July 13, 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 Part 190 Bankruptcy Regulations Proposal (RIN 3038-AE67)

Dear Mr. Kirkpatrick:

Intercontinental Exchange, Inc., on behalf of itself and its subsidiaries (collectively, "ICE") appreciates the opportunity to comment on the recent proposals from the Commodity Futures Trading Commission (the "Commission" or the "CFTC"), titled "Bankruptcy Regulations" (the "Part 190 Proposal" or the "Proposal").[1]

ICE currently operates four derivatives clearing organizations ("DCOs") registered with the Commission: ICE Clear Credit LLC,[2] ICE Clear Europe Limited,[3] ICE Clear US, Inc.[4] and ICE NGX Canada Inc.[5] ICE also operates ICE Clear Netherlands and ICE Clear Singapore, which are not registered as DCOs with the Commission but are registered clearing organizations in other jurisdictions. ICE has a successful history of clearing exchange traded and OTC derivatives across a spectrum of asset classes including energy, agriculture and financial products. As an operator of DCOs, ICE is keenly interested in the issues raised by the Part 190 Proposal, both from the perspective of managing the consequences of the insolvency of a clearing member and from the perspective of a DCO insolvency itself. ICE therefore appreciates the opportunity to comment on the Proposal.

Executive Summary

ICE supports the Commission's efforts to revise and modernize, in a comprehensive fashion, its Part 190 regulations. The market for cleared derivatives has changed significantly since the time the original regulations were adopted, notably with the development of clearing

[1] 85 FR 36000 (June 12, 2020) (RIN 3038-AE67).
[2] 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").
[3] ICE Clear Europe is also an 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 Securities Exchange Act of 1934.
[4] ICE Clear US has elected to be a subpart C DCO pursuant to Commission Rule 39.31.
[5] ICE NGX Canada Inc. is also registered with the Commission as a foreign board of trade and is a recognized exchange and clearing agency under the laws of Alberta, Canada.

for swaps, the imposition of mandatory clearing for some products, and the growth of cross-border derivatives clearing activity, among other developments. We support the Commission's decision to reconsider these key regulations in light of developments in the market.

It is vital to a DCO's risk management that the FCM insolvency regime provide clear rules that allow the DCO to manage the default of an FCM and provide appropriate protections for market participants, including non-defaulting clearing members and their customers. ICE also generally supports the Commission's goals in establishing regulations for the first time that govern the insolvency of a DCO. While unprecedented, the possibility of an insolvency of a DCO is necessarily a topic of concern to DCOs themselves as well as their clearing members, the customers of clearing members and other users of clearing services. For this reason, clear insolvency rules for DCOs is an important complement to ongoing discussions about enhancing the overall resilience, recovery and resolution of clearing organizations, particularly as cleared derivatives have come to represent a larger share of the derivatives market.

ICE thus supports the following aspects of the Commission's Proposal:

- Establishing a set of rules that applies to the insolvency of a DCO.
- The Proposal's recognition of the importance of a DCO's own rules and recovery plan in any insolvency proceeding concerning the DCO and of preserving the contractual rights of clearing members in any such proceeding.
- Clarifying the treatment of so-called delivery accounts, and of cash and other assets in the delivery process, during an FCM or DCO insolvency.
- The Proposal's clarification of the rules applicable to an FCM insolvency and the role of the trustee in that process, while recognizing the rights of a DCO to exercise its default rights and remedies for the protection of the clearing organization and its non-defaulting members.

At the same time, and as discussed in more detail below, ICE believes certain aspects of the Proposal raise significant policy concerns and non-insolvency regulatory issues that warrant further consideration, including the following:

- The Proposal does not adequately address complications that would arise in an insolvency proceeding of a DCO that is organized outside the United States, or otherwise significantly engaged in cross-border clearing activities.
- The Proposal appears to override certain limitations on clearing member liability that are established in DCO rules that have been approved by or self-certified to the Commission and other regulators, including separate default waterfalls or guarantee fund resources for particular product classes and other contractual limitations on recourse.
- The Proposal appears to create an additional preference for "public customers" of an FCM in the context of a DCO failure that is not consistent with the distribution scheme embodied in the Bankruptcy Code and may be detrimental to

market participants and the certainty that is so critical in times of stress, which a DCO failure would undoubtedly be.

