



December 11, 2017

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:
Amendments to the Clearing Rules, Clearing Procedures and CDS Procedures Relating to
Indirect Clearing

Dear Mr. Kirkpatrick:

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

Concise Explanation and Analysis

The purpose of the proposed changes is to amend ICE Clear Europe’s Clearing Rules (the “Rules”),¹ Clearing Procedures (the “Clearing Procedures”) and CDS Procedures (the “CDS Procedures”) to implement certain requirements under the European Union Markets in Financial Instruments Directive (“MiFID II”)² and Markets in Financial Instruments Regulation (“MiFIR”),³ and related implementing regulations and technical standards,⁴ relating to indirect

¹ Capitalized terms used but not defined herein have the meanings specified in the Rules.

² Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

³ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

⁴ Regulation (EU) 2017/2154 of 22 September 2017 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements (the

clearing and certain other matters as discussed herein. The relevant requirements under MiFID II and MiFIR will take effect on January 3, 2018.

Indirect Clearing

The European Market Infrastructure Regulation (“EMIR”)⁵ and technical standards thereunder⁶ impose certain standards for indirect clearing arrangements for OTC derivatives clearing. MiFID II and MiFIR, and the related implementing regulations, extend this concept to exchange-traded derivatives, and relevant EMIR technical standards are being simultaneously recast for consistency. In general, “indirect clearing” for this purpose refers to arrangements in which an entity that is itself a customer of a clearing member in turn is clearing for one or more of its own customers (“indirect clients”), as well as longer chains involving additional intermediaries.⁷ The new technical standards under EMIR, MiFIR and MiFID II⁸ have the objective that indirect clearing arrangements do not increase counterparty risk and that the assets and positions of the indirect client benefit from protections equivalent to those provided under EMIR for direct clients of a clearing member.⁹

The new MiFID II requirements impose segregation obligations on direct clients that provide indirect clearing, as well as on clearing organizations and clearing members directly. Clearing members are required to open and maintain specific types of separate accounts (referred to as standard omnibus indirect accounts and gross omnibus indirect accounts), at clearing member level, for assets and positions held by their direct clients on behalf of indirect clients.¹⁰ (Standard omnibus indirect accounts are to be used to hold assets and positions of indirect clients on an omnibus basis, distinct from the accounts used for proprietary positions of the direct client. Gross omnibus indirect accounts provide a further level of segregation that enables the client (and clearing member) to distinguish the assets and positions of each indirect client.) CCPs in turn are required to open and maintain corresponding new forms of customer accounts for their clearing members, which are to be used to hold assets and positions of indirect clients of direct customers of the clearing member in standard omnibus indirect accounts and gross omnibus indirect accounts, respectively.¹¹

“MiFIR RTS”) and Commission Delegated Regulation (EU) No 149/2013, together with the amendments set out in Regulation (EU) 2017/2155 of 22 September 2017 amending Delegated Regulation (EU) No 149/2013 with regard to regulatory technical standards on indirect clearing arrangements (the “EMIR RTS”).

⁵ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

⁶ Commission Delegated Regulation (EU) No 149/2013.

⁷ Specifically, indirect clearing arrangements are defined under both the EMIR and MiFIR RTS as “the set of contractual relationships between providers and recipients of indirect clearing services provided by a client, an indirect client or a second indirect client.” Article 1(a) of MiFIR RTS; Article 1(1) of EMIR RTS.

⁸ For ease of reference, we refer to the relevant requirements of MiFID II, MiFIR, EMIR and technical standards thereunder discussed herein as “MiFID II” or “MiFID II requirements”.

⁹ MiFIR Article 30.

¹⁰ MiFIR RTS Article 4(2).

¹¹ MiFIR RTS Article 4(4).

The amendments to the Rules and Clearing Procedures are designed to implement these new account type requirements at CCP level, while making certain allowances for FCM/BD Clearing Members in light of particular requirements of U.S. law, as discussed herein.

In Rule 101, new definitions for a series of customer account categories relating to indirect clients accessing the clearing house through Non-FCM/BD Clearing Members have been added (collectively referred to herein as “indirect clearing accounts”). Appropriate references to these new account categories have been added throughout the definitions. A new definition of “Indirect Client” has been added, consistent with the regulatory definition. Conforming changes are also made in the definition of Margin-flow Co-mingled Account and Nominated Customer Bank Account to clarify that equivalent procedures apply. A reference to MiFID I, which is to be repealed effective January 2018, has been removed from the definitions, and in various other provisions of the Rules.

