November 22, 2019

Via Electronic Submission

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st St, N.W.
Washington, DC 20581

Re: Comments on Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations RIN 3038-AE87 and Exemption from Derivatives Clearing Organization Registration RIN 3038-AE65

Dear Sir/Madam:

Intercontinental Exchange, Inc., on behalf of itself and its subsidiaries (collectively, "ICE") appreciates the opportunity to comment on the two recent proposals from the Commodity Futures Trading Commission (the "Commission" or the "CFTC"), titled "Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations" (the "Alternative Compliance Proposal")[1] and Exemption from Derivatives Clearing Organization Registration (the "Exemption Proposal" and together, the "Proposals").[2]

As background, ICE currently operates four derivatives clearing organizations ("DCOs") registered with the Commission: ICE Clear Credit LLC,[3] ICE Clear Europe Limited,[4] ICE Clear US, Inc.[5] and ICE NGX Canada Inc.[6] ICE also operates ICE Clear Netherlands and ICE Clear Singapore, which are not registered as DCOs with the Commission but are registered clearing organizations in other jurisdictions. ICE has a successful history of clearing exchange traded and OTC derivatives across a spectrum of asset classes including energy, agriculture and financial products. ICE Clear Credit, a CDS clearing house, is designated as systemically important under Title VIII of the Dodd-Frank Act. As an operator of both US and non-US clearing organizations, ICE is keenly interested in the issues raised by the Proposals and appreciates the opportunity to comment.

[1] 84 FR 34819 (July 19, 2019) (RIN 3038-AE87).
[2] 84 FR 35456 (July 23, 2019) (RIN 3038-AE65)
[3] ICE Clear Credit has been designated as a systemically important derivatives clearing organization pursuant to Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. ICE Clear Credit is also registered as a securities clearing agency under the Securities Exchange Act of 1934 (the "Exchange Act").
[4] ICE Clear Europe is also an authorized as a central counterparty under the European Market Infrastructure Regulation (EMIR) and a Recognised Clearing House under English law, and a registered securities clearing agency under the Securities Exchange Act of 1934.
[5] ICE Clear US has elected to be a subpart C DCO pursuant to Commission Rule 39.31.
[6] ICE NGX Canada Inc. is also registered with the Commission as a Foreign Board of Trade and is a recognized exchange and clearing agency under the laws of Alberta, Canada.

Background

ICE is supportive of the Commission's efforts to facilitate cross-border harmonization of DCO regulation and to avoid unnecessarily duplicative or conflicting regulations for clearing organizations that operate in multiple jurisdictions. ICE also appreciates the Commission's efforts to take a risk-based approach to the regulation of clearing organizations by focusing its oversight on those DCOs that are either based in the US or pose a substantial risk to the US financial system. We agree with the policy goals of facilitating an integrated, global swaps market to the extent possible, while still ensuring protection for US customers, and also encouraging further cooperation and coordination among US and foreign regulators.

ICE's comments in this letter suggest certain improvements, including to the overall scope of relief and the standard for determining whether a foreign clearing organization poses substantial risk to the US financial system.

1. Overall Scope

We note that the Proposals apply only to the clearing of swaps, and not futures.[7] ICE notes that there are non-US clearing organizations that clear both swaps and futures, and believes that, to the extent possible, the relief for swap clearing should apply to swap clearing conducted at such a clearing organization. However, it is not clear that the Alternative Compliance Proposal, as drafted, would be available for swap clearing at such a clearing organization. ICE believes that to the extent possible, any relief for swap clearing (including under the Alternative Compliance Proposal) should also apply to swap clearing conducted at a DCO that clears both futures and swaps, and suggests that the final rules be clarified to make this explicit. ICE recognizes that there may be certain complexities with regard to policies and practices of such a clearing house that relate both to futures and swaps, and ICE would be pleased to work with the Commission and its staff to determine how best to implement relief for such a clearing house.

