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April 22, 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: Comments in Response to ICE Clear Credit LLC's Certification of Amended Rule 211 (Regulatory Reporting of Swap Data)

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 letter to the Commodity Futures Trading Commission ("CFTC" or "Commission") in response to ICE Clear Credit's ("ICC") most recent submission for self-certification pursuant to Commission Rule 40.6 of Rule 211, dated April 10, 2013 ("Amended Rule 211").²

Amended Rule 211 raises additional issues not contained in ICC's original Rule 211 submission³ and, therefore, DTCC is providing the Commission with additional comments to supplement its previously filed petition, dated March 26, 2013, to stay the self-certification of proposed Rule 211 by ICC (the "Petition").⁴

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 ("ICC") Amended Rule 211 is *available at* <http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul041013icc002.pdf>.

³ ICC's original submission for self-certification of proposed Rule 211 is *available at* <http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul031413icc001.pdf>.

⁴ DTCC originally filed its petition to stay the self-certification of proposed Rule 211 by ICC on March 26, 2013 (the "Petition"). On April 4, 2013, ICC withdrew its original submission for self-certification of proposed Rule 211. Accordingly, following ICC's submission of Amended Rule 211 on April 10, 2013, DTCC resubmitted the Petition to the Commission on April 12, 2013.

For the reasons presented in this letter and the Petition, DTCC requests that the Commission reject the certification of Amended Rule 211 or, in the alternative, stay the certification pursuant to Commission Rule 40.6(c)(1).

The divergent perspectives offered by ICC and DTCC evidence that proposed Amended Rule 211 involves complex issues that should be given due consideration by the Commission and market participants and, therefore, is inappropriate for consideration under the Commission's Rule 40.6 self-certification process. Further, in reviewing the anticompetitive implications of Amended Rule 211, the Commission and market participants would benefit from additional clearing data as the clearing requirements are phased-in according to the Commission's compliance and implementation schedule.⁵

Therefore, DTCC requests that, should the Commission choose to stay the certification, 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.

Anticompetitive Considerations

DTCC's Petition detailed the inconsistency of ICC's proposed Rule 211 with the Commodity Exchange Act ("CEA" or "Act"), including the Act's prohibition against anticompetitive practices. However, ICC raises detailed assertions regarding its market power in its Amended Rule 211 submission, which are questionable and must be addressed. Specifically, ICC argues that it does not have market power because it claims that the market for credit default swap ("CDS") derivatives clearing is not a relevant market for purposes of evaluating competition issues.⁶

These unsupported statements are self-serving and mischaracterize current market conditions and the views of the U.S. Department of Justice ("DOJ") regarding market definition. First, ICC ignores that its exchanges host the vast majority of CDS clearing that currently occurs in the marketplace, establishing not only market power but likely monopoly power in the market for clearing CDS derivatives. Second, the *Horizontal Merger Guidelines* issued by the DOJ and the Federal Trade Commission ("FTC") do not support the notion that CDSs cannot represent a relevant market. Rather, the *Horizontal Merger Guidelines* state that "[w]hen a product sold by one merging firm (Product A) competes against one or more products sold by the other merging firm, the [DOJ and FTC] define a relevant product market around Product A to evaluate the importance of that competition. Such a relevant product market consists of a group of substitute products including

⁵ See Swap Transaction Compliance and Implementation Schedule: Clearing Requirement Under Section 2(h) of the CEA, 77 Fed. Reg. 44,441 (July 30, 2012) (establishing a phased compliance schedule of the clearing requirement based on the type of market participant entering into swaps subject to the clearing requirement).

⁶ See ICC's Amended Rule 211, *supra* note 2, at 3.

Product A. Multiple relevant product markets may thus be identified.”⁷ In other words, the DOJ and FTC would recognize and certainly would not exclude the notion that the product in which ICC is dominant—CDS derivatives clearing—can very well constitute a relevant product market.

