission regulations also set forth the classes of persons who may be solicited and regulate the method and manner of solicitation of those persons. *See, e.g.* 2 U.S.C. 441b(b)(4)(A)(i) and (B); 11 CFR 114.5(a), 114.5(g)(1), and 114.6. ICE, Inc. has not raised any question in its request concerning the propriety of its solicitation practices. The Commission assumes, for the purpose of rendering this advisory opinion, that ICE, Inc.'s solicitation practices conform to all requirements established by the Act and all relevant Commission regulations.

1 Commission concluded that each of these charity-match programs would not constitute a
2 prohibited exchange of corporate treasury monies for political contributions because no
3 contributor to the corporate SSF would receive a financial, tax, or other tangible benefit
4 from the corporation, the SSF, or the charities receiving the matching donations.

5 ICE, Inc.'s current plan, in which ICE, Inc. matches contributions to its SSF with
6 equivalent charitable donations, appears to conform to the conditions established in the
7 Commission's prior advisory opinions. *See id.* The sole question, then, is whether ICE,
8 Inc.'s proposal to increase its matching charitable donations to up to twice the amount
9 contributed to ICE-PAC would, in and of itself, transform the charity-match program into
10 a prohibited corporate contribution.

11 The Commission concludes that ICE, Inc.'s proposed modification is permissible,
12 so long as the contributors continue to receive no tangible benefit or premium in
13 exchange for their contributions to the SSF. ICE, Inc. indicates that, other than the
14 increase in the amount of corporate treasury funds used to make charitable matching
15 donations, all other aspects of the charity-match program will remain the same. Thus, the
16 only effect of increasing the level of charitable donation to up to twice the level of the
17 contribution to the SSF would be to increase ICE, Inc.'s permissible solicitation
18 expenses. For this reason, ICE, Inc. may implement its proposed modification to its
19 charity-match program.⁷

⁷ This conclusion assumes that ICE, Inc. will not act as the agent of a political party committee or of a Federal candidate or officeholder while administering the charity-match program. *See* 2 U.S.C. 441i(d), e(1) and (4), and 11 CFR 300.11, 300.37, 300.50, 300.51, 300.52, and 300.65; *see also* Advisory Opinion 2003-04 (FreeportMcMoran), n.3.

1 The Commission expresses no opinion regarding any tax ramifications of the
2 described activity because this question is not within the Commission's jurisdiction.

3 This response constitutes an advisory opinion concerning the application of the
4 Act and Commission regulations to the specific transaction or activity set forth in your
5 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
6 of the facts or assumptions presented and such facts or assumptions are material to a
7 conclusion presented in this advisory opinion, then the requester may not rely on that
8 conclusion as support for its proposed activity. Any person involved in any specific
9 transaction or activity which is indistinguishable in all its material aspects from the
10 transaction or activity with respect to which this advisory opinion is rendered may rely on
11 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
12 conclusions in this advisory opinion may be affected by subsequent developments in the
13 law including, but not limited to, statutes, regulations, advisory opinions and case law.
14 All cited advisory opinions are available on the Commission's website at
15 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Steven T. Walther
Chairman