I. Proposed Treatment of DCO Insolvency

Under the Proposal, the Part 190 rules would, for the first time, specifically address bankruptcy proceedings for a DCO.[6] Given the increased importance of clearing activity to the financial markets, the requirements that some products be cleared, and the broader focus of regulators and the derivatives industry on resilience, recovery and resolution issues, ICE generally supports the Commission's efforts to adopt a clear set of rules that would govern a DCO bankruptcy. While such a circumstance has been, and hopefully remains, unprecedented, ICE agrees that it is useful for both DCOs and market participants, to have a clear understanding of what may happen in that scenario. ICE also recognizes that establishing the rules for an insolvency proceeding is important as a baseline for comparison for purposes of any resolution proceeding for a DCO that might occur under the orderly liquidation authority of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "OLA"), if applicable.[7]

However, as the Commission has noted, the insolvency of a DCO is necessarily a complex and unpredictable event that would likely have systemic implications for one or more markets. It is also important to recognize that DCOs and their clearing members and other market participants have, at the urging of the CFTC and other regulators, engaged in significant planning, embodied in their rulebooks and recovery and resolution plans, to deal with extreme default and non-default scenarios that threaten the solvency or continued operation of a clearing house.[8] As set forth below, ICE believes that there are several circumstances where the Proposal may conflict with or otherwise override those rules and that planning in a way that may be detrimental to market participants.

A. Cross-Border Implications

As an operator of registered DCOs that are organized both in the United States and in other jurisdictions, ICE is concerned that the Proposal does not adequately take into account the particular issues that could arise in a cross-border insolvency. In ICE's view, the Proposal generally appears to presume, and makes the most sense in the context of, a US-organized DCO solely regulated by the Commission.

For DCOs organized outside the United Sates, however, the situation is significantly more complicated, and ICE believes the DCO insolvency provisions in the Proposal raise significant concerns in the context of a foreign-organized DCO that require further consideration. Of course, such an institution, if it becomes insolvent, is likely to be subject to an insolvency

[6] When it adopted the current set of Part 190 rules, the Commission declined to adopt specific rules relating to the insolvency of a clearing organization, on the theory that the failure of a clearing organization would likely be unique and raise complex systemic issues that did not lend themselves to specific rules.

[7] OLA Section 210(d)(2) provides that the maximum liability of the FDIC as receiver for a company in OLA resolution would be the amount the claimant would have received if the company had instead been liquidated under Chapter 7 of the Bankruptcy Code (often referred to as the bankruptcy counterfactual).

[8] See, e.g., Commission Rule 39.39.

proceeding in its home jurisdiction, notwithstanding that it is registered with the Commission as a DCO. In such cases, the Proposal's provisions for DCO insolvency under Part 190 may not apply at all.[9]

Because, however, many foreign-organized DCOs have significant assets (including for this purpose, the assets of clearing members and their customers) or other operations located in the United States, it is possible for such a DCO to be subject to a proceeding under the U.S. Bankruptcy Code (either voluntarily or involuntarily). Such a U.S. bankruptcy proceeding could occur in connection with a simultaneous proceeding in another jurisdiction. The Proposal does not, in ICE's view, address the interaction of any such proceeding under the revised Part 190 regulations with a foreign insolvency proceeding, and the significant potentials for conflict that may arise.[10]

For example, a foreign DCO may have, in addition to the customer account classes contemplated by the CEA and CFTC regulations (and the Part 190 regulations), one or more classes of customer accounts that are required to be segregated or separately accounted for under applicable foreign law, generally for the protection of foreign clearing members and their customers. To the extent the Part 190 rules mandate a distribution scheme for property of the insolvent DCO that would be inconsistent with foreign law applicable to the DCO, and that could disadvantage foreign members or their customers, significant conflicts may arise including the following:

- It would be inappropriate to categorize such other classes of customer accounts, and property held therein, as member property, particularly to the extent such property may be subject to a distribution preference under the Part 190 Rules in favor of U.S. public customers as discussed below.

- There may be significant differences in treatment of cleared positions, and posted margin or other property, of affiliates of clearing members, between U.S. and foreign laws. Under EMIR, for example, affiliates of clearing members are generally treated as public customers.

- The definition of customer property itself under the Part 190 Proposal may not be consistent with how such property is treated under foreign law.

- With respect to proprietary claims of clearing members themselves, the distributional scheme in any insolvency would need to take into account the relevant foreign law as well as U.S. law. U.S.-based clearing members should not be disadvantaged or advantaged relative to non-U.S. clearing members in

[9] ICE also recognizes that the OLA by its terms would not apply to a foreign-organized DCO.