Furthermore, while it is true that many entities offer clearing services for swaps, it is not true that all such entities are equally attractive to traders who need to clear an over-the-counter (“OTC”) CDS. For example, a company that desires to hedge its exposure to credit defaults may be interested in engaging in a CDS; it will not find the trading and clearing of salmon derivatives by NOS Clearing ASA to be an acceptable substitute. While the *Horizontal Merger Guidelines* are primarily intended for evaluating potentially anticompetitive effects of mergers, rather than for evaluating exclusionary rules issued by market participants, it advises that market definition begins and ends with demand-side analysis:

Market definition focuses solely on demand substitution factors, i.e., on customers’ ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis. They are considered in these Guidelines in the sections addressing the identification of market participants, the measurement of market shares, the analysis of competitive effects, and entry.⁸

ICC has ignored these demand-side issues. Counterparties enter into different types of swaps—including interest rate swaps, foreign exchange swaps, CDSs, and different kinds of commodity swaps (*e.g.*, salmon versus crude oil)—for different reasons. Other types of swaps will not be good substitutes for a CDS. As a result, CDSs are almost certainly not in the same markets as other categories of swaps.

Further, as derivatives clearing organizations (“DCOs”) differ substantially in the types of swaps that they accept for clearing, a counterparty wanting to clear a CDS must use a DCO that handles those swaps, which largely means using ICC, as discussed below. Whether “the clearing of CDS is no different from the clearing of numerous other categories of swaps” in some technical sense is irrelevant to real-world customers who need to clear OTC CDSs and overwhelmingly use ICC to do so.

ICC also incorrectly describes how market shares should be calculated to properly analyze its market power. It states:

In a rapidly changing area such as clearing where competitors are not capacity constrained, shares of a particular line of business are not helpful to assessing market power. Nonetheless, if one were to

⁷ U.S. DEP’T OF JUSTICE AND THE FED. TRADE COMM’N., HORIZONTAL MERGER GUIDELINES § 4.1 (Aug. 19, 2010) [hereinafter “*Horizontal Merger Guidelines*”], available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

⁸ *Id.* § 4.

attempt to calculate market shares, one would include market shares of all clearing organizations in related lines of business, including the clearing of all other types of swaps or even all types of futures.⁹

As discussed above, market shares should *not* be calculated for a so-called market that includes services of vendors of different products (*e.g.*, clearing of other types of swaps). In addition, ease of entry is considered in assessing market power. According to the DOJ and the FTC:

Firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.¹⁰

Firms that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a [Small but Significant and Non-transitory Increase in Price], without incurring significant sunk costs, are also considered market participants¹¹

The [DOJ and the FTC] normally calculate market shares for all firms that currently produce products in the relevant market, subject to the availability of data. The [DOJ and the FTC] also calculate market shares for other market participants if this can be done to reliably reflect their competitive significance.¹²

ICC has made no attempt to explain why DCOs that do not clear CDSs could nonetheless enter easily. Further, ICC has made no attempt to explain how DCOs with small shares of CDS clearing nonetheless place substantial competitive constraints on ICC. For example, ICC states:

A clearing organization with a high share would be unable to charge prices above competitive levels because there are simply too many clearing organizations that could enter that line of business quickly if they observed prices above competitive levels.¹³

This is unsubstantiated assertion, not analysis. The available data suggest that ICC has not made an attempt to provide analysis because it is incorrect with respect to the ease of entry into CDS clearing. As shown in Appendix A of the Petition, as of mid-March of 2013, ICC and ICE Clear Europe combined account for 96 percent of the total open interest in cleared CDS contracts.

⁹ ICC's Amended Rule 211, *supra* note 2, at 3-4 (citing *Horizontal Merger Guidelines*, *supra* note 7, §§ 5.2, 5.3).

¹⁰ *Horizontal Merger Guidelines*, *supra* note 7, § 5.1.

¹¹ *Id.* § 5.1.

¹² *Id.* § 5.2.

¹³ ICC's Amended Rule 211, *supra* note 2, at 4 (citing *Horizontal Merger Guidelines*, *supra* note 7, § 9).