In Rules 102(f) and (q), conforming and clarifying changes are made to reflect the various customer account classes that may apply, in light of the additional indirect clearing accounts. Rule 102(g) is amended to require that Clearing Members, consistent with the MiFID II requirements, offer their Affected Customers with indirect clients the choice of a gross omnibus indirect account or a standard omnibus indirect account. The definition of “Affected Customer” in Rule 101 has been amended to address indirect clearing situations as well as direct clearing. As a result of this definition, Rule 102(g) does not impose an obligation to make the new indirect clearing accounts available in situations where applicable law in the relevant jurisdiction prevents or prohibits such accounts from being offered. As discussed in more detail below, such limitations may, for example, apply to FCM/BD Clearing Members under applicable U.S. law.

In Rule 202(a)(xxi), the obligation of Clearing Members to provide certain information to ICE Clear Europe with respect to segregated customer accounts is amended to include the new indirect client accounts. Similarly, Rule 203(a)(xx), which limits use of title transfer accounts where the clearing member is subject to UK CASS segregation rules, is amended to cover the new title transfer account categories for indirect clients. Conforming changes are also made to Rule 207(d) to specify the customer account categories for Non-FCM/BD Clearing Members.

The amendments to Rule 302 incorporate the payment mechanics relating to segregated gross indirect accounts, in a manner similar to the approach used for Margin-flow Co-mingled Accounts.

Rule 401(o) is being amended to reflect the additional capacities through which a clearing member may enter into a contract for a customer account where the customer is providing indirect clearing services. The amendment distinguishes scenarios where the customer is acting for its own account from those where it is acting for the account of indirect clients.

Rule 503(k) has been amended to address transfer of Permitted Cover in respect of segregated gross indirect accounts, in a manner similar to the current treatment of Margin-flow Co-mingled Accounts. The amendments in particular address certain reporting required to be

provided by the clearing member to the clearing house with respect to such Permitted Cover. Rule 504(c)(vi), which provides certain representations by clearing members concerning Permitted Cover they transfer to the clearing house, is amended in paragraph (v) to add a representation concerning compliance with obligations under MiFID II and other applicable laws to third parties (including with respect to receipt of assets from clients) and in paragraph (vi) to add references to the relevant classes of indirect client account.

Various changes have been made to Rule 904 to address default management involving indirect client accounts. Rule 904(m), which addresses the transfer process for certain classes of customer account, has been clarified to exclude segregated gross indirect accounts, which are covered in new Rule 904(w), discussed below. Rule 904(v) is being added to set out principles that will apply when ICEU is calculating the net sums on segregated gross indirect accounts of a defaulting clearing member or determining the amounts available to be transferred to a transferee clearing member in respect of such an account, in a manner similar to the calculation of net sums for Margin-flow Co-mingled Accounts. Rule 904(w) is being added to require that upon an event of default being declared in respect of a clearing member, ICEU commits to triggering the procedures for the transfer process for both margin and open contract positions recorded in segregated gross indirect accounts, subject to specified conditions similar those for other account categories.

Rule 906(b), which provides that net sums will be determined separately in respect of each class of customer account, has been amended to reference the new classes of indirect client accounts, and to make certain other conforming changes. Pursuant to new Rule 907(n), ICEU will, if requested by a non-defaulting clearing member, transfer any contracts, margin or other permitted assets from a standard omnibus indirect account or segregated gross indirect account of that clearing member to a different standard omnibus indirect account or segregated gross indirect account of the same clearing member or will otherwise update the records relating to such an account to facilitate the management by the clearing member of the default of the customer or an indirect client.

References to relevant indirect clearing accounts have been added in Rule 1516(a), which imposes certain requirements on clearing members for customer accounts for CDS Contracts.

The CDS Standard Terms, the F&O Standard Terms and the FX Standard Terms have each been amended in a new paragraph 3(p) to provide that each customer or indirect client that has chosen individual segregation through usage of a margin-flow co-mingled account or segregated gross indirect account authorizes the clearing member to determine how the different classes of permitted assets should be transferred to ICEU in respect of the relevant account, for purposes of revised Rule 503(k) as discussed above.