[10] ICE notes, in this regard, that the provisions of Chapter 15 of the Bankruptcy Code, which are intended to address ancillary U.S. bankruptcy proceedings in connection with a foreign bankruptcy proceeding, do not by their terms apply to the insolvency of a commodity broker such as a DCO. 11 U.S.C. 1501(c). As a result, it may be that fully addressing the prospect of a cross-border clearing organization insolvency is a matter that ultimately will require legislation. However, as discussed herein, ICE believes that the Commission should not adopt, as part of the Part 190 rules, provisions that would complicate or make any such proceeding more difficult to manage than it would be current law.

terms of their claims in respect of their proprietary accounts in any DCO insolvency.

The insolvency of a foreign DCO is likely to require coordination with courts and regulators in the foreign jurisdiction.[11] ICE believes it would be prudent for the Commission to refrain from adopting regulations that would complicate such cooperation through prescriptive rules not suited to the conduct of a cross-border proceeding and suggests the following, more flexible, approaches that the Commission could take in such a scenario:

- The Commission could provide that the new Part 190 regulations would not apply to a foreign DCO. This approach would leave the current status quo in effect, recognizing that such an insolvency is likely sui generis and would lead to systemic issues in multiple jurisdictions that would need to be addressed at the time. In connection with such an approach, the Commission could issue less prescriptive, principles-based guidance as to how any U.S. insolvency proceeding related to a foreign insolvency proceeding for a foreign DCO should be handle. This approach would reflect the policy considerations underlying the Part 190 regulations, while providing flexibility to deal with the complexities of a particular insolvency.

- Alternatively, the Commission could provide that the new Part 190 regulations, including the distributional regime, would apply only to the separate customer account class structure provided for under U.S. law (futures, cleared swaps and foreign futures), to the extent carried through FCM clearing members. For this purpose, any distribution would only be made from the property segregated for those account classes, and any claims to other assets held by the DCO for other purposes would need to be addressed in the broader insolvency proceeding for the DCO in its home jurisdiction. In particular, the Commission should not attempt to use other property held by the insolvent DCO (whether for other classes of customer account or the proprietary accounts of members), in light of the conflicts that would likely cause.

B. Distributional Preference for Public Customers

In several respects, the Proposal, particularly proposed Rule 190.18, creates a distributional preference for public customers of clearing members over clearing members (and any non-public customers of clearing members) themselves, in the context of a DCO insolvency. While such a preference has a long history *within* the context of an FCM insolvency (where the FCM has obligations in favor of its own customers), ICE does not believe it is appropriate in the context of a DCO failure. Nothing in Section 766(i) of the Bankruptcy Code imposes or requires such a preference. Although the Commission has some discretion, under Section 20 of the CEA, to determine the allocation of property held by the insolvent DCO

[11] A cross-border insolvency of a DCO may raise other complications that need to be considered further. For example, while it does not appear that the Commission intends that the "framework 2" to the Part 190 rules, addressing the treatment of customer property held outside the United States, would apply to a DCO, it is also not clear whether, or in what manner, the risks of sovereign action affecting customer funds should be addressed. This is likely an issue that warrants further consideration and comment from interested market participants.

between "member property" and "customer property other than member property" for this purpose, the Proposal does not clearly indicate the basis for such a preference, and it is not otherwise obvious what the justification for such a policy would be.

Proposed Rule 190.18 would provide that excess guaranty fund and assessment deposits (i.e., those remaining after application of DCO rules) would be allocated to public customer property to the extent there is any shortfall to pay net equity claims for public customers in any account class. Only after such a distribution to public customers would excess guaranty fund and assessment deposits be returned to members as member property. This distribution to public customers would take place regardless of whether it is consistent with the rules of the DCO. Such an approach could impose significant and unexpected losses on clearing members and would be inconsistent with the terms on which they have agreed to participate in the clearing house pursuant to the clearing house rules. The Commission has not clearly established why, as a matter of policy, public customers should get "another bite at the apple," to the extent such guaranty fund and assessment amounts were not provided by clearing members for public customers' benefit under the DCO's rules.

- Clearing houses often impose liability caps for clearing members, limiting both the overall amount of contributions and assessments and the manner in which contributions and assessments may be used for a particular default. These limitations are important to clearing members as a matter of risk management and often are necessary under relevant capital requirements applicable to clearing members. To the extent, Commission rules require use of such contributions or assessments for purposes or in circumstances other than what is established under DCO rules, it would render such caps and limitations ineffective and would significantly change the contractual terms for clearing members embodied in the DCO rules.

