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March 26, 2013

Ms. Melissa Jurgens
Office of the Secretariat
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Petition to Stay the Certifications of ICE Clear Credit's Proposed Rule 211 (Regulatory Reporting of Swap Data) and ICE Clear Europe Limited's Proposed Rule 410 (Swap Data Repository ("SDR") Reporting)

Dear Ms. Jurgens:

The Depository Trust & Clearing Corporation ("DTCC"),[1] in conjunction with its provisionally registered swap data repository ("SDR"), DTCC Data Repository (U.S.) LLC ("DDR"), submits this petition to the Commodity Futures Trading Commission ("CFTC" or "Commission") in response to the submissions for self-certification pursuant to Commission Rule 40.6 of amended Rule 211, dated March 14, 2013,[2] and amended Rule 211, dated March 22, 2013[3] (together, "Rule 211"), as well as proposed new Rule 410 ("Rule 410"), dated March 15, 2013,[4] by ICE Clear Credit and ICE Clear Europe Limited, respectively (together, "ICE").

Executive Summary

At issue here is an intended self-certification by a clearing house of anti-competitive rules. ICE clears large volumes in certain swaps markets and appears intent on

[1] The Depository Trust & Clearing Corporation ("DTCC") provides critical infrastructure to serve all participants in the financial industry, including investors, commercial end-users, broker-dealers, banks, insurance carriers, and mutual funds. DTCC operates as a cooperative that is owned collectively by its users and governed by a diverse Board of Directors. DTCC's governance structure includes 344 shareholders.

[2] ICE Clear Credit's submission for self-certification of proposed new Rule 211 is *available at* http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul031413icc001.pdf.

[3] ICE Clear Credit's submission for self-certification of amended Rule 211is *available at* http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul032213icc001.pdf.

[4] ICE Clear Europe Limited's ("ICE Clear Europe") submission for self-certification of proposed new Rule 410 is *available at* http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul031513iclreu001.pdf [hereinafter ICE Clear Europe Letter].

expanding its market power through the self-certification of two anti-competitive rules. ICE's "extraordinarily high share" in certain cleared contract markets is shown in the accompanying Report.[5]

For the reasons presented in this petition, DTCC requests that the Commission reject the certifications of Rule 211 and Rule 410 (to the extent it is still pending or may be resubmitted),[6] or in the alternative, stay the certifications pursuant to Commission Rule 40.6(c)(1). Should the Commission choose to stay the certifications, DTCC requests that, in accordance with its own regulations, the Commission utilize an additional 90 days from the date of its notification of the stay to conduct a review and, within such 90 days, provide the public with a 30-day comment period.

Discussion

Commission Rule 40.6(c)(1) provides that "[t]he Commission may stay the certification of a new rule or rule amendment . . . on the grounds that . . . the rule or rule amendment is potentially inconsistent with the Act or the Commission's regulations thereunder."[7]

According to Rule 40.6(a)(7), registered entities must certify that rule submissions comply with the Commodity Exchange Act ("CEA") and the Commission's regulations thereunder. In making the inaccurate certifications that Rule 211 and Rule 410 comply with the CEA and attendant Commission regulations, ICE implicitly relies upon the approval order contained in the Statement of the Commission in response to The Chicago Mercantile Exchange Inc.'s ("CME") request for approval of new Chapter 10 and Rule 1001 submission ("Rule 1001") (hereinafter referred to as "CME Approval Order").[8]

In addition to the CME Rule 1001 and the CME Approval Order and process being arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,[9] ICE's reliance on the CME Approval Order is misplaced because of

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[5] NERA Report on ICE Volumes in Cleared Contracts, attached hereto as Appendix A.

[6] DTCC observes that the status of the filing for Rule 410 is uncertain, as the CFTC website reflects that it was withdrawn on March 21, 2013. However, in an abundance of caution and because ICE representatives provided details about the proposed rule amendment during a webinar about SDR reporting on March 22, 2013, DTCC is including a petition to stay Rule 410. Information on the webinar is *available at* http://www.cadwalader.com/view_event.php?event_id=806&archive=archive.

[7] In addition to being potentially inconsistent with the CEA, ICE's rule submissions must be stayed because they also present "novel or complex issues that require additional time to analyze [and] the rule or rule amendment is accompanied by an inadequate explanation." Indeed, ICE's rule filings with the Commission are in a frequent state of change, making Commission action to stay or reject certification and provide a comment period all the more necessary. *See* 17 C.F.R. § 40.6(c)(1).

