ICE CLEAR CREDIT SM

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Kevin R. McClear
General Counsel

April 10, 2013

Re: SDR Reporting Rule Certification Pursuant to Section 5c(c)(1) of the Commodity Exchange Act and Commission Regulation 40.6

VIA E-MAIL
Ms. Melissa Jurgens
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

Dear Ms. Jurgens:

ICE Clear Credit ("ICC") hereby submits, pursuant to Section 5c(c)(1) of the Commodity Exchange Act ("Act") and Commodity Futures Trading Commission ("Commission" or "CFTC") Regulation 40.6, a self-certification of amended Rule 211 of ICC related to the Commission's Part 45 regulations (Swap Data Repository Reporting). ICC is registered with the Commission as a Derivatives Clearing Organization. ICC intends to implement Rule 211 on April 25, 2013.

Operation, Purpose, and Effect of ICC Proposed Rule 211

As the Commission is aware, ICC currently complies with Part 45 by reporting to IntercontinentalExchange, Inc.'s Swap Data Repository ("SDR"), the SDR selected by ICC. In order to codify ICC's practice of reporting relevant Part 45 data to the SDR selected by ICC, ICC proposes to add, in Chapter 2 of the ICC Rules, Rule 211 (Regulatory Reporting of Swap Data). Proposed ICC Rule 211 provides that (with respect to cleared swaps and resulting positions) ICC shall report creation and continuation data to IntercontinentalExchange, Inc.'s SDR for purposes of complying with applicable Commission regulations governing the regulatory reporting of swaps. The cleared swaps referenced in this proposed Rule 211 are those swaps entered into between Clearing Participants and ICC. In addition, proposed ICC Rule 211 provides that, upon the request of an ICC Clearing Participant that is a counterparty to a swap cleared at ICC, ICC shall provide the same creation and continuation data to the SDR selected by the counterparty. ICC Rule 211 is substantively identical to Chicago Mercantile Exchange ("CME") Rule 1001 approved by the Commission on March 6, 2013.[1]

[1] Statement of the Commission regarding Chicago Mercantile Exchange, Inc.'s Amended Request to Adopt a New Chapter 10 and New Rule 1001 related to the Regulatory Reporting of Swap Data (March 6, 2013).

Compliance with Applicable Provisions of the Act

Proposed Rule 211 is consistent with Core Principle N

Core Principle N states, "Unless 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." Proposed Rule 211 is consistent with Core Principle N because it does not restrain competition and ICC does not possess market power.[2]

Proposed Rule 211 does not result in an unreasonable restraint of trade

ICC proposed Rule 211 cannot have any effect on competition because it is not a restraint. It does not keep reportable trade data from being reported to any other SDR. Indeed, the proposed rule explicitly allows a Participant that is a counterparty to a swap cleared at ICC to designate any other 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.[3]

Proposed Rule 211 does not impose any material anticompetitive burdens

ICC's proposed Rule 211 creates no material anticompetitive burdens and relieves ICC's Participants of arduous reporting obligations by reporting swap creation and continuation data on their behalf. Any data sent on behalf of a Participant can be seen via reports generated by ICC thus alleviating a Participants' need to reconcile data at each SDR to which data may be sent at the request of the Participant. As noted before, ICC will additionally send the same creation and continuation data to a SDR selected by a Participant that is a counterparty to a swap. This enables each Participant to have equal data sets at ICC and the SDR of its choice and mitigates any concerns regarding the effect on competition of proposed Rule 211.[4]

Proposed Rule 211 is necessary to achieve the purposes of the Act

As explained above, ICC's proposed Rule 211 does not result in an unreasonable restraint of trade or impose any material anticompetitive burden. But even if it did, Core Principle N provides that the DCO rule would still be permitted if it is necessary or appropriate to achieve the purposes of the Act. Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") amended the Act to establish a comprehensive new regulatory framework for swaps, including new swap reporting and clearing obligations to increase transparency and to help reduce systemic risk in the swaps market. Section 727 of the Dodd-Frank Act added Section 2(a)(13)(G) to the Act, requiring that each swap (whether cleared or uncleared) shall be reported to a registered swap data repository. While Congress mandated the reporting of swap data to an SDR, it delegated to the Commission the authority to implement the mandate as the Commission deems appropriate. The Commission implemented

[2] 7 U.S.C. § 7a-1(c)(2)(N).
[3] *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).
[4] *See* Footnote 68, Statement of the Commission.