The Clearing Procedures are also being amended to incorporate the new account categories, including a separate set of changes to address FCM/BD Clearing Members. As noted above, revised Rule 102(g) does not require clearing members to offer the new indirect client accounts where doing so would be inconsistent with relevant applicable law. In the case of

FCM/BD Clearing Members, under the U.S. Commodity Exchange Act¹² and U.S. Bankruptcy Code,¹³ segregation for customer account positions and assets is established on an omnibus basis by account class (U.S. futures, swap or non-U.S. futures) without distinguishing between clients and indirect clients (and without distinguishing among indirect clients). As a result, in the event of an FCM failure, all customers in the same account class (whether direct or indirect) share in the same pool of customer property for that account class. Because of this limitation on the ability to provide individual account segregation for indirect clients of customers of an FCM/BD Clearing Member, ICE Clear Europe is offering only a segregated form of position-keeping for indirect clients for such clearing members. Specifically, ICE Clear Europe will offer standard omnibus indirect accounts for FCM/BD Clearing Members that will be made available as position-keeping subaccounts of the existing customer accounts. Three such position-keeping subaccounts will be created, one linked to each of the FCM/BD Customer Accounts that use a gross margin model: the DCM Customer Account, the Swap Customer Account, and the Non-DCM/Swap Customer Account.¹⁴

Each such subaccount can be used by FCM/BD Clearing Members to record positions of indirect clients of customers separately from positions of direct customers, and thus facilitate segregation of indirect clients from direct clients in the event of a client default and related record-keeping, consistent with certain of the MiFID II requirements as regards indirect clearing. In the event of a clearing member default, however, ICE Clear Europe would manage the default, as under the current Rules, separately for each customer account class, including any indirect client subaccount within such class, consistent with the requirements of the Commodity Exchange Act and U.S. Bankruptcy Code as discussed above.¹⁵

Paragraph 2.3(3) of the Clearing Procedures is being amended to add the specific position-keeping subaccounts linked to the customer accounts for FCM/BD clearing members. In addition, Paragraphs 2.3(4) and 2.3(5) of the Clearing Procedures add the relevant position-keeping accounts for the new indirect client accounts for Non-FCM/BD Clearing Members. Conforming changes are added in paragraph 3.1 to reflect the corresponding margin accounts for the indirect client account categories. Conforming changes are made to the table of account categories following paragraph 3.2 of the Clearing Procedures.

Emission Allowances

Various Rule changes are proposed to address the consequence of emission allowances becoming a new class of “financial instrument” under MiFID II.¹⁶ This includes new definitions

¹² 7 U.S.C. 1 et seq.

¹³ Title 11, United States Code.

¹⁴ Notwithstanding this change, the Swap Customer Account is not currently available for use by FCM/BD Clearing Members for customer positions in CDS Contracts (including CDS Contracts that are security-based swaps).

¹⁵ Only a single type of indirect client subaccount per account class is being made available for FCM/BD Clearing Members. In light of the segregation requirements under applicable U.S. law, and the corresponding limitation on the ability to offer individual account segregation, ICE Clear Europe does not believe that offering additional subaccounts based on the gross omnibus indirect account model would provide additional benefits for indirect clients.

¹⁶ MiFID II, Annex 1, Section C(11).

for “Emission Allowance” and “Emissions Registry” in Rule 101, as well as conforming changes to the definition of “Delivery Facility.” Various amendments have also been made to Part 12 of the Rules to address settlement finality with respect to transactions in Emission Allowances, which as a result of this designation become in-scope as transfer orders for purposes of the EU Settlement Finality Directive¹⁷ and UK Settlement Finality Regulations¹⁸.

Straight-Through Processing

MiFID II introduces new straight-through processing requirements for cleared transactions. To comply with these requirements, the CDS Procedures have been amended to implement certain requirements under MiFID II relating to the timing of submission of transactions for clearing. Specifically, Section 4.4(a) has been amended to clarify the clearing house’s obligation to give notice of the acceptance or rejection of a submitted CDS transaction on a real-time basis for purposes of MiFID II. The amendments also address the submission of certain bilaterally executed transactions, in light of the trade execution requirements of MiFID II, and require that clearing members only submit CDS trade particulars in relation to bilateral CDS transactions if, at the time such transactions were entered into, it was not agreed that the transaction would be submitted for clearing. Certain other clarifications to the bilateral submission process are also made. Paragraphs 4.17 and 4.18 have been amended to revise the timeframes under which ICEU will accept or reject CDS trade particulars submitted for clearing, depending on the manner of execution or facility through which the transaction was executed, consistent with the requirements of MiFID II. The amendments supplement the existing provisions in the Clearing Procedures that implement applicable US law requirements as to the timing of submission of clearing and transaction processing,¹⁹ such that ICE Clear Europe will be in compliance with both US and EU requirements in this regard.

Market Maker Amendments

The Clearing Procedures have also been amended as a consequence of proposed revisions to the ICE Futures Europe Rules in light of the MiFID II market making scheme requirements. Under the proposed amendments, ICE Futures Europe's existing “Market Maker Programs” have been renamed as “Liquidity Provider Programs” to distinguish the existing incentive scheme under the ICE Futures Europe Rules from the market maker scheme regulated under MiFID II in relation to certain types of financial instruments. As a result of this change, the Clearing Procedures are being amended to rename the relevant position keeping account as “Liquidity Provider” rather than “Market Maker,” specifically in Paragraph 2.3(b)(vii) and the related summary table following Paragraph 3.2(a).