[8] *See* CME Approval Order *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/statementofthecommission.pdf.

DTCC maintains all of its objections to Rule 1001 and the CME Approval Order, including that the CFTC's actions violated the Administrative Procedure Act. *See* Letter from Larry Thompson,

significant substantive differences between Rule 211 and Rule 410, on the one hand, and Rule 1001. First, both Rule 211 and Rule 410 are anticompetitive in light of ICE's relevant market share and the dictates of CEA Section 19(b) and Derivatives Clearing Organization ("DCO") Core Principle N. Further, Rule 410 contains an additional requirement related to valuation data that Rule 1001 did not include, which is inconsistent with swap dealer ("SD") and major swap participant ("MSP") reporting obligations under Part 45 of the Commission's regulations.

Anti-Competitive Considerations

Rule 211 and Rule 410 are inconsistent with Core Principle N, which provides: "[u]nless necessary or appropriate to achieve the purposes of this Act, a derivatives clearing organization shall not—(i) adopt any rule or take any action that results in any unreasonable restraint of trade; or (ii) impose any material anticompetitive burden."[10] They are also inconsistent with CEA Section 19(b), which provides that the Commission must "take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anti-competitive means of achieving the objectives of this chapter."[11]

In approving CME Rule 1001, the Commission summarily (and erroneously) concluded that CME did not have the requisite market power necessary to find that an anti-competitive arrangement existed, asserting that CME's relevant market shares were three percent or less.[12] DTCC disagrees with the Commission's conclusions both with respect to CME's market power and with respect to whether a static market power measurement is the relevant measure, as the Commission failed to conduct a sufficiently rigorous analysis and failed to take into consideration other appropriate facts and circumstances. However, as the CFTC acknowledged, Congress intended for the potential anti-competitive effects of a particular practice or rule to be evaluated and considered by both regulated entities and the

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General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Nov. 20, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58974&SearchTex;

see also Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Dec. 5, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58975&SearchText;

Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Dec. 7, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58976&SearchText;

Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Dec. 20, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59009&SearchText=;

Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Jan. 3, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59025&SearchText=.

[10] 7 U.S.C. § 7a-1(c)(2)(N).

[11] *Id.* § 19(b)

[12] *See* CME Approval Order, at 12.

Commission. Therefore, ICE was required to do so before self-certifying that Rule 211 and Rule 410 comply with Core Principle N and CEA Section 19(b).[13] Under its own admission, the CFTC must do so as well with respect to these new proposed rules.

To date, it appears the Commission has not done any analysis of ICE's market share. However, ICE unquestionably demonstrates strong market power in the product areas that it clears. For example, ICE clears approximately 96 percent of the open interest in cleared credit default swaps contracts, and is quite significant in other cleared product areas such as commodities.[14] In fact, ICE proclaims on its website that it is "[t]he world's largest clearing house for credit default swaps (CDS)."[15]

Reporting Obligations of Swap Dealers and Major Swap Participants

In proposed Rule 410 (b), ICE includes an obligation not contained in Rule 1001 that "would provide that ICE Clear Europe, in the capacity of a third-party facilitator, will, 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."[16] In particular, ICE Rule 410(b) states, in relevant part, as follows:

> In order to promote consistency with respect to reported valuation data and to minimize operational risk . . . the Clearing House, in the capacity of a third-party facilitator, will report valuation data on behalf of a Clearing Member that is a swap dealer or major swap participant.[17]

Rule 410(b) is facially inconsistent with Commission Rule 45.4(b)(2), which explicitly requires both the DCO and a reporting counterparty that is an SD or MSP to report *their respective* valuation data for a swap on a daily basis.[18] In the preamble to the final rule, the Commission explained that "[b]ecause the prudential regulators have informed the Commission that counterparty valuations are useful for systemic risk monitoring even where valuations differ . . . SD and MSP reporting counterparties [are required] to report the daily mark for each of their swaps, on a daily basis."[19] Elsewhere in the preamble, the Commission similarly notes the

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[13] *See id.* at 11.

[14] *See* Appendix A. DTCC estimates such values upon comparing data available at: https://www.theice.com/marketdata/reports/ReportCenter.shtml#report/101; http://www.cmegroup.com/trading/cds/?tabs=21#data; http://www.lchclearnet.com/cdsclear/data.asp; and http://www.eurexclearing.com/clearing-en/cleared-markets/eurex-otc/eurex-otc-clear/eurex-credit-clear/.