2. Definition of Substantial Risk to the US Financial System

Pursuant to proposed § 39.51(a)(1)(iii) and 39.6(a)(2), the Commission may register a DCO under the alternative compliance regime if, among other findings, the Commission determines that the DCO does not pose "substantial risk to the US financial system." The exemption from DCO registration would similarly only be available to foreign clearing houses that do not pose a substantial risk to the US financial system. The Commission is proposing to define ''substantial risk to the U.S. financial system'' to mean, with respect to a non-US DCO, that "(1) the DCO holds 20 percent or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt DCOs; and (2) 20 percent or more of the initial margin requirements for swaps at that DCO is attributable to U.S. clearing members; provided, however, where one or both of these thresholds are close to 20 percent, the

[7] Although the topic is outside the scope of the Proposals, ICE nonetheless believes that the arguments in favor of alternative compliance and deference to home country regulation are also applicable to the clearing of exchange-traded futures contracts. ICE would be pleased to work with the Commission and its staff in evaluating whether alternative compliance or similar relief should be made available for clearing of futures contracts as well.

Commission may exercise discretion…" ICE supports the establishment of an objective standard based on initial margin for this purpose, but believes the specifics of this proposal raise several potential concerns.

As an initial matter, it is not clear from the Proposals how the Commission has arrived at the 20% level as indicative of substantial risk. The Commission should provide a clearer explanation of the basis for this determination.

Moreover, it may be difficult for a clearing house or other market participants to determine whether the margin threshold has been met, particularly the first prong of the test—whether a clearing organization holds 20% or more of the required initial margin of US clearing members for swaps across all registered and exempt clearing organizations. There is likely not a readily available public source for a clearing organization to obtain such information about other clearing organizations. Although the Commission may have better access to such information, the standard needs to be one that is predictable and assessable for clearing organizations themselves.

Further, "US clearing member" for this purpose would include not only those clearing members organized in the US, but any clearing member with a US parent, as well as any Futures Commission Merchant ("FCM"). ICE believes this definition is overbroad. The mere fact that a non-US clearing member of a non-US clearing house has a US parent does not mean that its clearing activity has or can be expected to have a material effect (or any effect) on US markets. It is indeed common for there to be cross-border ownership of clearing members (with, for example, US parent companies owning foreign clearing members and foreign parent companies owning US clearing members). Accordingly, in ICE's view, it is inappropriate for the regulation of a clearing house (or the availability of an exemption from registration) to turn on the US ownership of its clearing members. The test under the rules should instead examine only the location and activity of the clearing members themselves. Such an approach will also have the benefit of being more predictable, and easier to administer, for both clearing houses and the Commission.

In addition, the Proposals leave the CFTC with considerable flexibility and thus creates legal uncertainty for the clearing house and market participants. Where one or both thresholds are "close to 20%," the CFTC may exercise discretion in determining whether the DCO poses substantial risk to the US financial system. Further, the Proposals state that in making its determination, the CFTC may look at other factors that reduce or mitigate the risk to the US financial system, or provide a better indication of the DCO's risk to the financial system. The Proposals do not indicate what these other factors may be. ICE appreciates the CFTC's efforts to provide some clarity regarding this test by applying a quantitative threshold; however, the potential scope of discretion, and lack of definition of relevant factors, may create significant uncertainty as to how the CFTC may classify a DCO and may result in inconsistent determinations. The lack of detail may also lead to unnecessary delays in the assessment of an applicant CCP, which would increase compliance costs and may disincentivize CCPs from submitting an application.

To the extent that the CFTC determines that it is necessary to consider additional factors, ICE would support the CFTC refining and amending the Proposals to provide additional detail and clarification on the criteria it would take into account as part of its discretionary

assessment of risk and risk mitigation factors to ensure a fair, predictable, and consistent application of the criteria.

ICE would also note that the frequency with which the DCO must test whether it poses substantial risk to the US financial system or otherwise meets the requirements of the exemption is not clear, nor is the period it would have to come into full compliance with US requirements if it ceases to be eligible. Greater clarity with respect to these matters would be helpful.

