



June 9, 2023

Via Electronic Submission

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

Re: Derivatives Clearing Organization Risk Management Regulations to Account for the Treatment of Separate Accounts by Futures Commission Merchants (RIN 3038-AF21)

Dear Mr. Kirkpatrick:

Intercontinental Exchange, Inc., on behalf of itself and its subsidiaries (collectively, “ICE”) appreciates the opportunity to comment on the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) notice of proposed rulemaking relating to Risk Management Regulations to Account for the Treatment of Separate Accounts by Futures Commission Merchants (the “Proposal”).¹

ICE currently operates four derivatives clearing organizations (“DCOs”) registered with the Commission: ICE Clear Credit LLC,² ICE Clear Europe Limited,³ ICE Clear US, Inc.,⁴ and ICE NGX Canada Inc.⁵ 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 supports the Commission’s proposal to adopt formal regulations codifying time-limited no-action relief for the treatment of separate accounts by futures commission merchants (“FCMs”). ICE does not however believe that the specific conditions on FCMs’ use of separate accounts should be imposed through DCO rules or that DCOs should be responsible for the supervision of separate accounts. ICE instead suggests the CFTC impose these requirements directly on FCMs

¹ Derivatives Clearing Organization Risk Management Regulations to Account for the Treatment of Separate Accounts by Futures Commission Merchants (RIN 3038-AF21), 88 Fed. Reg. 22934 (April 14, 2023).

² 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 (“Dodd-Frank Act”). ICE Clear Credit is also registered as a securities clearing agency under the Securities Exchange Act of 1934 (the “Exchange Act”).

³ ICE Clear Europe is an authorized as a central counterparty under the European Market Infrastructure Regulation (EMIR) and a recognized clearing house under English law. ICE Clear Europe is also a registered securities clearing agency under the Exchange Act.

⁴ ICE Clear US has elected to be a subpart C DCO pursuant to Commission Rule 39.31.

⁵ 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.

and supervise through the existing designated self-regulatory organization (“DSRO”) examination process.

1. Overall Approach.

Commission Rule 39.13(g)(8)(iii) provides that a DCO must require its clearing members to ensure that customers do not withdraw funds unless the net liquidating value plus margin deposits remaining in a customer’s account after the withdrawal are sufficient to meet the customer initial margin requirements. Commission staff has issued a series of no-action letters permitting FCMs to treat separate accounts of the same customer as being for different legal entities.⁶ The relief under the no-action letters is subject to numerous conditions on the use of separate accounts by FCMs.

The Commission proposes new Rule 39.13(j), which would codify the existing no-action letters and allow a DCO to permit an FCM to treat separate accounts of its customers as accounts of separate entities for purposes of Rule 39.13(g)(8)(iii). ICE agrees with the Commission that it is appropriate for a DCO to be allowed to permit FCMs to treat qualifying separate accounts as distinct for purposes of withdrawals under Rule 39.13(g)(8)(iii). ICE also agrees with the Commission’s Proposal that a DCO should not be precluded from imposing additional or more stringent requirements on FCMs than are required by the regulation, if the DCO determines it is appropriate to do so for risk management purposes.⁷

Moreover, Proposed Rule 39.13(j) includes a set of detailed conditions with which an FCM would have to comply to apply separate account treatment to customer accounts.⁸ Given the detailed nature of these conditions, ICE does not believe that DCOs should be required to be responsible for implementation and enforcement of the CFTC’s proposed requirements. Instead, ICE suggests that the Commission adopt a separate rule in Part 1 of the Commission’s Regulations or outside of Part 39 that imposes these conditions directly on FCMs electing to provide separate account treatment for their customers. Rule 39.13(j) could be revised to allow a DCO to permit an FCM complying with the separate rule to treat separate accounts as distinct for purposes of Rule 39.13(g)(8)(iii).

ICE does not believe that there is any benefit to the Commission imposing its proposed conditions on FCMs indirectly through DCO rules. These conditions are principally relevant to the operation of the FCM and the FCM’s relationships with its customers, not the operation of the DCO. ICE does not believe the conditions will affect the DCO’s calculation of its own margin requirements for either house or customer accounts (for futures or swaps) or otherwise change DCO risk management. ICE expects the conditions to solely affect the way in which an FCM interacts with customers and complies with its own obligations. As such, the Commission should impose the conditions as regulatory requirements for the FCM.

