



December 14, 2020

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 –
GDPR Clearing Rule Amendments

Dear Mr. Kirkpatrick:

ICE Clear Europe Limited (“ICE Clear Europe” or the “Clearing House”), a registered derivatives clearing organization under the Commodity Exchange Act, as amended (the “Act”), hereby submits to the Commodity Futures Trading Commission (the “Commission”), pursuant to Commission Rule 40.6 for self-certification, amendments to its Clearing Rules (the “Rules”)¹ as discussed herein. The amendments are to become effective on the first business day following the tenth business day after submission, or such later date as ICE Clear Europe may determine.

Concise Explanation and Analysis

ICE Clear Europe is amending its Rules to address certain requirements under the European Union General Data Protection Regulation (“GDPR”)² in the event that at the end of current transition period (ending December 31, 2020) (the “Transition Period”) the United Kingdom (“UK”) exits the European Union (“EU”) in circumstances where: (i) no trade agreement has been agreed between the UK and the EU27 which stipulates that EU data protection law, among other laws, shall continue to apply in the UK (a “trade agreement”); and (ii) the UK’s data protection laws have

¹ Capitalized terms used but not defined herein have the meanings specified in the ICE Clear Europe Clearing Rules (the “Rules”).

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

not been found to provide for an adequate level of protection for the personal data of individuals in the EU pursuant to a decision made by the European Commission under Article 45 of the GDPR (an “adequacy decision”). The amendments are intended to supplement existing Rule provisions to reflect the judgment in a recent EU judicial decision.

The amendments add certain supplemental data protection clauses to the Standard Contractual Clauses in Exhibit 5 of the Rules that address certain requirements under the GDPR relating to personal data. The amendments will be relevant upon the end of the Transition Period, in circumstances where: (i) no trade agreement has been agreed between the UK and the EU27; and (ii) the UK has not been the subject of an adequacy decision, such that the UK thereby becomes a third country under the GDPR

Amendments previously submitted by the Clearing House in 2019³ (the “2019 Filing”) generally address the situation where the UK would be treated as a ‘third country’ for GDPR purposes. In that case, in certain circumstances, it may be necessary or advisable to take certain additional steps to avoid a greater risk that transfers of personal data from EU27-based Clearing Members to ICE Clear Europe violate the GDPR, including the use of certain Standard Contractual Clauses, which were endorsed and published in a decision of the European Commission, that will govern transfer of personal data to ICE Clear Europe in order to comply with the GDPR.

The amendments in the instant filing are intended to take into account the recent Court of Justice of the European Union decision in the *Schrems II* case.⁴ That decision, among other matters, recognized that transfer of personal data outside of the EU may be permissible if governed by the Standard Contractual Clauses, subject to certain additional protections and conditions, including in some cases the use of supplementary measures, to achieve the required level of data protection. In light of this decision, and given the possibility that the Transition Period will end without a trade agreement between the UK and the EU27 and/or an EU adequacy decision with respect to UK data protection requirements, ICE Clear Europe believes that it would be prudent to put in place additional safeguards with respect to transfers of personal data from EU27-based Clearing Members to ICE Clear Europe such that it can be certain that such transfers are subject to appropriate safeguards within the meaning of the GDPR.

In the event that the Transition Period ends without a trade agreement between the UK and the EU27 and/or an EU adequacy decision with respect to UK data protection requirements, a new Appendix to Exhibit 5 of the Rules will set out additional safeguards to the Standard Contractual Clauses that address the conditions that must be met in order to rely upon such clauses as set out in *Schrems II*. Specifically, the Appendix states that the data importer (in this case, ICE Clear Europe) must assess whether the laws applicable to it provide adequate protection under EU data protection law. To the extent that the laws do not, (1) the data importer would adopt

³ ICE Clear Europe Self-Certification Pursuant to Commission Rule 40.6 – GDPR Clearing Rule Amendments (Feb. 25, 2019).

⁴ Case C-311/18 Data Protection Commissioner v Facebook Ireland Ltd and Maximilian Schrems.

supplementary measures to protect the personal data received under Standard Contractual Clauses from the data exporter in accordance with EU data protection laws and (2) in the event that the data importer receives a legally binding request for access to the data by a public authority, the data importer will (i) promptly notify the data exporter of the request, (ii) comply with its internal policies governing disclosure, (iii) not make disproportionate disclosures and (iv) upon request from the data exporter, provide general information on such requests received in the preceding 12 month period.

The amendments also correct a typographical error in the definition of Standard Contractual Clauses in Rule 106(m) and in Exhibit 5 of the Rules to correctly reference Commission Decision C(2004) 5271.

Compliance with the Act and CFTC Regulations

The rule amendments are potentially relevant to the following core principle: (R) Legal Risk, and the applicable regulations of the Commission thereunder.

- *Legal Risk.* As discussed herein, the amendments are designed to facilitate continued compliance by ICE Clear Europe and its Clearing Members with requirements of GDPR that will apply at the end of the Transition Period if there is no trade agreement and the EU has not issued an adequacy decision, in light of the additional requirements of the *Schrems II* decision. Specifically, the Rule change will facilitate EU-based Clearing Members' continued ability to export personal data as necessary in connection with clearing without violating GDPR should the Transition Period end without a trade agreement and without an adequacy decision. The amendments thereby facilitate continued clearing for EU-based persons in accordance with EU regulations relating to data protection. As a result, ICE Clear Europe believes the amendments are consistent with the requirements of Core Principle R and CFTC Rule 39.27.

As set forth herein, the amendments consist of changes to the Rules, a copy of which is attached hereto in the form of a blackline to the Rule changes submitted in connection with the 2019 Filing.

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 proposed 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 George.milton@theice.com or +44 20 7429 4564.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'G. Milton', with a long horizontal flourish underneath.

George Milton
Interim Head of Regulation & Compliance