



May 20, 2013

Ms. Melissa Jurgens  
Office of the Secretariat  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

By Email: [submissions@cftc.gov](mailto:submissions@cftc.gov)

Re: ICE Clear Europe Self-Certification Pursuant to Commission Rule 40.6

Dear Ms. Jurgens:

ICE Clear Europe Limited (“ICE Clear Europe”), a registered derivatives clearing organization (“DCO”) 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 the attached amendment to its clearing rules. This submission supplants the ICE Clear Europe Self-Certification that was submitted on March 15, 2013 and subsequently withdrawn on March 21, 2013.

This submission corrects, pursuant to a CFTC staff request, a typographical error in the previous ICE Clear Europe Self-Certification. Additionally, the attached amendment adding new Rule 411 to the ICE Clear Europe clearing rules no longer includes section (b) to the proposed new rule as provided in the previous self-certification submission. As noted in the previous self-certification, section (b) to the proposed new rule would have provided that ICE Clear Europe, in the capacity of a third-party facilitator, would, on behalf of a clearing member that is a swap dealer or major swap participant, report valuation data related to a swap cleared at ICE Clear Europe. In light of the fact that reporting counterparties to cleared swaps that are swap dealers or major swap participants are not presently required to report daily valuation data for cleared swaps due to time-limited no-action relief provided by the Commission’s Division of Market Oversight,<sup>1</sup> ICE Clear Europe is not including section (b) in this revised submission for self-certification. ICE Clear Europe reserves

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<sup>1</sup> See Time-Limited No-Action Relief for Swap Dealers and Major Swap Participants from Compliance With Reporting Obligations Under 17 C.F.R. § 45.4(b)(2)(ii), CFTC Letter No. 12-55 (December 17, 2012).

the right to propose such an amendment to its clearing rules in the future in the event that swap dealers and major swap participants cease to enjoy such relief.

The rule amendment will become effective on June 10, 2013, or such later date as ICE Clear Europe may determine.

ICE Clear Europe currently meets its reporting obligations under Part 45 of the Commission's Rules by reporting the relevant data to ICE Trade Vault, LLC ("ICE Trade Vault"), a provisionally registered swap data repository ("SDR"). The rule amendment, which provides for the addition of new Rule 411, serves to codify this practice of reporting to ICE Trade Vault, the SDR selected by ICE Clear Europe.

Proposed new Rule 411 provides that with respect to all swaps cleared by ICE Clear Europe and resulting positions, ICE Clear Europe will report creation and continuation data to ICE Trade Vault for purposes of complying with applicable Commission rules and regulations governing the regulatory reporting of swaps. The proposed new rule further provides that upon the request of a clearing member counterparty to a swap cleared at ICE Clear Europe, ICE Clear Europe will provide the same creation and continuation data reported by ICE Clear Europe to ICE Trade Vault to an SDR selected by such counterparty. Please note further that proposed Rule 411 mirrors Chicago Mercantile Exchange Inc. ("CME") Rule 1001-Regulatory Reporting of Swap Data, approved by the Commission on March 6, 2013, in every substantive respect and the rationale of the Commission in granting CME Rule 1001 applies with equal force in this case.<sup>2</sup>

There were no opposing views expressed to ICE Clear Europe by governing board or committee members, members of ICE Clear Europe or market participants. However, there was an opposing view expressed by a competitor, The Depository Trust & Clearing Corporation ("DTCC"), in response to ICE Clear Europe's previous filing made on March 15, 2013. DTCC, the world's largest securities clearance and settlement organization, asserts that ICE Clear Europe's proposed rule regarding the regulatory reporting of swaps (the proposed Rule 411) is fundamentally inconsistent with both the Act and the Commission's regulations thereunder in light of ICE Clear Europe's relevant market share. ICE Clear Europe responds herein to DTCC's incorrect assertions.

Like CME Rule 1001, proposed Rule 411 relates to the two swaps resulting from the clearing novation process, and not to the original swap presented for clearing. As the Commission made clear in its Statement approving CME Rule 1001, the Act does not prescribe any procedures for the reporting of cleared swaps and Part 45 of the Commission's Regulations does not preclude a DCO from reporting the resulting swap data to an affiliated SDR. Indeed, the Commission noted that when it approved Parts 45 and 49 of its Regulations, the Commission specifically contemplated that DCOs may report swaps to an SDR of their choosing. Thus, the Commission has aptly rejected any assertion that either CME Rule 1001 or proposed Rule 411 is inconsistent with the Act or the Commission's regulations thereunder.

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<sup>2</sup> See Statement of the Commission (March 6, 2013) ("Statement").

Proposed Rule 411 is consistent with DCO Core Principle N (Antitrust Considerations) because it does not result in an unreasonable restraint of trade. Proposed Rule 411 cannot have any effect on competition because it is not restraint. It does not keep reportable trade data from being reported to another SDR. Indeed, Proposed Rule 411 explicitly allows a clearing member that is a counterparty to a swap cleared at ICE Clear Europe to designate another SDR to receive the same swap creation and continuation data. Thus, the rule is not exclusionary. By its very terms, it does not keep trade data from any SDR that seeks to compete in the market for SDR services and it therefore cannot be a restraint.<sup>3</sup>

Proposed Rule 411 creates no material anticompetitive burdens and relieves ICE Clear Europe's clearing members of certain reporting obligations by reporting swap creation and continuation data on their behalf. Any data sent on behalf of a clearing member can be seen via reports generated by ICE Clear Europe thus alleviating a clearing member's need to reconcile data at each SDR to which data may be sent pursuant to such clearing member's request. As noted before, ICE Clear Europe will send the same creation and continuation data to an SDR selected by a clearing member that is a counterparty to a swap cleared at ICE Clear Europe. This enables each clearing member to have equal data sets at ICE Clear Europe and the SDR of its choice and mitigates any concerns regarding the effect on competition of proposed Rule 411. Furthermore, proposed Rule 411 in no way constitutes a restraint on the ability of a clearing member to make a voluntary, supplemental report to an SDR of its choosing pursuant to Commission Rule 45.12.