Furthermore, ICE believes that supervision of FCM compliance with requirements related to separate accounts will be more consistently applied if not done at the individual DCO level. DCOs are not engaged in supervising, examining or surveilling the relationship of FCMs with their

⁶ See, e.g., Commission Letters Nos. 19-17 (July 10, 2019), 20-28 (Sept. 15, 2020), 21-29 (Dec. 21, 2021) and 22-11 (Sept. 15, 2022).

⁷ See Proposal at 22937.

⁸ See Proposal at 22938.

customers and do not have the personnel or infrastructure dedicated to these functions. Instead, these functions are typically performed by the DSRO for the FCM pursuant to the requirements of Commission Rule 1.52. DSROs have developed robust supervisory programs with related surveillance and examination procedures designed to address the financial, risk management and other requirements applicable to FCMs. ICE does not see any reason why the new conditions should be treated differently from other similar issues that are currently supervised by a DSRO. ICE also believes it will be more efficient for FCMs themselves to have these matters assessed by a single DSRO as opposed to each DCO of which they are a member. In addition, imposing the additional burden and costs of supervising these conditions on the DCO may also create a disincentive for DCOs to permit FCMs to use separate accounts which could limit the benefits of the Proposal for market participants.

Finally, to the extent a DCO determines to impose additional requirements on an FCM beyond those in the Proposal, ICE agrees that it would be appropriate for the DCO to be responsible for the supervision or examination of such additional requirements.

2. Additional Comments.

The Commission proposes to establish certain margin call timeframes under proposed Rule 39.13(j)(4).⁹ ICE does not object to the proposed timing for the delivery of customer margin but believes the Commission should clarify that the Proposal would not affect stricter margin call timeframes established by the DCO for its clearing members. To the extent the Commission determines to establish its own rules for the timing of customer margin calls when there is an unscheduled holiday, ICE also believes that any such requirements should not affect margin calls between the DCO and its clearing members as DCOs address the treatment of unscheduled holidays in their rules or procedures.

The Commission has also requested comment as to whether it should prescribe specific steps a DCO must take to require a clearing member to verify the identity of an authorized representative of a customer.¹⁰ ICE does not believe that a DCO is well-placed to administer or enforce these prescriptive requirements on its members. If the Commission believes that it is necessary to establish the proposed specific steps that clearing members must take to identify authorized representatives of customers, it has the authority to directly impose such requirements on clearing members.

Furthermore, Proposed Rule 39.13(j)(14) would require clearing members to apply separate account treatment to their customers in a consistent manner over time. ICE does not object to this requirement; however, we note that the Commission has stated that DCOs would have responsibility for determining whether a clearing FCM has applied separate account treatment consistently over time.¹¹ For the reasons discussed above, ICE does not believe a DCO can readily assess whether an FCM is applying the treatment consistently and believes that a DSRO is better placed to make such an assessment.

⁹ See Proposal at 22941.

¹⁰ See Proposal at 22944.

¹¹ See Proposal at 22945.



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ICE appreciates the opportunity to comment on the Proposal. ICE supports the goals of the Commission to clarify and codify requirements for treatment of separate accounts by FCMs. As noted in this letter, ICE does not however believe that the specific conditions on FCMs' use of separate accounts should be imposed through DCO rules or that DCOs should be responsible for the supervision of separate accounts. ICE instead suggests that implementation by direct regulation of FCMs and supervision by the relevant DSRO is more appropriate.

Sincerely,

A handwritten signature in black ink that reads "Christopher A. Edmonds".

Chris Edmonds
Chief Development Officer
Intercontinental Exchange Inc.

cc: Honorable Chairman Rostin Benham
Honorable Commissioner Christy Goldsmith Romero
Honorable Commissioner Kristen N. Johnson
Honorable Commissioner Summer Mersinger
Honorable Commissioner Caroline D. Pham
Clark Hutchison, Director, Division of Clearing and Risk
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