



December 07, 2016

Mr. Christopher J. Kirkpatrick
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: ICE Clear Europe Self-Certification Pursuant to Commission Rule 40.6:
Amendments to Clearing Rules Regarding German CDS Clearing Members

Dear Mr. Kirkpatrick:

ICE Clear Europe Limited (“ICE Clear Europe”), a registered derivatives clearing organization under the Commodity Exchange Act, as amended (the “Act”), hereby submits to the Commodity Futures Trading Commission (the “Commission”), for self-certification pursuant to Commission Rule 40.6, the rule amendments discussed herein. The amendments are to become effective on the business day following the tenth business day after submission, or such later date as ICE Clear Europe may determine.

Concise Explanation and Analysis

The principal purpose of the rule amendments is to revise the application of certain provisions of the ICE Clear Europe Clearing Rules (“Clearing Rules”) related to economic sanctions compliance by CDS Clearing Members and Customers of CDS Clearing Members incorporated in Germany. The existing ICE Clear Europe Rules impose certain requirements on all Clearing Members with respect to compliance with economic sanctions regimes, specifically those imposed by the European Union, the United Kingdom, the United States and the United Nations Security Council. These requirements include representations by Clearing Members that they would not be prevented from entering into any cleared contract or from using the Clearing House under such sanctions regimes, and that they are in compliance with requirements under such regimes relating to due diligence in respect of their customers in any cleared transactions.

Clearing Members that are incorporated in Germany (“German Clearing Members”) have expressed concern to ICE Clear Europe that these requirements under the Rules may potentially be inconsistent with the anti-boycott provisions in Section 7 of the German Foreign Trade Ordinance (*Außenwirtschaftsverordnung*) (the “anti-boycott ordinance”), which generally prevents German persons from participating in so-called foreign boycotts. German Clearing Members have noted the view that contractual provisions that require them to comply with economic sanctions that are imposed by a jurisdiction other than Germany, the EU or the UN Security Council may, at least as a theoretical matter, conflict with the anti-boycott ordinance. This potential conflict may apply to sanctions imposed by the United States or the United Kingdom that are not also imposed by the EU or UN Security Council.

To avoid this potential conflict, ICE Clear Europe is amending its Clearing Rules to provide exceptions to certain of the representations and undertakings for German Clearing Members, to the extent the representation or undertaking would be in conflict with the anti-boycott ordinance. Instead, such German Clearing Members would be required to provide notice to the Clearing House at least 30 days in advance of any transaction (including a customer transaction) that would otherwise violate such a representation or undertaking. In such case, ICE Clear Europe would as an operational and compliance matter continue to evaluate whether the transaction or activity would be subject to or restricted under any applicable sanctions regime or restriction (including those of the United States and United Kingdom). If so, ICE Clear Europe would be entitled, as it determined to be appropriate, to use one of its existing authorities under the Clearing Rules, including potentially under Rules 104, 404 and Parts 2 and 6 depending on the circumstances, to avoid or decline to clear the transaction or impose a position limit preventing the transaction from being effective even if submitted. The amendments only relate to German Clearing Members that are CDS Clearing Members in connection with their CDS clearing activity; they do not apply to Clearing Members organized in other jurisdictions or to other products cleared by German Clearing Members.

The changes are thus intended to avoid placing German CDS Clearing Members in a situation where they face a potential conflict between the Clearing Rules as they relate to non-German sanctions regimes and the anti-boycott ordinance, while at the same time allowing ICE Clear Europe itself to maintain compliance with all applicable sanctions regimes, including those of the United States and the United Kingdom. The making of these changes is regarded as important by German market participants particularly in relation to CDS clearing, which is subject to a clearing mandate under the European Market Infrastructure Regulation (EMIR),¹ effective from February 2017. The so-called “frontloading window” for mandatory clearing of CDS has already commenced and based on communications with Clearing Members, ICE Clear Europe understands that market participants regard it as important that there be certainty that CDS transactions executed today by German users, which will later be

¹ 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, as well as various implementing regulations and technical standards.

required to be cleared, can be capable of being cleared in compliance with applicable laws.

The proposed amendments to the Rules are described in more detail as follows:

In Rule 101, a new definition of “Sanction” has been added, which largely tracks existing references in the Rules to economic sanctions regulations and restrictions imposed by the EU, United Kingdom, United States or UN Security Council.

In Rule 201(a), which contains a representation that the Clearing Member will not be prevented from entering into a contract or using the Clearing House as a result of prohibition or restriction under an economic sanction regime, paragraph (xxxiv) has been amended to provide the exception described above for German CDS Clearing Members, solely in respect of their CDS business, and solely to the extent that the representation would conflict with applicable laws purporting to nullify or restrict the effect of foreign sanctions or preventing boycotts (the “anti-boycott exception”). It has also been modified to use the new defined term Sanction.

