



February 25, 2019

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 –  
GDPR Clearing Rule Amendments

Dear Mr. Kirkpatrick:

ICE Clear Europe Limited (“ICE Clear Europe” or the “Clearing House”), a registered derivatives clearing organization under the Commodity Exchange Act, as amended (the “Act”), hereby submits to the Commodity Futures Trading Commission (the “Commission”), pursuant to Commission Rule 40.6 for self-certification, the amendments to its Clearing Rules (the “Rules”)<sup>1</sup> 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 Europe may determine.

*Concise Explanation and Analysis*

The purpose of the proposed changes is to amend the Rules to address certain requirements under the European Union General Data Protection Regulation (“GDPR”)<sup>2</sup> relating to personal data in the context of Clearing House activity that will apply upon the United Kingdom (“UK”) ceasing to be a European Union (“EU”) member state, in circumstances where: (i) no withdrawal agreement has been agreed between the UK and the EU27 which stipulates that EU data protection law, among other laws, shall continue to apply in the UK (a “withdrawal agreement”); and (ii) the UK’s data protection laws have not been found to provide for an adequate level of

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<sup>1</sup> Capitalized terms used but not defined herein have the meanings specified in the Rules.

<sup>2</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

protection for the personal data of individuals in the EU pursuant to a decision made by the European Commission (an “adequacy decision”).

ICE Clear Europe Rules relating to personal data protection were amended in 2018 to reflect certain requirements of the GDPR as it applied to ICE Clear Europe.<sup>3</sup> Rule 106 currently requires, among other provisions, that Clearing Members ensure that personal data transfers to ICEU are lawful.

If the UK ceases to be an EU member state without a withdrawal agreement being agreed and in the absence of adequacy decision, the UK would be a ‘third country’ for GDPR purposes. In that case, in certain circumstances, it may be necessary or advisable to take certain additional steps to avoid a greater risk that transfers of personal data from EU27-based Clearing Members to ICE Clear Europe violate the GDPR. Specifically, if an EU27-based Clearing Member has not already put in place safeguards called for by the GDPR with respect to transfer of personal data from that member to ICE Clear Europe, that Clearing Member could violate the GDPR if it continued to transfer personal data to ICE Clear Europe. Thus, in the case of a UK exit without a withdrawal agreement or adequacy decision, without any change to the Rules, Clearing Members could violate the GDPR as well as Rule 106, which requires, among other provisions, that Clearing Members ensure that personal data transfers to ICE Clear Europe are lawful.

In light of this change in circumstances, although the principles of Rule 106 continue to be relevant, ICE Clear Europe considers that it would be prudent to put in place additional safeguards with respect to transfers of personal data from EU27-based Clearing Members to ICE Clear Europe such that it can be certain that such transfers are subject to appropriate safeguards within the meaning of the GDPR and therefore comply with the GDPR and Rule 106. As such, ICE Clear Europe is amending its Rules to incorporate standard data protection clauses pursuant to Article 46(2) of the GDPR in the form of the Set II Standard Contractual Clauses published by the European Commission for the transfer of personal data from the EU to third countries<sup>4</sup> (the “Standard Contractual Clauses”) into Rule 106 and a new Exhibit 5.

The amendments in new Rule 106(f) by their terms apply only if ICE Clear Europe is established in a jurisdiction which the European Commission has not found to offer an adequate level of protection for personal data under the GDPR, in other words, in a scenario where no withdrawal agreement has been agreed and there has been no adequacy decision by the European Commission in respect of the UK. It is noted that if no withdrawal agreement is agreed at the time of the UK’s departure from the EU, it cannot be assumed that an adequacy decision would automatically be granted.

The amendments require that the Clearing House and each Clearing Member subject to Chapter V of the GDPR which transfers Personal Data to the Clearing House (an “Exporting Member”) agree to comply with the Standard Contractual Clauses. Revised Rule 106 specifically provides for the positions of the Clearing Member and the Clearing House under the Standard Contractual Clauses (as data exporter and data

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<sup>3</sup> ICE Clear Europe CFTC filing dated May 18, 2018.

<sup>4</sup> SET II Standard contractual clauses for the transfer of personal data from the Community to third countries (controller to controller transfers), European Commission Decision C(2004)5721.

importer, respectively). The amendments also provide for the Standard Contractual Clauses to take precedence over other Rules and the Clearing Membership Agreement on Personal Data processing matters. The amendments define certain terms to have the meaning given to such terms in the GDPR for purposes of Rule 106. Rule 106(d) has been deleted and reserved as unnecessary.

The amendments add a new Exhibit 5 to the Rules, which reproduces the Standard Contractual Clauses. The Standard Contractual Clauses are in the form prescribed by the EU and have not been amended (except for Annex B which is intended to be tailored to the processing of personal data carried out by that specific data controller).

The Standard Contractual Clauses define certain terms and set out the obligations of the data exporter and data importer. Each party commits to being liable to the other for damages caused by breach of the Standard Contractual Clauses and to giving a data subject the right to enforce as a third party beneficiary many of the Standard Contractual Clauses. The Standard Contractual Clauses also set out how disputes with data subjects or authorities would be resolved.

The Standard Contractual Clauses permit the data exporter to temporarily suspend transfers of personal data under certain circumstances and further set out the conditions under which either party may terminate the Standard Contractual Clauses and when the authority must be informed. Annex A to Exhibit 5 to the Rules sets out certain data processing principles. Annex B to Exhibit 5 to the Rules sets out the description of the Data Subjects, recipients of Personal Data, purpose of the transfer(s) and categories of Personal Data transferred by the Exporting Member, for purposes of Rule 106.

#### *Compliance with the Act and CFTC Regulations*

The rule amendments are potentially relevant to the following core principle: (R) Legal Risk, and the applicable regulations of the Commission thereunder.

- *Legal Risk.* As discussed herein, the amendments are designed to facilitate continued compliance by ICE Clear Europe and its Clearing Members with requirements of GDPR that will apply upon the UK ceasing to be an EU member state if there is no withdrawal agreement and the EU has not issued an adequacy decision. EU based Clearing Members must export personal data to ICE Clear Europe in order to clear transactions at ICE Clear Europe, and this Rule change will facilitate those Clearing Members' continued ability to export the data without violating GDPR should UK depart the EU without a withdrawal agreement and without an adequacy decision. The amendments thereby facilitate continued clearing for EU-based persons in accordance with EU regulations relating to data protection, and also further the Clearing House's ability to operate pursuant to enforceable legal framework with respect to its activities in all relevant jurisdictions. As a result, ICE Clear Europe believes the amendments are consistent with the requirements of Core Principle R and CFTC Rule 39.27.

As set forth herein, the amendments consist of changes to the Rules, a copy of which is attached hereto.

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 proposed 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 [giulia.honorati@theice.com](mailto:giulia.honorati@theice.com) or +44 20 7429 7127.

Very truly yours,



Giulia Honorati  
Manager Regulation & Compliance