May 22, 2020

Via Electronic Submission

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st St, N.W.
Washington, DC 20581

Re: Comments on Swap Data Recordkeeping and Reporting Requirements - RIN 3038-AE31; and Real-Time Public Reporting Requirements - RIN 3038-AE60

Dear Sir/Madam:

ICE Clear Credit LLC[1] and ICE Clear Europe Limited[2] (collectively referred to herein as the "ICE clearing houses") appreciate the opportunity to comment on the rules proposed by the Commodity Futures Trading Commission (the "Commission" or the "CFTC"), titled "Swap Data Recordkeeping and Reporting Requirements"[3] and "Real-Time Public Reporting Requirements"[4] (the "Proposed Rules" or the "Proposal").

As background, both ICE Clear Credit and ICE Clear Europe are CFTC registered derivatives clearing organizations ("DCOs") that clear credit default swap ("CDS") contracts and, accordingly, serve as "reporting counterparties" for cleared swap trades under CFTC regulations.[5] In November 2019, the ICE clearing houses provided comments[6] to the Commission's rule proposal titled "Certain Swap Data Repository and Data Reporting Requirements" (the "2019 Proposal").[7] The ICE clearing houses note that the Proposed Rules together with the 2019 Proposal are intended to achieve the goals laid out in the Commission's "Roadmap to Achieve High Quality Swap Data" published by the CFTC on July 10, 2017. The ICE clearing houses further note that implementing the Proposed Rules will require significant systems related development and resources. Accordingly, in addition to the comments below, the ICE clearing

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[1] ICE Clear Credit has been designated as a systemically important derivatives clearing organization pursuant to Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. ICE Clear Credit is also registered as a securities clearing agency under the Securities Exchange Act of 1934 (the "Exchange Act").
[2] ICE Clear Europe is authorized as a central counterparty under the European Market Infrastructure Regulation (EMIR) and a Recognised Clearing House under English law, and a registered securities clearing agency under the Exchange Act.
[3] 85 Fed. Reg. 21578 (April 17, 2020) (RIN 3038-AE31).
[4] 85 Fed. Reg. 21516 (April 17, 2020) (RIN 3038-AE60).
[5] In particular, see Title 17 CFR Chapter 1 Part 43 and Part 45 re: swap data reporting.
[6] ICE's November 2019 Comment Letter is located here:
https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62246&SearchText=Rauh
[7] 84 Fed. Reg. 21044 (May 13, 2019) (RIN 3038-AE32).

houses strongly urge the Commission to adopt a realistic compliance implementation period that allows for industry-wide coordination and roll out.

I. Clarification that Swap Transactions Arising from Default Management Are Not Subject to Real-Time Public Reporting

The Commission has proposed adding new Reg. 43.3(a)(5), which would add DCOs to the reporting counterparty hierarchy for clearing swaps that are publicly reportable. The ICE clearing houses understand the Commission's stated desire to align Part 43 with Part 45 (specifically, Reg.45.8(i)) and, indeed, the ICE clearing houses currently report under Part 43 original swaps they create for purposes of implementing their end-of-day price discovery processes. It is concerning, however, that the default management example in the Proposed Rules cited by the CFTC[8] with respect to the proposed Reg. 43.3(a)(5) obligation appears to put an inappropriate obligation on the clearing house during a time of default.

The ICE clearing houses believe that it would be unwise, as stated in the example, to subject all swap transactions created as the result of managing a default to real-time public reporting under the Proposed Rule. Such real-time public disclosure, if required, could frustrate the default management process and, as a result, be detrimental to the financial stability of the overall markets. Reporting of such transactions also may be impractical as the liquidation of a defaulter's portfolio may be achieved through a default auction, or a series of auctions, on a portfolio basis, which does not lend itself to reporting valuation of individual transactions within the larger portfolio(s). In addition, real-time reporting of transactions that are part of the default management process raises front-running concerns, which may impede a DCO's ability to successfully complete the default liquidation process. For example, the ICE clearing houses' CDS default processes contemplate the possibility of multiple auctions over multiple days. Publicly disclosing the results of the first auction of a series of auctions on a real-time basis could invite front-running that would frustrate the efficient and fair liquidation of the default portfolio. During the management of a default, a clearing house's priority is to take timely action to contain losses and to allow for the efficient, fair and safe management of events. Regulations that require real-time public reporting of default auctions, which would inappropriately and incompletely reveal sizes and prices, could cause market disruption and price dislocations in addition to the default event itself, which is contrary to clearing house efforts to mitigate the systemic risk impacts of the default in a timely manner.