- The Proposal is also unworkable for clearing houses that have separate guaranty funds for separate products, or other limited recourse provisions in their rulebooks. Clearing houses use such limitations to designate particular default resources for particular products, and to ring-fence the liability of clearing members from particular products that they may choose not to clear. Potentially, proposed Rule 190.18 could result in the use of excess guaranty fund in one product category to cover a shortfall in another product category, in a manner contrary to clearing organization rules. The Proposal thus calls into question the operation of significant aspects of the existing rulebooks of DCOs that have been approved by the Commission or been self-certified in accordance with Commission regulations.

- These concerns may be exacerbated in the case of clearing houses and cleared markets where there is significant participation by self-clearing members. Provisions such as Rule 190.18 may in effect subordinate claims of such members of a defaulting clearing house to customers of other clearing members. The rule could thus serve as a significant disincentive to self-clearing, or to models with similar types of alternative clearing membership (sponsored clearing or direct clearing), hindering development of robust clearing frameworks, and exacerbating current difficulties in expanding access to clearing.

ICE does not believe it is appropriate to impose losses, or greater losses, on non-defaulting clearing members to benefit public customers of other clearing members in a manner that overrides the negotiated and approved frameworks embodied in DCO rules. Such a change could require fundamental restructuring of DCO operations, which changes the Commission has not considered or evaluated in the Proposal. In particular, the implications of the Commission's approach are inconsistent with DCO rules implemented under Part 39 of the Commission's regulations. If the Commission seeks to advance this aspect of the Proposal, which could require fundamental changes in DCO structures, ICE believes it must be done as part of a separate rulemaking that addresses the interaction with the Part 39 requirements.

C. Interaction with Non-Default Loss Allocation Provisions. As part of ongoing efforts to address resilience, recovery and resolution issues for clearing organizations, many DCOs have sought to separately address, through rulebook and other provisions, the allocation of so-called non-default losses, which may include investment losses, custodial losses, litigation losses and other general business losses that could threaten the solvency of a clearing organization. Clearing house rules may allocate certain losses, and not others, to clearing members and/or to the clearing organization itself, and/or provide for sharing of certain losses in certain amounts. ICE believes that the Proposal should be revised to expressly acknowledge such distributional rules in the context of a clearing organization insolvency. In particular, ICE believes that provisions, such as proposed Rule 190.18, should not be applied to require the use of clearing member guarantee fund, margin or other resources in the context of a non-default loss where the rules of the DCO specifically do not contemplate (or expressly forbid) the use of such assets for such purposes.

D. Interaction with Termination Under Clearing House Rules. The Proposal would permit, in proposed Rule 190.14(b), with CFTC approval, the continued operation of the clearing house for up to six days if the trustee determines that it is practicable to do so, and for purposes of facilitating either a transfer to another clearing organization or resolution under the OLA. The Proposal also recognizes that such continued operation would not be feasible where clearing house rules provide for termination of all contracts upon a clearing house insolvency.

In ICE's experience, such an automatic termination is common. Thus, while ICE does not object to proposed Rule 190.14(b), in practice it is unlikely to be feasible to contemplate continued operation of a clearing house after insolvency. It is also important that any final rules not upset settled expectations of clearing members as to the when, and under what circumstances, their contracts will terminate as a result of a Clearing House failure. In this regard, ICE notes that clearing member capital and accounting often take into account the ability of a clearing member to terminate, or the automatic termination of, its cleared positions in the event of a clearing house insolvency. For this reason, ICE believes that if the Commission finalizes Rule 190.14(b), it should clarify that the rule does not interfere with either the automatic termination of contracts upon insolvency or clearing member rights to terminate contracts upon insolvency.

E. Treatment of Other Clearing Activity. The proposed rules do not clearly take account of non-CFTC-regulated clearing or other activity occurring at a DCO, including security-based swaps and other securities, cleared forward contracts or spot contracts to the extent such instruments are not carried in a CFTC regulated futures or swap account. Although such activity may be outside the scope of the Part 190 regulations, claims of members with respect to

such activity, whether for their proprietary or customer accounts, need to be properly accounted for in a DCO's bankruptcy and should not be disadvantaged.

F. Definition of Net Equity Claims. Proposed Rule 190.17(b) would provide that a clearing member's net equity claim include "the full allocation of the [DCO]'s loss allocation rules and procedures," including any assessments or loss allocation arrangements that were not called before the filing date or, if called, have not been paid.