ICC also takes the view that another reason why it cannot have market power over cleared CDSs is because CDS counterparties could choose not to clear their swaps.¹⁴

Moreover, because the swap reporting requirement applies to cleared and uncleared swaps, the relevant market is not the market for cleared CDS, but rather the market for all CDS, both cleared and uncleared and any firm's share would be even lower.¹⁵

This assertion is unconvincing. ICC is the largest entity that clears CDSs. A comparison of the volume of uncleared swaps with the volume of cleared swaps sheds no light on the extent of ICC's market power in the clearing of CDSs. By definition, counterparties who choose not to clear a swap are not customers in the market in which ICC's market power is being judged. The issue at hand is whether ICC's market power in cleared swaps, coupled with Amended Rule 211, would adversely affect competition in the provision of SDR services. That not all CDSs are cleared has no bearing on whether ICC has market power in the clearing of swaps.

Third-Party Facilitation of Swap Data Reporting

The language of Amended Rule 211 is materially identical to Chicago Mercantile Exchange's ("CME") Rule 1001 and would achieve the same anticompetitive result—namely, no choice but to automatic reporting of swap data to ICC's captive SDR. ICC, however, provides a substantively new justification from its original submission for certification. ICC asserts itself as a third-party service provider with respect to the reporting obligations of its clearing participants, by stating that Amended Rule 211 "*relieves* ICC's Participants of arduous reporting obligations by reporting swap creation and continuation data *on their behalf*."¹⁶ This can be further inferred given ICC's corresponding rule 211 filing with the Securities and Exchange Commission ("SEC"), which provides that "ICC, *in the capacity of a third-party service provider*, will be responsible for reporting required swap creation and continuation data *on behalf of* ICC's Clearing Participants."¹⁷

¹⁴ ICC's suggestion that CDS counterparties could choose not to clear swaps is misleading given that 15 major over-the-counter ("OTC") derivatives dealers have already committed to increase the use of central clearing for OTC credit and interest rate derivatives. See FEDERAL RESERVE BANK OF NEW YORK, MARKET PARTICIPANTS COMMIT TO EXPAND CENTRAL CLEARING FOR OTC DERIVATIVES (Sept. 8, 2009), <http://www.newyorkfed.org/newsevents/news/markets/2009/ma090908.html>.

¹⁵ ICC's Amended Rule 211, *supra* note 2, at 4.

¹⁶ See *id.* at 2 (emphasis added).

¹⁷ See ICC's submission to add proposed Rule 211 is available at https://www.theice.com/publicdocs/regulatory_filings/ICC_SEC_040813.pdf (emphasis added). ICC specifically explains that it seeks to act as a third-party service provider for swap counterparties in its request to the Securities and Exchange Commission ("SEC") on March 25, 2013 for accelerated approval of proposed rule 211, which is identical to Amended Rule 211. See Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Related to Regulatory Reporting of Swap Data, 78 Fed. Reg. 22,350, 22,350-22,351 (Apr. 15, 2013).

Under the Commission’s final Part 45 and 43 regulations, a reporting counterparty may contract with a third-party service provider to facilitate reporting.¹⁸ Despite such an arrangement, the reporting counterparty bears the ultimate responsibility in fulfilling its reporting obligations.¹⁹ Rule 45.9 states, in relevant part, that “swap counterparties required . . . to report required swap creation data or required swap continuation data, *while remaining fully responsible for reporting . . . may contract with third-party service providers to facilitate reporting.*”²⁰ The Commission reiterates in the preamble to final Part 45 that “the use of such third-party facilitators . . . should not allow the registered entity or counterparty with the obligation to report to avoid its responsibility to report swap data in a timely and accurate manner.”²¹

Similarly, under final Part 43, the Commission permits “reporting parties to contract with a third party—including a DCO that clears the swap—to report the data to an SDR.”²² The Commission notes that, as a reporting party “retain[s] the obligation to ensure that the appropriate information is provided in the appropriate timeframe to an SDR for public dissemination,” such party “would be liable for a violation of [its reporting obligations] if, for example, a third party acting on behalf of a reporting party did not report the appropriate swap transaction and pricing data to an SDR for public dissemination.”²³

ICC’s assertion that it will “facilitate” reporting as a third-party service provider is problematic for several reasons. First, contrary to prior IntercontinentalExchange, Inc. (“ICE”) statements acknowledging the importance of reporting counterparty choice,²⁴ ICC fails to note in its self-certification that, by providing it “*shall* report creation and continuation data,”²⁵ Amended Rule 211 would effectively eviscerate

¹⁸ See Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2,136, 2,208 (Jan. 13, 2013); see also Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1,182, 1,236 (Jan. 9, 2012).