For these reasons, the ICE clearing houses request that, if the Commission finalizes proposed Reg. 43.3(a)(5), it also changes the definition of "Publicly reportable swap transactions" to exclude swap transactions created through the default management process.

[8] 85 Fed. Reg. at 21523.

II. Clarification that SDRs Maintain Responsibility for Matching Original Swap Messages to Termination Messages of such Original Swaps

Revised Reg. 45.3(b)(1) would require that SD/MSP/DCO reporting counterparties report required swap creation data to an SDR not later than T+1 following the execution date. This change would extend the time DCOs have to report required swap creation data for clearing swaps pursuant to Reg. 45.3(e) from as soon as technologically practicable ("ASATP") after clearing or execution to T+1 following the execution date. As a general matter, the ICE clearing houses support this change, but believe it is critical for the Commission to confirm the responsibility of an SDR to maintain the message terminating an original swap and applying it to the appropriate original swap.

As DCOs, the ICE clearing houses clear swaps ASATP and report terminations of original swaps to SDRs as part of this clearing process.[9] Accordingly, with respect to their reporting of original swap terminations, the ICE clearing houses would like confirmation that SDRs are responsible for holding the termination message and applying it to the appropriate original swap once such swap is reported. Additionally, the SDR's validation procedures will need to take into account that the SDR may receive the DCO's termination of an original swap prior to the SDR's receipt of the original swap itself and that the SDR will not reject the DCO's report (or the original reporting counterparty's report) as invalid or issue error messages to the reporting counterparties based on this timing. In this way, the reporting counterparties can be assured that they will not fail to meet their respective regulatory reporting obligations under proposed Reg. 45.13(b)(2).[10]

III. CFTC Reg. 45.4(c) Proposal for Daily Valuation Reporting to include Margin and Collateral Data is Not Appropriate for Cleared Swaps

With respect to cleared swaps, the ICE clearing houses are opposed to the Commission's proposal to expand the Part 45 reporting requirement to include margin and collateral data. In the Proposal for Reg. 45.4(c), the Commission stated that it "believes margin and collateral data is necessary to monitor risk in the swaps market."[11] As DCOs, the ICE clearing houses are already reporting detailed information to the Commission with respect to margin and collateral on a daily basis under CFTC Reg. 39.19(c)(1).[12] The information currently being reported under Reg. 39.19 exceeds the proposed Part 45 margin and collateral data reporting requirement and is better suited to allow the Commission to monitor risk. In particular, the Reg. 39.19 information appropriately takes into account portfolio-based margin methodologies -- whereas Part 45

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[9] The Commission noted this connection of clearing and reporting processes in the Proposal. See 85 Fed. Reg. at 21586.

[10] The ICE clearing houses suggest that the Commission could address this comment by adopting a rule similar to Proposed Reg. 49.10(c)(3). Proposed Reg. 49.10(c)(3) would require that if an SDR allows for the joint submission of swap transaction and pricing data and swap data, the SDR validate the swap transaction and pricing data and swap data separately. Swap transaction and pricing data that satisfies the data validation procedures applied by an SDR shall not be deemed to contain a data validation error because it was submitted to the SDR jointly with swap data that contained a data validation error. Similarly, the Commission could provide that the DCO's submission of a termination message will not be deemed to contain a validation error because it was submitted to the SDR prior to the original swap that it was designed to terminate.

[11] 85 Fed. Reg. at 21590.

[12] See the CFTC's Part 39 Reporting Requirements for Derivatives Clearing Organizations, Guidebook for Daily Reports, v 0.9.2 Errata, December 2017, Section 2.1.4 Cash Flow - Credit.

requires data with respect to each individual swap transaction, which would be misleading. Specifically, the cleared swaps initial margin methodology for the ICE clearing houses utilizes a portfolio approach whereby portfolio benefits are recognized. As such portfolio benefits are provided, the attribution of initial margin to individual cleared swap transactions will be model and assumption dependent and lead to incorrect interpretations of the levels of collateralizations and perceived riskiness of the cleared swaps. In other words, the initial margin requirements for two identical transactions cleared and reported by the same DCO at the same time and at the same price can be substantially different as these two transactions are appended to two different cleared portfolios with different risk profiles. As the incremental impacts of the same transactions could be different, the reported initial margin requirements would be different. Accordingly, the ICE clearing houses strongly urge the Commission to forgo imposing a new, unnecessary and potentially misleading reporting requirement on DCOs.[13]