Dodd-Frank's regulatory reporting requirement for swap data through Parts 45 and 49 of its regulations. An overarching principal in its rules is "reporting by the registered entity having the easiest, fastest, and cheapest access to the data in question, and most likely to have automated systems suitable for reporting."[5] When the Commission adopted Parts 45 and 49 of its regulations, it specifically contemplated that DCOs may report swaps to SDRs of their choosing. The Commission stated that "the rules and regulations of a particular SEF, DCM or DCO may provide for the reporting to a particular SDR."[6]

ICC Rule 211 concerns the manner in which certain of the SDR reporting obligations for swaps cleared through ICC are to be met and is necessary and appropriate to achieve the purposes of the Act. Proposed Rule 211 codifies ICC's obligation to report swap data to a registered SDR. As previously stated in a letter from ICC to the Commission dated January 4, 2013,[7] the Dodd-Frank Act and the CFTC's implementing regulations require each registered DCO report all creation data and continuation data of a swap to an SDR as soon as technologically practicable after acceptance for clearing. On October 12, 2012, following guidance from Commission Staff,[8] ICC commenced reporting of its cleared, resulting swap creation and continuation data to ICE Trade Vault, a provisionally-registered SDR. The Commission has previously concluded that nothing in the Commission's rules preclude a DCO from sending swap data to its own, or an affiliated, SDR. Proposed Rule 211 memorializes this practice and is consistent with CME Rule 1001, which was previously approved by the Commission.

ICC does not have market power

ICC's proposed rule does not limit competition in the market for trade data reported to SDRs because the clearing of CDS is not a relevant market and ICC does not have market power in any relevant market.

Clearing CDS is not a relevant market because the clearing of CDS is no different from the clearing of numerous other categories of swaps. There are many clearing organizations that offer clearing services for a wide variety of derivatives, including futures and swaps. The CME, LCH.Clearnet as well as other international derivatives clearing organizations (not currently registered with the Commission) also provide swap clearing services, including the Singapore Exchange, Eurex Clearing AG, NOS Clearing ASA, LCH SA, and the Australian Stock Exchange. The Antitrust Division of the United States Department of Justice would not define clearing CDS as a relevant product market because a hypothetical monopolist over that service could not charge prices above competitive levels – if the monopolist were to do so, it would face new entry by alternative service providers in a very short time.[9]

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.[10]

[5] 77 Fed. Reg. 2136, 2155 (January 13, 2012).
[6] 76 Fed. Reg. 54538, 54569 (Sep. 1, 2011).
[7] Letter from ICE Clear Credit to CFTC (January 4, 2013).
[8] CFTC, Frequently Asked Questions on the Reporting of Cleared Swaps (Oct. 11, 2012).
[9] U.S. Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines §4.1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf
[10] *Id.* at §5.3. ("The Agencies give more weight to market concentration when market shares have been stable over time . . . .")

Nonetheless, if one were to 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.[11]

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. ICC has cleared open interest, as of March 26, 2013, in single-name and index credit swaps with an aggregate notional amount of $1.6 trillion, which represents only 6.78% of the $23.6 trillion in Gross Notional USD equivalent for all credit products reported to The Depository Trust & Clearing Corporation's ("DTCC") Trade Information Warehouse as of the week ending March 29, 2013.[12] Given that swap reporting applies to both cleared and uncleared swaps, and given ICC's miniscule portion of the total cleared and uncleared credit swap market, DTCC's allegations of ICC's exercise of its purported clearing market power are unwarranted.