3. Alternative Compliance Proposal

Below, we have set out our additional comments with respect to the Alternative Compliance Proposal.

a. Assessment of Compliance

Pursuant to proposed rule § 39.51(a)(1)(i), the CFTC would need to determine that a foreign clearing organization's compliance with its home country's regulatory regime would satisfy the DCO core principles. The Alternative Compliance Proposal states that the home country regime would not need to satisfy the Part 39 regulations (with certain exceptions), but it is not clear from the proposal how the CFTC would make this assessment. ICE believes that the proper approach would be to determine whether the foreign regulatory regime, as a whole, provides equivalent outcomes to the DCO core principles and is reflective of international standards such as the PFMI. It should not be necessary for a DCO to do a rule-by-rule comparison between the US and its home jurisdiction, and a jurisdiction should not be determined to be non-comparable or non-equivalent on the basis of discrete differences from a Part 39 requirement. An assessment of comparability or equivalence should accept that there will be differences between the manner in which a foreign clearing organization's domestic regulator achieves international standards and CFTC regulations, and these differences should not be disqualifying. ICE thus encourages the CFTC to benchmark its comparability assessment with regard to compliance with international standards and in particular the PFMIs. Such an outcomes-based approach would provide appropriate deference to the foreign regulatory scheme. Otherwise, ICE is concerned that the alternative compliance regime is likely to be of little benefit, or result in substantial delays in implementation as equivalence is determined.

b. Alternative Compliance Conditions

As the Commission noted in the Alternative Compliance proposing release, to the extent that the DCO's home country regulatory regime lacks a particular legal requirement that corresponds to a DCO Core Principle (but is otherwise equivalent), the Commission may, in its discretion, grant registration subject to conditions that would address the relevant DCO Core Principles. For example, if the DCO's home country regulatory regime lacks legal requirements that would satisfy DCO Core Principle M (regarding information sharing), the Commission may grant registration subject to conditions that would address information sharing. This flexibility is helpful, provided that it is applied with sufficient deference to the overall home country regulatory regime in light of the standard discussed above. We would also caution that the CFTC should not impose different supplemental rules for similarly situated clearing organizations from the same jurisdiction.

The Commission should also be mindful of principles of international comity. The Alternative Compliance Proposal states that the CFTC may take into account, in placing conditions on the relief, the extent to which the home country regulator defers to the CFTC with respect to the oversight of US DCOs. We caution that any such approach should not be applied to create uncertainty for a DCO relying on the relief. We also note that any such approach may result in other regulators taking similar positions, which could have the effect of lessening cross-border cooperation.

c. Open Access

Proposed § 39.51(b)(2) is intended to codify the ‘‘open access’’ requirements of section 2(h)(1)(B) of the CEA with respect to swaps cleared by a DCO to which one or more of the counterparties is a U.S. person. We note that it is not clear from the proposing release why this specific requirement is necessary if the foreign DCO's home jurisdiction has a comparable requirement.

d. Rule Review

In the Alternative Compliance proposing release, the Commission requested comment as to whether it should require, as part of the application process for alternative compliance, that there is a rule review or approval process in the foreign DCO's home country regime. We note that global regulators take different approaches to "rule reviews" and as such, the Commission should not require that the home regulator have a process to review every rule, but rather should consider whether *material* rule changes are reviewed by the home regulator. For example, the Bank of England does not require clearing organizations to file every rule change for approval, but does require filing of major initiatives. Assuming material rule changes are subject to review by the foreign regulator, this should be sufficient, and the CFTC should neither deny alternative compliance nor impose review of every rule change by either the home regulator or the CFTC in order for a non-US DCO to be eligible for alternative compliance.

The Alternative Compliance Proposal also does not specifically address Rule 39.5 filings for new swaps or categories of swaps. Consistent with the Commission's position that the foreign DCO would not need to file rule amendments with the CFTC under Rule 40.6 (other than those relating to customer protection, segregation and swap reporting), it should be clarified that Rule 39.5 filings would not be required as well.

e. Modification of Registration Upon Commission Initiative (Proposed § 39.51(d))

Proposed § 39.51(d) would permit the Commission to modify the terms and conditions of a DCO order of registration, "in its discretion and upon its own initiative, based on changes to or omissions in facts or circumstances pursuant to which the order was issued, or if any of the terms and conditions of the order have not been met. For example, the Commission could modify the terms of a registration order upon a determination that compliance with the DCO's home country regulatory regime does not satisfy the DCO Core Principles, the DCO is not in good regulatory standing in its home country, or the DCO poses substantial risk to the U.S. financial system." ICE believes that such an action would only be appropriate where there has been a change in the home country regulatory regime such that it is no longer equivalent as a whole to the DCO core principles set out in the CEA. Furthermore, given the potential

ramifications of such a decision to the DCO and potentially other market participants, ICE believes strongly that would be important for the Commission to provide a clear process relating to how they would modify terms and give the DCO opportunity to respond to such findings from the CFTC prior to any modification..