IV. CFTC Reg. 45.6(d)(3) Proposal to Require Third Party LEI Registration Requires Clarification

While the ICE clearing houses understand the Commission's proposed Regs 45.6(d)(1) and (d)(2) require parties to obtain, maintain and renew their own Legal Entity Identifiers ("LEI"), the ICE clearing houses believe clarification is necessary with respect to proposed Reg. 45.6(d)(3). In particular, proposed Reg. 45.6(d)(3) would require that "each [DCO] and each financial entity reporting counterparty executing a swap with a counterparty that is eligible to receive an LEI, but has not been assigned an LEI, shall, prior to reporting any required swap creation data for such swap, cause an LEI to be assigned to the counterparty, including if necessary, through third-party registration." The Commission states in its Proposal that it is not prescribing "the initial manner in which a DCO or financial entity reporting counterparty causes an LEI to be assigned to the nonreporting counterparty" and provides various reasons for its belief that the DCO/financial entity reporting counterparty should serve as a backstop to ensure the identification of the non-reporting counterparty with an LEI.[14]

The ICE clearing houses believe that Reg. 45.6(d)(3), as proposed, goes too far in shifting the burden to DCOs and financial entities to undertake obligations on behalf of other parties that rightly belong with such other parties. The Commission acknowledges in its rulemaking that it anticipates that third party registration in these instances would be infrequent because most non-

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[13] The ICE clearing houses also note that with respect to cleared swaps this proposal would not be consistent with the CFTC's Project KISS initiative which is "about taking CFTC's existing rules as they are and applying them in ways that are simpler, less burdensome and less of a drag on the American economy". *Project KISS (Request for Information)*, 82 FR 23765 (May 24, 2017) at 23766.

[14] 85 Fed. Reg. at 21599. "The Commission preliminarily believes that having a DCO or financial entity reporting counterparty serving as a backstop under new Reg.45.6(d)(3) to ensure the identification of the non-reporting counterparty with an LEI is appropriate because: (i) Each DCO and financial entity reporting counterparty already has obtained, via its ''know your customer'' and anti-money laundering compliance processes, all identification and relationship reference data of the non-reporting counterparty required by a local operating unit to issue an LEI for the non-reporting counterparty; (ii) multiple local operating units offer expedited issuance of LEI in sufficient time to allow reporting counterparties to meet their new extended deadline in Reg.45.3(a) through (b) for reporting required swap creation data; and (iii) the Commission anticipates that third party registration in these instances will be infrequent, as the Commission expects most non-reporting counterparties to be mindful of their direct obligation to obtain their own LEIs pursuant to Reg.45.6.1."

reporting counterparties would be mindful of their direct obligations to obtain an LEI.[15] The ICE clearing houses do not believe it is appropriate for Commission rules to place a burden on DCOs to backstop the compliance functions of other market participants. Moreover, the ICE clearing houses are concerned that proposed Reg. 45.6(d)(3) could require a DCO to obtain LEIs for the clients of clearing members with which a DCO has no relationship. As a general matter, swap transactions are submitted *by clearing members* to the DCO for acceptance. Each transaction is identified as being for either the house or client account *of the clearing member*. Upon acceptance for clearing, the DCO is substituted as the counterparty to each *clearing member* buyer and to each *clearing member* seller through novation.[16] In other words, the DCO's legal relationship is with its clearing members and the DCO does not maintain a legal relationship with the underlying clients of a clearing member. Accordingly, the ICE clearing houses request that the Commission remove proposed Reg. 45.6(d)(3) or in the alternative clarify that the DCO is not required to "cause an LEI to be assigned" to non-clearing members.

Conclusion

The ICE clearing houses appreciate the opportunity to comment on the Proposed Rules, and the engagement of the Commission and its staff in the rulemaking process. The ICE clearing houses request that the Commission continue to consider the different types of swap reporting counterparties impacted by the Proposed Rules and the 2019 Proposal including the role of DCOs with respect to cleared swaps which is governed by Part 39 of the CFTC regulations.

Sincerely,

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[15] Id.
[16] See ICE Clear Credit Rulebook, Chapter 3 (Clearing of Contracts)