The Commission carefully considered anti-competitive considerations, in particular, DCO Core Principle N (Antitrust Considerations), in approving CME Rule 1001. The Commission correctly noted that the language and structure of DCO Core Principle N reflects a determination by Congress that *the dictates of antitrust law would not be dispositive* in evaluating the legitimacy of the practices and rules of regulated entities under the Act. Prior to approving CME Rule 1001, the Commission did consider the antitrust laws in evaluating whether CME Rule 1001 is inconsistent with the Act and the Commission's regulations thereunder.

The Commission observed that for purposes of conducting an antitrust analysis it is presently premature to know what the relevant market is regarding the clearing of swaps since the mandatory clearing of swaps and reporting of cleared swaps is just beginning. But even if one were to take a very narrow view of market definition and define the clearing of CDS as a relevant product market, a high market share would not necessarily be indicative of an ability for any clearing organization in that market to exercise market power.<sup>4</sup> A clearing organization with a high market share would be unable to charge prices above competitive levels because there are many clearing organizations that could enter that line of business quickly if they observed prices above competitive levels.<sup>5</sup>

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<sup>3</sup> See, e.g., *CBS v. ASCAP*, 620 F.2d 930, 936-939 (2d Cir. 11980) (blanket licensing was not restraint of trade in part because composers retained right to license compositions independently).

<sup>4</sup> See U.S. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 9 ("A merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger").

<sup>5</sup> *Id.*

At the same time, the Commission has considered the fact that allowing an entity other than a swap dealer to make the choice of which SDR to which swap data for cleared swaps should be reported could foster rather than harm competition in a manner consistent with Part 45 of the Commission's regulations. Likewise, in approving CME Rule 1001, the Commission expressed its belief that the availability of secondary reports, as required under CME Rule 1001, may mitigate concerns regarding an anti-competitive concern posed by the rule. Proposed Rule 411 makes secondary reports available in an identical manner.

Proposed Rule 411 is consistent with DCO Core Principle C (Participant and Product Eligibility) because it is not a participant and membership requirement and therefore does not violate the fair and open access standard applicable to such requirements. As stated above, Proposed Rule 411 described how ICE Clear Europe satisfies *its* regulatory obligations set forth in Part 45 of the Commission's rules. ICE Clear Europe currently satisfies its reporting requirements by reporting cleared swap data to ICE Trade Vault. An ICE Clear Europe clearing member (prospective or current) is not required to use ICE Trade Vault's SDR services as a prerequisite to future or existing membership at ICE Clear Europe. Because proposed Rule 411 is not a participant and membership requirement it cannot violate the fair and open access standard applicable to such requirements.

ICE Clear Europe has determined that proposed Rule 411 will not have an adverse effect on its compliance with DCO Core Principles and that following the effectiveness of proposed Rule 411 ICE Clear Europe will continue to be in compliance with DCO Core Principles.

Accordingly, ICE Clear Europe hereby certifies that the amendment complies with the Act and the Commission's regulations thereunder.

Concurrent with the filing of this submission, ICE Clear Europe has posted a notice of pending certification and a copy of this submission on its website at <https://www.theice.com/notices/Notices.shtml?regulatoryFilings>.

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](mailto:patrick.davis@theice.com) or +44 20 7065 7738, Dee Blake, Director of Regulation, at [dee.blake@theice.com](mailto:dee.blake@theice.com) or +44 20 7065 7752 or Paul Swann, President & Chief Operating Officer, at [paul.swann@theice.com](mailto:paul.swann@theice.com) or +44 20 7065 7700.

Very truly yours,



Patrick Davis  
Head of Legal and Company Secretary



# **ICE Clear Europe<sup>sm</sup>**

## **Clearing Rules**

- (v) as a result of a sale or transfer of Contracts pursuant to Rule 902(a)(i).
- (b) Any purported transfer of any rights, liabilities or obligations under a Contract other than in accordance with Rule 408(a) shall be null and void.

***Rule 409      Amendment of Contract Terms***

- (a) The terms of any Contract may only be amended, waived or varied with the prior written consent of the Clearing House.

***Rule 410      [Not used]***

***Rule 411      Swap Data Repository (“SDR”) Reporting***

For all swaps cleared by the Clearing House and resulting positions, the Clearing House will report creation and continuation data to the ICE Trade Vault swap data repository for purposes of complying with applicable CFTC rules governing the regulatory reporting of swaps. Upon the request of a counterparty to a swap cleared at the Clearing House, the Clearing House will provide the same creation and continuation data to a swap data repository selected by the counterparty as the Clearing House provided to the ICE Trade Vault swap data repository under the preceding sentence.