¹⁹ See Division of Market Oversight Advisory, CFTC, at 2 (Mar. 8, 2013) (reminding market participants that “[a] party with reporting obligations under the swap data recordkeeping and reporting rules remains fully responsible for the timely and accurate fulfillment of its reporting obligations, regardless of whether it contracts with a third party service provider to facilitate reporting”), available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/dmoadvisory030813.pdf>.

²⁰ Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2,208 (emphasis added).

²¹ *Id.* at 2,167.

²² Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. at 1,236.

²³ See *id.* at 1,199, n.155.

²⁴ See Letter from Bruce Tupper and Carrie Slagle, IntercontinentalExchange, Inc., to David Stawick, Secretary, CFTC (Feb. 7, 2011), at 3 (acknowledging that “the reporting counterparty is ultimately responsible for managing the swap in the SDR for the entire life of the transaction” and recommending that “the Commission require SEFs and DCMs to submit swap creation data to a SDR according to the preferences of the reporting counterparty”), available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27635&SearchText=>.

²⁵ ICC’s Amended Rule 211, *supra* note 2 (emphasis added).

reporting counterparties' *choice* to contract with ICC, as a third-party service provider, in contravention of the Commission's regulations.

Second, ICC states at the outset of its self-certification that Amended Rule 211 is "substantively identical to [CME] Rule 1001 approved by the Commission on March 6, 2013."²⁶ While Amended Rule 211 suffers from many of the same failings as CME Rule 1001, ICC's characterization of operating as a third-party service provider on behalf of its clearing participants adds additional shortcomings, despite materially identical rule language. Under CME Rule 1001, CME purports to fulfill its own reporting obligations, an interpretation which DTCC maintains is flawed and inconsistent with the Commission's reporting framework.²⁷ However, by stating that ICC would "relieve" clearing participants of their reporting obligations as a third-party service provider, ICC implicitly acknowledges that its clearing participants retain their reporting obligations following novation.²⁸ ICC may not, therefore, rely on the Commission's novation rationale with respect to CME Rule 1001 (which is erroneous and contrary to law) to certify compliance of Amended Rule 211 with the Commission's regulatory reporting framework.

* * *

In summary, Amended Rule 211 is fundamentally inconsistent with the applicable statutory requirements in the CEA and attendant Commission regulations related to swap data reporting. Further, ICC may not rely on the Commission's rationale for approval of CME Rule 1001 to certify Amended Rule 211. Accordingly, DTCC requests that the Commission reject the certification of Amended Rule 211 or, in the alternative, stay the certification pursuant to Commission Rule 40.6(c)(1) and

²⁶ *Id.* at 1.

²⁷ DTCC maintains all of its objections to CME Rule 1001 and the Statement of the Commission in response to CME's request for approval of new Chapter 10 and Rule 1001, including that the CFTC's actions violated the Administrative Procedure Act. *See* Letter from Larry Thompson, 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&SearchText;>

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=;](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=.](http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59025&SearchText=)

²⁸ This line of reasoning is substantially dissimilar to CME's misguided justification for assuming the reporting obligations of reporting counterparties.

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provide the public with a 30-day comment period to further examine the inconsistencies of Amended Rule 211 with the CEA and the Commission's regulations.

Should the Commission wish to discuss these comments further, please contact me at 212-855-3240 or lthompson@dtcc.com.

Sincerely yours,

A handwritten signature in cursive script that reads "Larry E. Thompson".

Larry E. Thompson
General Counsel