[15] *See* ICE Clear Credit, https://www.theice.com/clear_credit.jhtml.

[16] *See* ICE Clear Europe Letter, *supra* note 3.

[17] *See id.*

[18] *See* 17 C.F.R. § 45.4(b)(2).

[19] Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2,136, 2,154 (Jan. 13, 2012).

importance of counterparty valuations "even where such valuations represent the view of one party, and even where such valuations may differ."[20]

In addition to the final Part 45 rules, the Commission reiterated the distinct reporting obligations of DCOs and SD/MSP reporting counterparties with respect to valuation data. In the Commission's no-action letter regarding SD and MSP reporting obligations under Rule 45.4(b)(2), dated December 17, 2012, the Commission makes clear that "[t]he obligation of the DCO to provide valuation data for the cleared swap under regulation 45.4(b)(2)(i) is *independent of* the obligation of the SD or MSP to provide valuation for the same cleared swap under regulation 45.4(b)(2)(ii)."[21]

As the Commission has clearly distinguished between the distinct reporting obligations of DCOs and SD/MSP reporting counterparties, ICE's certification of Rule 410(b) is false because it would contravene Rule 45.4(b)(2).[22]

* * *

In summary, ICE's rule proposals are fundamentally inconsistent with both the CEA and the Commission's rules and regulations.[23] Accordingly, the DTCC requests that the CFTC reject the rule certifications, or, in the alternative, stay the certifications of Rule 211 and Rule 410 pursuant to Commission Rule 40.6(c)(1). If the Commission chooses to stay the certifications, the Commission should provide the public with a 30-day comment period to allow market participants sufficient time to develop comments and garner information regarding the operation of the proposed rules, their inconsistency with the statute and the Commission's rules and regulations, the anti-competitive impact of the proposed rules and regulations, and the relative costs and benefits of adopting Rule 211 and Rule 410.

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[20] *Id.*

[21] CFTC Letter No. 12-55 from Richard Shilts, Director of the Division of Market Oversight, to Robert Pickel, Chief Executive Officer, International Swaps and Derivatives Association, Inc. (Dec. 17, 2012) (emphasis added).

[22] ICE's rule also fails to require that ICE report all data, but rather limits its obligations to reporting *available* data. When CME attempted to frame Rule 1001 in a manner that would require CME to report only available data, the CFTC staff required CME to submit an amended Rule 1001 to remove the word "available." *See* CME Amended Rule 1001, *available at:* http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul121412cme001.pdf.

[23] *See also,* Concurring Statement of Commissioner Jill E. Sommers on the CME Request for Commission Approval of New Chapter 10 and New Rule 1001, *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/sommerstatement030613 (stating that "[t]he proper method to eliminate the confusion the Commission has created in this area would have been to amend [the Commission's Part 45] rules"); *see also* Statement of Commissioner Scott O'Malia on CME Request for Commission Approval of New Chapter 10 and New Rule 1001, *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement030613 (stating that Commissioner O'Malia's "preferred approach . . . would have been to re-propose the internally inconsistent Part 45 of the Commission's regulations in compliance with the Administrative Procedure Act."

Should the Commission wish to discuss DTCC's petition further, please contact me at 212-855-3240 or lthompson@dtcc.com.

Sincerely yours,

Larry E. Thompson
General Counsel

Cc: The Honorable Gary Gensler, Chairman, CFTC
The Honorable Bart Chilton, Commissioner, CFTC
The Honorable Scott O'Malia, Commissioner, CFTC
The Honorable Jill Sommers, Commissioner, CFTC
The Honorable Mark Wetjen, Commissioner, CFTC
Ananda Radhakrishnan, Director, Division of Clearing and Risk, CFTC
Office of the General Counsel, CFTC

Appendix A

NERA
ECONOMIC CONSULTING

ICE Volumes in Cleared Contracts

Matthew Evans

Vice President, Global Securities and Finance Practice

March 26, 2013

NERA Economic Consulting ("NERA") was commissioned by Patton Boggs LLP, on behalf of DTCC Data Repository, to provide market volume research and economic analysis of ICE's trading volumes in certain cleared contracts. The figures may be relevant for regulators and stakeholders when considering the potential impacts of ICE Clear Credit's proposed Rule 211 and ICE Clear Europe Limited's proposed Rule 410 for specific cleared product areas in which ICE has significant dealings.