In Rule 203(a), a new paragraph (xxi) has been added, which requires a German CDS Clearing Member (or any Clearing Member dealing with a customer incorporated in Germany) to provide at least 30 days’ notice before entering into a transaction that would breach applicable representations or undertakings in the Rules relating to Sanctions, but for the anti-boycott exception.

Similar provisions have been added in new paragraphs (xiv) and (xv) of Rule 204(a), which requires Clearing Members to provide certain notices to the Clearing House. Paragraph (xiv) requires that a German CDS Clearing Member provide notice if any UK or US Sanctions would, if they were applicable, prevent the German CDS Clearing Member from entering into a cleared contract or using the Clearing House in circumstances in which neither EU Sanctions nor UN Security Council Sanctions would impose such restriction. Similarly, paragraph (xv) requires that a German CDS Clearing Member (or any Clearing Member for a customer incorporated in Germany) provide notice if U.K. or U.S. Sanctions would, if they were applicable, restrict or prevent any derivatives or spot trading activities involving the customer in circumstances in which neither EU Sanctions nor UN Security Council Sanctions would impose such restriction. Such notices must be given 30 days before entering into any such cleared contract. Corresponding changes have been made in Rule 405(a) and Rule 1901(d).

In addition, in the form of Standard Terms Annex for CDS transactions, paragraph 3(o) has been revised to include a corresponding anti-boycott exception applicable where the Clearing Member or Customer is located in Germany. The other Standard Terms Annexes for F&O and FX include a conforming amendment.

Compliance with the Act and Commission Regulations

The rule amendments are potentially relevant to the following core principles: (C) Participant and Product Eligibility, (H) Rule Enforcement and (R) Legal Framework and the applicable regulations of the Commission thereunder.

- *Participant and Product Eligibility.* As described herein, the Clearing Rules amendments are designed to resolve a potential conflict between German anti-boycott ordinance and the Rules applicable to German Clearing Members. The amendments thus facilitate continued clearing by German Clearing Members (and their customers), while maintaining the clearing house's ability to comply with applicable sanctions requirements in relevant jurisdictions. As noted above, German Clearing Members have indicated that these changes are important to their ability to clear CDS transactions, particularly in light of upcoming clearing obligations under EMIR. In ICE Clear Europe's view, the amendments are therefore consistent with the requirements of Core Principle C and Commission Rule 39.12.
- *Rule Enforcement.* Although certain responsibilities of German Clearing Members with respect to sanctions compliance are being modified, the amendments impose new notice requirements on such Clearing Members. This will facilitate the identification and review by the clearing house of potential sanctions violations, and permit the clearing house to take appropriate action under the Rules to address any such potential violation. In ICE Clear Europe's view, the amendments will thus facilitate continued compliance by ICE Clear Europe with sanctions regimes in all relevant jurisdictions and enforcement by ICE Clear Europe of its related rules. ICE Clear Europe believes that the amendments are therefore consistent with the requirements of Core Principle H and Commission Rule 39.17.
- *Legal Risk.* As a clearing organization that provides services outside the United States, ICE Clear Europe is required under Core Principle R and Commission Rule 39.27 to identify and address any material conflict of law issues, and to be able to demonstrate that its rules and procedures are enforceable in all relevant jurisdictions. As discussed above, the amendments are designed to avoid subjecting German Clearing Members to a potential conflict with applicable German laws, while maintaining overall compliance by the clearing house with sanctions requirements in multiple jurisdictions. As such, the amendments will further the clearing house's compliance with these requirements under Core Principle R, as well as more generally support its operation pursuant to a well-founded legal framework in all relevant jurisdictions.

As set forth herein, the amendments consist of revisions to the Clearing Rules, a copy of which is attached hereto.

ICE Clear Europe hereby certifies that the amendments comply with the Act and the Commission's regulations thereunder.

ICE Clear Europe has received no substantive opposing views in relation to the rule amendments.

ICE Clear Europe has posted a notice of pending certification and a copy of this submission on its website concurrent with the filing of this submission.

If you or your staff should have any questions or comments or require further information regarding this submission, please do not hesitate to contact the undersigned at patrick.davis@theice.com or +44 20 7065 7738, Dee Blake, Director of Regulation, at dee.blake@theice.com or +44 20 7065 7752 or Paul Swann, President & Managing Director, at paul.swann@theice.com or +44 20 7065 7700.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Patrick Davis', written over a light blue horizontal line.

Patrick Davis
Head of Legal and Company Secretary