¹⁷ Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.

¹⁸ Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SI 1999/2979). See also the UK Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (SI 2017/701), which amends the definition of “securities” (used in the context of a “securities transfer order”) in the Settlement Finality Regulations to refer to the definition of “securities” under MiFID II (Regulation 50(4), Schedule 5, paragraph 2(b)).

¹⁹ See, e.g., 17 C.F.R. 39.12(b)(7).

Compliance with the Act and Commission Regulations

The rule amendments are potentially relevant to the following core principles: (C) Participant and Product Eligibility, (D) Risk Management, (E) Settlement Procedures, (F) Treatment of Funds, (G) Default Rules and Procedures and (R) Legal Risk.

- *Participant and Product Eligibility.* The amendments described above relating to straight-through processing for CDS contracts implement certain timing requirements under MiFID II, while retaining compliance with those requirements applicable under Commission Rule 39.12(b)(7). As a result, the amendments are consistent with Core Principle B.
- *Risk Management.* The amendments are intended principally to address specific requirements in MiFID II relating to indirect clearing, including through protection of positions and margin provided by indirect clients of customers of clearing members. The amendments thus facilitate risk management of client positions, particularly by clearing members. Through the new account classes, Non-FCM/BD Clearing Members will be better able to separate positions and margin of indirect clients from other positions and margin of direct customers, which will provide enhanced protection for such clients in the event of a default of the customer of the clearing member. The amendments also adopt a separate set of position-keeping accounts for indirect clients of customers of FCM/BD Clearing Members, which are designed to facilitate tracking of positions of such clients by clearing members in a manner consistent with the segregation regime under the Act and U.S. Bankruptcy Code. The amendments do not change the clearing house's margin methodology or the basis on which it calls for margin on customer positions in various account classes, and otherwise should not adversely affect risk management at the clearing house level. As a result, in ICE Clear Europe's view, the amendments are consistent with the risk management requirements of Core Principle D and Commission Rule 39.13.
- *Settlement Procedures.* Certain amendments discussed above are intended to enhance finality of transfers of emission allowances in settlement of certain contracts, as a result of amendments made by MiFID II that bring such transfers within the scope of relevant European and UK settlement finality regulations. The amendments are thus consistent with Core Principle E and Commission Rule 39.14.
- *Treatment of Funds.* As noted above, the amendments are designed to enhance the segregation and portability of positions and margin of indirect clients of customers of clearing members, in line with the requirements of MiFID II. The amendments adopt new account classes for Non-FCM/BD Clearing Members to facilitate such segregation and portability. With respect to FCM/BD Clearing Members, the amendments provide for position-keeping subaccounts, which such clearing members may use to facilitate recordkeeping with respect to positions of indirect clients of their customers. At the same time, the amendments for FCM/BD Clearing Members retain the existing account structure for segregation and portability of customer positions and margin, consistent

with the requirements of Section 4d of the Act, the U.S. Bankruptcy Code and applicable Commission regulations. As a result, the amendments are consistent with the requirements of Core Principle F and Commission Rule 39.15.

- *Default Management.* The amendments are designed to facilitate management by a clearing member of a default by a customer that is clearing for indirect clients, and so enhance the segregation and portability of positions and margin of such indirect clients. Although certain new account categories are created, particularly for Non-FCM/BD Clearing Members, the amendments do not materially affect the ability of the clearing house to manage the default of a clearing member, or the clearing house's rights and obligations with respect to such a defaulting clearing member. In ICE Clear Europe's view, the amendments are therefore consistent with Core Principle G and Commission Rule 39.16.

Legal Risk. ICEU is making the amendments to comply with requirements under MiFID II and MiFIR, which will take effect on January 3, 2018. The amendments also take into consideration the particular requirements applicable to FCM/BD Clearing Members under the Act and US bankruptcy laws to ensure that the amendments will also be in compliance with those requirements. As such, in ICEU's view, the amendments are in compliance with Core Principle R and Commission Rule 39.27.

As set forth herein, the amendments consist of revisions to the Rules, Clearing Procedures and CDS Procedures, which have been submitted concurrently with this self-certification submission.


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 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 patrick.davis@theice.com or +44 20 7065 7738 or Dee Blake, Director of Regulation, at dee.blake@theice.com or +44 20 7065 7752.

Very truly yours,



Patrick Davis
Head of Legal and Company Secretary