From an economics perspective, not all swaps are alike. For example, credit default swaps (CDSs) are unlikely to be close substitutes for interest rate swaps (IRSs), commodity swaps, or foreign exchange (FX) swaps. As a result, a DCO could have a dominant position in some particular major category of swaps, or certain product areas, without necessarily having a large share of swaps overall. This was historically true in the case of ICE, who, until a recent merger announced with NYSE Euronext, had no presence in cleared interest rate contracts.[1]

Error! Reference source not found. shows the current (figures as of 3/15/2013 or closest date available) reported open interest in cleared credit default swaps from publicly available data:

Table 1

Total Open Interest in Cleared CDS Contracts (All Types) As of Mid-March 2013		
Exchange	**Open Interest (USD, Billions)**	**% of Total**
ICE Clear Credit	$ 753.0	50%
ICE Clear Europe	$ 706.0	46%
CME	$ 44.0	3%
LCH	$ 16.6	1%
Eurex	$ 0.0	0%
Total	**$ 1,519.7**	

Data from:
https://www.theice.com/marketdata/reports/ReportCenter.shtml#report/101,
http://www.cmegroup.com/trading/cds/?tabs=21#data,
http://www.lchclearnet.com/cdsclear/data.asp,
http://www.eurexclearing.com/clearing-en/cleared-markets/eurex-otc/eurex-otc-clear/eurex-credit-clear/

Ignoring differences across CDS contract specifications (e.g., for sovereign, corporate, or index), as of mid-March, ICE Clear Credit and ICE Clear Europe accounted for a combined 96 percent of the open interest in cleared credit default swaps contracts. At a minimum, such an extraordinarily high share calls for careful analysis of the potential effects of ICE's proposed rules. As of today, cleared credit default swaps contracts do not face direct competition from futures contracts. Looking to the future, ICE has announced plans to offer credit default futures

[1] http://online.wsj.com/article/SB10001424127887324461604578191031432500980.html.

contracts, to some unknown extent competing with itself in cleared credit default swaps.[2] Unless other parties also begin to offer credit default futures, however, the possible emergence of credit default futures is unlikely to significantly alter the degree to which ICE has a large share in clearing for credit default swaps.

Cleared credit default is not the only area in which ICE offers products. ICE has a substantial presence in commodity markets as well. There are a variety of contract specifications for commodities, some of which may not be close substitutes for others. For example, a coal contract is unlikely to be a close substitute for a sugar contract.

For illustrative purposes, we have researched the volumes of cleared energy contracts traded at the two leading energy commodities exchanges, CME and ICE.[3] While it is well known that ICE and CME compete in the energy commodities space, it is unlikely that every one of the dozens of energy contract types included in these aggregate energy volume statistics (comprised of oil, natural gas, refined products, electricity, and other) compete as close substitutes for each other. Ignoring the specific differences in energy product offerings, which could be substantial, Table 2 shows the monthly volumes in cleared energy contracts at both ICE and CME from publicly available data.

Table 2

Cleared Energy Contract Volumes by ICE and CME
January 2013 - February 2013

Exchange	Energy Contracts Volume
ICE Futures - Europe	50,437,935
ICE Futures - US	62,771,642
CME Group	57,725,477

Data from:
http://www.cmegroup.com/wrappedpages/web_monthly_report/Web_Volume_Report_CMEG.pdf,
https://www.theice.com/marketdata/reports/ReportCenter.shtml#report/7,
https://www.theice.com/marketdata/reports/ReportCenter.shtml#report/8

These volume data, like the open interest data for credit default swaps, indicate that ICE's high share in energy contracts calls for careful analysis of potential effects of ICE's proposed rules. Given the breadth of ICE's commodity product offerings within the above energy contracts, and its breadth of offerings in non-energy commodity contracts, such as agricultural and grain contracts, ICE may hold high shares of market volumes in a wide variety of product areas within the commodities space.

[2] http://ir.theice.com/releasedetail.cfm?ReleaseID=713783.

[3] ICE and CME are not the only exchanges to list cleared energy contracts. However, based on 2010-2011 volume data, these two exchanges listed the majority of the world's twenty most actively traded energy contracts. See http://www.futuresindustry.org/files/css/magazineArticles/article-1383.pdf page 30.

In summary, the data collected show that ICE trading volumes are quite significant in cleared product areas such as credit default contracts and commodities. As such, when considering the potential impacts of ICE Clear Credit's proposed Rule 211 and ICE Clear Europe Limited's proposed Rule 410, regulators should recognize the specific cleared product areas in which ICE has significant dealings and has significant shares of volume.