ICE agrees that, for example, an assessment that was called before filing, but not paid by the clearing member, should be taken into account in the clearing member's net equity claim. However, where an assessment could have been called, but was not, it is not clear to ICE that it is appropriate, or even feasible, to take such potential assessment into account in determining a clearing member's net equity claim. A DCO's determination, under its governance process, to call for an assessment and/or implement other loss allocation arrangements, or not, takes into account many considerations. ICE does not believe it is appropriate to revisit those determinations post hoc in an insolvency. In addition, it may not be possible to determine what it means to apply loss allocation rules "fully," or what would have happened in any such full allocation. For example, to the extent the clearing house has the right, but not an obligation, to make multiple assessments against a clearing member, how would the CFTC, or the insolvency trustee, determine how many the DCO should have made. If clearing members have the right to cap their liability by terminating their membership in a DCO, how would the CFTC or the trustee determine whether a clearing member should have terminated its membership or not. It also may not be possible to determine definitively what the losses to the clearing house would have been if additional loss allocation steps, such as variation margin gains haircutting or tear-up, had been taken. For these reasons, ICE believes the Commission should not adopt proposed Rule 190.17(b) or provide specific guidance as to what assumptions the CFTC would make and how the net equity claim is to be calculated hypothetically.

G. Definition of Customer Property. ICE notes that unlike in the context of an FCM insolvency, the Commission has not proposed that property in an insolvent DCO's general estate can be treated as customer property where customer property is otherwise insufficient to pay customer claims. ICE supports this approach. ICE would also suggest clarifying that any ability to use residual assets should be only to the extent such assets are not required to be used for any other purpose under other applicable law (e.g. for other classes of customers or for other products). The definition of customer property should also respect any express limitations on recourse that have been implemented under DCO rules.

H. Reliance on Default Rules/Recovery and Wind-Down Plans. In general, the Proposal contemplates that a bankruptcy trustee for an insolvent DCO would follow, and cannot avoid actions taken under, the DCO's default rules and its recovery and wind-down plans, to the extent they had been previously submitted to the CFTC for self-certification or approval. ICE supports this approach, as it reflects the expectations of clearing members, their customers and the DCO itself, and the Commission's policy choices under Part 39 of its rules. However, the proposed rules provide that the trustee's obligation to do so is "subject to the reasonable discretion" of the trustee or is limited "to the extent reasonable and practicable." While recognizing the need for some degree of flexibility in the conduct of a bankruptcy proceeding, ICE believes that the Commission should make clear that the trustee cannot override the DCO rules, particularly as they relate to obligations and liabilities of the DCO and clearing members.

Similarly, a trustee should not be permitted to deviate from an approved recovery or wind-down plan.

II. Proposed Amendments for FCM Insolvency

ICE generally supports the aspects of the Proposal that address the insolvency of an FCM. ICE agrees that many of the existing provisions in Part 190, as they relate to FCM insolvencies, are outdated and can usefully be updated and clarified in light of experiences with prior defaults. In that light, ICE offers the following comments and suggestions:

A. Clearing House Liquidation Rights. From the perspective of a DCO, it is critical that the Part 190 rules preserve the ability of a clearing house to liquidate positions of a defaulting clearing member in accordance with the clearing house rules. ICE believes the amendments are consistent with this principle but believes it would be nonetheless helpful to state this principle explicitly and unambiguously. In this regard, several aspects of proposed Rule 190.04 are intended to provide the trustee with greater flexibility in managing the failed FCM. While this approach may be appropriate, the Commission should clarify that any such actions by the trustee are subject to the obligations of the defaulting clearing member, and the rights of the clearing house, under the clearing house rules.

B. Facilitation of Transfer of Customer Positions. The amendments make a number of changes intended to facilitate transfers of customer positions and property following an FCM default. ICE generally supports these changes, but notes the following:

- Proposed Rule 109.07(a)(3) would state that a DCO cannot "interfere with" (instead of "prevent") the acceptance by its members of certain transfers. Because of the potential breadth of the term "interfere with," ICE believes the Commission should clarify that a clearing house is not precluded from managing the risks presented by any such transfer, including through bona fide changes in margin requirements and guarantee fund contributions for transferee clearing members.

- ICE notes that transfer is still generally at the direction or initiative of the trustee. Outside of the United States, it may be more common for such transfers to be initiated and made by the clearing house itself under its rules. Although transfers by the clearing house itself are not prohibited by the Proposal, it may be helpful for the Commission to clarify that such a transfer is permissible under Part 190.