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 be indicative of an ability for any clearing organization in that market to exercise market power.[13] 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.[14]

Proposed Rule 211 is consistent with Core Principle C

DCO Core Principle C requires that "[t]he participant and membership requirements of each [DCO] shall…permit fair and open access."[15] Proposed Rule 211 is consistent with Core Principle C 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 before, Proposed Rule 211 describes how ICC satisfies its regulatory reporting obligations set forth in Part 45 of the CFTC Regulations. ICC currently satisfies its reporting requirements by reporting cleared swap data to ICE Trade Vault. An ICC Clearing Participant (prospective or current) is not required to use ICE Trade Vault's SDR services as a prerequisite to their future or existing membership at ICC. Because proposed Rule 211 is not a participant and membership requirement it cannot violate the fair and open access standard applicable to such requirements.

No Substantive Opposing Views

There were no opposing views expressed to ICC by its governing board or committee members, members of the entity or market participants. However, there was an opposing view expressed

[11] *See id.* at § 5.2.
[12] *See* http://www.dtcc.com/products/derivserv/data_table_i.php
[13] *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").
[14] *Id.*
[15] 7 U.S.C. § 7a-1(c)(2)(C).

by a competitor, DTCC, in response to ICC's previous, March 22, 2013, Rule 211 filing.[16] DTCC, the world's largest securities clearance and settlement organization, asserts that ICC's proposed Rule 211 is fundamentally inconsistent with both the CEA and the Commission's rules and regulations in light of ICC's relevant market share. We have responded to DTCC's incorrect assertions herein.

Certification of the Amended Rules pursuant to Section 5c(c)(1) of the Act and Commission Regulation 40.6 is also provided below.

Amended Rule:

The proposed rule change consists of a change to Chapter 2 of the ICC Rules to provide that (with respect to cleared swaps and resulting positions) ICC shall report available creation and continuation data to IntercontinentalExchange, Inc.'s SDR for purposes of complying with applicable Commission regulations governing the regulatory reporting of swaps. In addition, proposed ICC Rule 211 provides that, upon the request of an ICC clearing participant that is a counterparty to a swap cleared at ICC, ICC shall provide the same creation and continuation data to the SDR selected by the counterparty.

Annexed as an Exhibit hereto is the following:

A. Proposed ICC Rule 211

Certifications:

ICE Clear Credit hereby certifies that the Amended Rule complies with the Act and the regulations thereunder.

ICE Clear Credit hereby certifies that, concurrent with this filing, a copy of the submission was posted on ICE Clear Credit's website, which may be accessed at https://www.theice.com/notices/Notices.shtml?regulatoryFilings

ICC would be pleased to respond to any questions the Commission or the staff may have regarding this submission. Please direct any questions or requests for information to the attention of the undersigned at (312) 836-6833.

Respectfully submitted,

Kevin R. McClear
General Counsel

cc: Phyllis Dietz (by email)
Heidi M. Rauh (by email)

[16] *See* the DTCC letter, dated March 26, 2013, that is posted in the CFTC's public files.

Clearing Rules

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it were a Retiring Participant. Payment of the Prepaid Contribution shall not limit such Participant's obligations to make additional contributions to the General Guaranty Fund as otherwise required by the Rules, provided that if such a Participant becomes a Retiring Participant it may apply the Prepaid Contribution to its obligation to make additional contributions to the General Guaranty Fund up to its Additional Assessment Limit. Notwithstanding anything to the contrary herein, except in the case of a Default with respect to such Participant, the Prepaid Contribution will not be deemed to be part of the General Guaranty Fund for purposes of Rule 802(b) until such time as it is applied to the Participant's obligations to make additional contributions to the General Guaranty Fund as provided in the preceding sentence.

210. [Intentionally Omitted]

211. Regulatory Reporting of Swap Data.

For all swaps cleared by ICE Clear Credit, and resulting positions, ICE Clear Credit shall report creation and continuation data to IntercontinentalExchange, Inc.'s swap data repository for purposes of complying with applicable CFTC rules governing the regulatory reporting of swaps. Upon the request of a Participant that is a counterparty to a swap cleared at ICE Clear Credit, ICE Clear Credit shall provide the same creation and continuation data to a swap data repository selected by the counterparty as ICE Clear Credit provided to IntercontinentalExchange, Inc.'s swap data repository under the preceding sentence.