f. Procedures for Registration (Proposed § 39.3(a)(3))

Pursuant to the Alternative Compliance Proposal application procedure set out in proposed § 39.3(a)(3), applicants would need to submit a regulatory compliance chart as an exhibit to their application. Pursuant to the proposing release, this would require identifying the applicable legal requirements in the applicant's home country that correspond with each DCO Core Principle and explaining how it satisfies those requirements. In light of the prescriptive and detailed nature of clearing organization requirements both in the US and in foreign jurisdictions, and the extensive work that would be required to provide a detailed mapping of all foreign requirements to all CFTC requirements, ICE suggests that the CFTC permit this requirement to be met in a more flexible manner than requiring the provision of a mapping document. ICE instead recommends that the format for an alternative compliance request be broken down by categories of regulatory objectives under Dodd-Frank or CFTC regulations. Mapping requirements on the granular basis proposed would not allow the CFTC to adopt an approach to alternate compliance that is outcomes-based.

ICE further suggests the CFTC ensure that a foreign clearing organization subject to rules in their home jurisdiction that meet CPMI-IOSCO and other international standards are not determined to be non-comparable on the basis of discrete differences from a Part 39 requirement. An assessment of comparability should accept that there will be differences between the manner in which a foreign clearing organization's domestic regulator achieves international standards and CFTC regulations. ICE encourages the CFTC to benchmark its comparability assessment with regard to compliance with international standards and in particular the PFMIs.

g. Swap Data Reporting (Proposed § 39.51(b))

Pursuant to proposed § 39.51(b), a DCO subject to the alternative compliance regime would still be required to comply with Part 45 of the CFTC regulations relating to swap data reporting. We would suggest that as the Alternative Compliance Proposal would treat most other DCO requirements under the alternative compliance regime, the Commission should consider the extent to which requirements in the applicant's home country correspond with this requirement and how the applicant satisfies such requirements. Certain other jurisdictions including Europe, through the requirements under the European Market Infrastructure Regulation ("EMIR")[8] require swap (and, also in Europe, also futures) reporting. Compliance with the CFTC swap reporting rules in addition to home jurisdiction swap reporting rules would be very costly for DCOs, and provide little additional benefit. Instead, the Commission should consider addressing the sharing of swap data reporting under the memoranda of understanding or other agreement with the foreign DCO's home regulator.

[8] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

h. Representation of Good Regulatory Standing (Proposed § 39.51(b)(6))

Pursuant to proposed § 39.51(b)(6), on an annual basis under the alternative compliance regime, following the end of a DCO's fiscal year, a DCO's a home country regulator would need to provide to the CFTC a written representation that the DCO is in good regulatory standing, which would require that either the home country regulator found no material nonobservance of the relevant home country legal requirements by the DCO, or if it found material non-observance, any such finding was, or is being, resolved to the satisfaction of the home country regulator. In the proposing release, the Commission requested comment as to whether it should, instead of requiring only instances of material nonobservance to be reported, require reporting of all instances of nonobservance. ICE would request that this be limited to only material instances of nonobservance given the number of very detailed requirements to which many clearing organizations are subject. Given the volume of detailed requirements, it should not be necessary to report on each individual minor variation of a minor requirement to which a foreign clearing organization is subject.

i. Books and Records (Proposed § 39.51(5))

Pursuant to the Alternative Compliance Proposal, the DCO would be required to demonstrate compliance and to make available its books and records for inspection by the CFTC. The CFTC states that it would not expect to conduct routine examinations of foreign DCOs, but it would be useful to clarify the expected scope of examination by the CFTC. In particular, the CFTC should state explicitly that it would defer to the home country regulator's examination in the first instance (provided that the home country regulatory share the results of the examination with the CFTC).