C. Coverage of Certain Contracts. The amendments would explicitly treat forward contracts traded on a DCM and cleared by a DCO as part of customer property. ICE supports this change. As noted above, the treatment of security-based swaps that are not held in a swap account is unclear under the Proposal. Given that many FCMs clear both swaps and security-based swaps, the Commission should clarify its intent on this point.

D. Delivery Arrangements. ICE strongly supports the Proposal's clarifications with respect to deliveries and the delivery account in the context of an FCM insolvency. In this regard, ICE notes the following:

- Business As Usual/Pre-Bankruptcy Delivery Account. The proposed changes to Rule 190.10(d) would helpfully clarify that delivery with respect to customer positions may occur in a segregated futures account or in a non-segregated delivery account, and that, if the FCM uses a non-segregated account, it would have to be treated as a delivery account on the FCM's books and records. ICE supports this statement, which would help avoid significant questions that have arisen as to the proper booking of delivery activities. ICE nonetheless recommends that the Commission include this provision in a different part of the Commission's regulations (perhaps in Part 1), as it does not specifically relate to insolvency.

- Definition of Property for Purposes of the Delivery Account. ICE strongly agrees with the Commission's proposal to clarify that intangible property received or held for purposes of delivery is appropriately regarded as subject to the delivery account, without regard to whether it is "physical" as under the current rule. In ICE's view, any asset, tangible or intangible, that can be delivered in settlement of a contract should be eligible to be treated as delivery property, as set out in the proposed definition of "physical delivery property." This proposed definition would avoid questions that may otherwise arise in connection with the delivery of digital currencies or other novel digital assets. In light of the evolving nature of intangible assets, and of the manner in which they may be held, custodied or transferred, ICE would also suggest that the definition of physical delivery property include, as examples (and not by way of limitation), other electronic representations of commodities (whether or not technically an "electronic title document") or any property entitlement to a commodity (such as for a commodity held as a financial asset in a securities account under Article 8 of the Uniform Commercial Code (whether or not a security) or similar structure).

- Separation of Physical and Cash Delivery Property. The amendments propose separate subaccounts of the delivery account for physical property (the property being delivered) and cash property (cash used to pay for delivery). ICE supports this helpful clarification.

- Cash Delivery Property. The definition of cash delivery property contains a limitation to cash received on or after three calendar days before the relevant first notice date or exercise date. It is not clear why this limitation is appropriate, and it may unnecessarily penalize a customer who provides cash in preparation of delivery earlier than three days before the notice or exercise date.

E. Valuation of Contracts. Under proposed Rule 190.08, the valuation of a contract being transferred, for purposes of the FCM insolvency, would be determined as of the end of the last settlement cycle preceding the transfer. Although this valuation may not be relevant to the clearing organization itself, ICE does not believe that valuation is the right one, particularly because the market may move significantly on the date of transfer. Instead, ICE recommends a more flexible approach. Also, we note that where a contract is liquidated as part of a bulk auction by a clearing house, the proposal provides that the trustee would value the contract at the clearing house's settlement price as of the end of the settlement cycle during which it is

liquidated. ICE does not believe it this price should be used, but instead that the price achieved in the auction should be used.

F. Margin Payments by Trustee. The amendments would clarify the ability of the trustee to make variation margin payments on open contracts, pending their liquidation or transfer. ICE supports this change.

G. Definition of Customer Property. ICE notes the Commission's changes to the definition of customer property In Rule 190.09(a)(ii)(L) in the context of an FCM failure. This proposed change is designed to address the issues raised in the Griffin Trading case relating to the extent to which property in the debtor's general estate may be treated as customer property where customer property is otherwise insufficient to pay customer claims. ICE is not expressing a view on this aspect of the proposal, but notes that the issue may be complicated to the extent an FCM is engaged in other activities outside of futures and cleared swaps (including securities and uncleared swaps and security-based swaps) and it, thus, may warrant further consideration.

Conclusion

ICE appreciates the opportunity to comment on the Proposal. ICE recognizes, and applauds the significant work reflected in the Proposal and the ongoing engagement of the Commission and its staff with the industry in the process of preparing the proposal. ICE shares the Commission's goals of clarifying and updating the insolvency regime applicable to FCMs and DCOs, and ICE respectfully requests that the Commission and its staff consider the comments in this letter in light of those goals. ICE would be pleased to discuss any of the issues in our comments, or other aspects of the Proposal, with the Commission and its staff as the Commission considers final rules.

Sincerely,

Chris Edmonds

Chris Edmonds
Global Head of Clearing & Risk
Intercontinental Exchange, Inc.

cc: Honorable Chairman Heath P. Tarbert
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