FOIA - CONFIDENTIAL TREATMENT REQUESTED

Submission No. 16-003

April 28, 2016

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 US, Inc. Self-Certification Pursuant to Commission Rule 40.6 - Amendment to By-Law Section 5.4 Regarding Custodial Failures

Dear Mr. Kirkpatrick:

ICE Clear US, Inc. ("ICE Clear US"), 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"), for self-certification pursuant to Commission Rule 40.6, the amendments to its By-Laws attached hereto and discussed herein. The amendments are to become effective on the first business day following the tenth business day after submission, or such later date as ICE Clear US may designate.

Explanation and Analysis

ICE Clear US proposes to adopt a new Section 5.4(n) of its By-Laws to limit expressly the clearing house's liability for losses from certain failures of custodians and similar service providers holding guaranty fund contributions and margin deposits of clearing members. The text of the amendments is attached as an exhibit hereto.

Specifically, Section 5.4(n) provides that ICE Clear US is not liable for losses to guaranty fund contributions or margin deposits as a result of the insolvency or failure of any bank or other depository or third party settlement system, as a result of embezzlement, defalcation or theft by a third party or for any other reason other than use pursuant to the By-Laws as a result of a clearing member default (collectively, "custodial losses"). The amendments expressly do not limit ICE Clear US's liability for its own gross negligence or willful misconduct. The amendments also do not address losses resulting from investment of guaranty fund or margin assets by ICE Clear US.

The amendments are tailored to address a particular (and likely remote) risk to the clearing house—that because of the failure or insolvency of a custodial bank or similar third party institution or because of theft, embezzlement or similar malfeasance by a third party (or other event not resulting from clearing member default), a loss results with respect to margin or guaranty fund assets. The revisions clarify that the clearing house is not responsible for such custodial losses. This approach is consistent with that taken by other DCOs.[1]

The amendments will not affect the ordinary course operations of the clearing house or the protections it provides. As a DCO, ICE Clear US necessarily uses a number of third party service providers as custodial banks, settlement banks, depositories and other settlement systems to hold and transfer guaranty fund and margin assets that are provided to ICE Clear US in connection with its clearing functions. Such arrangements are consistent with longstanding industry practice for DCOs. In addition, because ICE Clear US does not have access to a Federal Reserve or other central bank accounts for safekeeping of margin and guaranty fund deposits, the clearing house has no alternative to the use of such third party commercial service providers. Such service providers are typically subject to regulation as banks or other financial institutions in the United States or other jurisdictions. Custodial and banking arrangements of DCOs are also subject to certain requirements under the Act and Commission regulations.

As part of its own risk management procedures, ICE Clear US considers and evaluates on an ongoing basis the financial strength and operational and other capabilities of such service providers. The financial institutions that ICUS uses for settlement and custody are among the largest financial institutions in the world. They are reputable organizations that employ accounting practices, safekeeping procedures and internal controls designed to protect deposits. ICE Clear US also monitors the financial condition of such institutions on an ongoing basis and assesses the risk of such institutions, based on financial data, market data, market standing and other relevant factors.[2] However, these entities are ultimately beyond the control of the clearing house, and the possibility of a failure, insolvency, theft or other loss event with respect to such service providers or the margin or guaranty fund assets deposited with them cannot be entirely eliminated.

As a result, ICE Clear US believes that it is appropriate for it to disclaim the risk of custodial loss. With respect to the custody of guaranty fund and margin assets, ICE Clear US's role is essentially an intermediary: it receives such assets and is required by Commission regulations to place them with a depository or other institution that is in the business of accepting and holding such assets. ICE Clear US is not itself in the business of acting as a custodian, and is not regulated or financed as such. Moreover, while ICE Clear US, as a DCO, provides a guaranty with respect to the financial performance of transactions submitted for clearing, it is not in a position to guaranty the deposit or custodial liabilities of a third party bank or custodial institution. Such a guaranty has not been within the customary responsibilities of a DCO, and

[1] See, e.g., CME Rule 820, ICE Clear Europe Rule 919(r).

[2] ICE Clear US's practices and procedures in this regard are discussed in more detail in the ICE Clear US, Inc. Disclosure Framework (Dec. 31, 2014), Principles 9 and 16, available at https://www.theice.com/publicdocs/clear_us/ICUS_DisclosureFramework.pdf).

nothing in the Commission's rules or regulations would require a DCO to assume such a responsibility.

Compliance with the Act and Commission Regulations

The rule amendment is potentially relevant to Core Principles B (Financial Resources), D (Risk Management) and E (Settlement Procedures) under the Act, and the applicable regulations of the Commission thereunder.

- Financial Resources. ICE Clear US does not propose to change the amount or level of financial resources and liquidity arrangements currently available to support its clearing operations and to cover credit losses resulting from defaulting clearing members as required by Commission Rules 39.11 and 39.33. The amendments would provide an additional procedure for addressing custodial losses, which constitute a distinct type of loss from that resulting from clearing member default, by providing that ICE Clear US is not responsible for such losses. As a result, in ICE Clear US's view, the amendments are consistent with the financial resources requirements applicable to it under Core Principle B and Commission Rules 39.11 and 39.33.

- Risk Management. ICE Clear US believes that the new rules will enhance the clearing house's ability to manage custodial losses. Such losses in particular may constitute general business risks, operational risks or other risks that can threaten the viability of the clearing house as a going concern, within the meaning of Commission Rule 39.39. The amendments facilitate the ability of the clearing house to manage such risks and withstand and/or recover from such risks, as required by such rule, so that the clearing house can continue operations. As a result, in ICE Clear US's view, the changes are consistent with Core Principle D and the rules thereunder.

- Settlement Procedures. Commission Rules 39.14 and 39.36 require that the clearing house monitor, manage and limit its credit and liquidity risks arising from settlement banks (and the concentration of those risks), among other matters. Although the amendments provide that ICE Clear US is not responsible for custodial losses, it is still in ICE Clear US's interest to avoid the potential disruption and costs to itself and clearing members of custodial losses. As a result, ICE Clear US does not believe that the amendments will adversely affect its incentive to continue monitoring its service providers, and ICE Clear US does not propose to change its policies, procedures and practices in that regard as a result of the amendments. The amendments address the scenario where notwithstanding such efforts, a settlement bank or other custodial institution fails. In ICE Clear US's view, the amendments are therefore consistent with Core Principle E and the regulations thereunder.

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

ICE Clear US has received no substantive opposing views in relation to the proposed rule amendment.

ICE Clear US has posted a notice of pending certification and a copy of this submission on its website concurrently 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 Heidi.Rauh@theice.com or (312) 836-6716.

Sincerely,

Heidi M. Rauh

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General Counsel

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Exhibit

By-Laws New Section 5.4(n)

(n) Notwithstanding anything to the contrary herein (but subject to Section 5.4(j)(i) above), the Corporation shall not be liable if (1) the Guaranty Fund or any part thereof and/or (2) any margin (whether for the proprietary or customer account) or other assets provided by or held for the account of a Clearing Member are lost or decrease in value as a result of the (A) insolvency or failure of any bank or other depository or third party settlement system, (B) embezzlement, defalcation or theft by any person (other than the Corporation or its directors, officers, employees or representatives) or (C) any other reason other than use pursuant to the By-Laws or Rules.

Nothing in this Section 5.4(n) will limit any liability of the Corporation for its own gross negligence or willful misconduct.

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