Pursuant to proposed § 39.51(c), the foreign DCO would be required to provide daily reporting, including details as to initial margin requirements and deposits for US clearing members and their customers. Quarterly and event-specific reporting would also be required. These requirements are generally lighter than those applicable to registered DCOs today, but would impose generally higher requirements with respect to events relating to US clearing members than other clearing members. We would suggest that the CFTC ensure that the final rules impose requirements relating to US clearing member events that are no higher than those imposed on other clearing members.

j. Futures Commission Merchant Clearing

The Alternative Compliance Proposal would still require that US customers clear swaps through a FCM. We would suggest that the CFTC consider whether, as a supplement to the exemption proposal, non-FCM intermediaries that are clearing members of the foreign DCO be allowed to transact with US customers in swaps, on a basis similar to the Rule 30.10 exemption. (At a minimum, this should be considered if it is permitted for exempt DCOs, as discussed below.)

4. Exemption Proposal

Below we have set out some additional concerns and suggestions specifically with respect to the Exemption Proposal.

a. Competitive Impact

We believe that the Commission should give careful consideration as to whether the exemptions may have an adverse competitive impact on US DCOs and US FCMs, and may facilitate movement of clearing activity to clearing organizations in foreign jurisdictions (at least so long as the substantial risk test is not triggered). As the CFTC itself acknowledged in the Exemption Proposal proposing release, a registered DCO subject to full CFTC regulation and oversight could face higher compliance costs than an exempt DCO. Similarly, the Exemption Proposal proposing release also recognized that FCMs may face a competitive disadvantage as, unlike foreign intermediaries, they would not be able to clear customer trades at an exempt DCO. The CFTC suggests that this option would carry costs to the customer in the form of increased risk due to the uncertainty of bankruptcy protection in a foreign jurisdiction, but to the extent that customers may be satisfied with those bankruptcy protections, it would permit foreign intermediaries to provide a service to US customers that US FCMs would not be permitted to provide. ICE believes that the competitive impact on FCMs could be mitigated, with benefits to the cleared swaps markets, if the CFTC considered ways to enable greater FCM participation, rather than precluding US FCMs from competing in certain cleared markets.

b. Customer Protection

In this regard, the CFTC should consider ways to address the identified bankruptcy law concerns about having US FCMs carry positions at exempt DCOs, with the goal of enabling FCM participation in those markets.

To the extent non-FCM foreign intermediaries are allowed to clear swaps for US customers, the proposal does not address the level of segregation or protection such intermediaries must provide to US customers in situations where there may be a choice under the home country law. We note that Rule 30.10 is generally more protective in this regard for customers of foreign futures intermediaries (as it does not allow intermediaries or customers to waive segregation requirements). The Commission should consider whether a different standard or approach is sufficiently justified for swaps, in light of the customer protection and competitiveness considerations noted above.

c. Clarity

The proposal raises the question, but does not take a position, on whether a non-US clearing organization can clear swaps for foreign branches of US persons, without registration or a formal exemption. It would be useful for the CFTC to clarify that such clearing is permissible without registration or an exemption.

d. Alternative Clearing

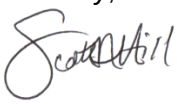
The Commission requested comment regarding alternative clearing structures, such as allowing non-FCMs to clear directly on behalf of non-US customers at US DCOs and allowing an FCM clearing member to be guaranteed by an affiliated non-FCM. ICE generally supports such flexibility. It is important to the functioning and continued development of the cleared derivatives markets that regulations not artificially limit cross-border access to clearing through intermediaries, and regulators should take steps to facilitate such access. In general, ICE believes a DCO (registered or exempt) should be able to determine whether it is satisfied that a

particular clearing member or clearing structure adequately protects the clearing house and market participants from a credit, market, operational, legal and other risk perspective.

5. Conclusion

ICE appreciates the opportunity to comment on the Proposed Rules, and the engagement of the Commission and its staff in the rulemaking process. ICE shares the Commission's goals of mutual recognition of cross-border regulatory requirements and facilitating cross-border access to clearing. ICE respectfully requests that the Commission and its staff consider the comments in this letter in light of those goals.

Sincerely,



Scott Hill
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