October 26, 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 Supplemental 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 supplemental proposal from the Commodity Futures Trading Commission (the "Commission" or the "CFTC"), titled "Bankruptcy Regulations" (the "Supplemental Proposal").[1] ICE has previously commented[2] on the Commission's original notice of proposed rulemaking relating to the Part 190 regulations (the "Original Proposal").[3]

ICE currently operates four derivatives clearing organizations ("DCOs") registered with the Commission: ICE Clear Credit LLC,[4] ICE Clear Europe Limited,[5] ICE Clear US, Inc.[6] and ICE NGX Canada Inc.[7] 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. As an operator of DCOs, ICE is keenly interested in the issues raised by the Original Proposal and the Supplemental Proposal. ICE therefore welcomes the opportunity to comment on the Supplemental Proposal.

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1 85 FR 60110 (September 24, 2020) (RIN 3038-AE67) (Supplemental Notice of Proposed Rulemaking).

2 Comment Letter from Chris Edmonds, Global Head of Clearing & Risk, Intercontinental Exchange, Inc., to Christopher Kirkpatrick, Secretary, CFTC, dated July 13, 2020 (the "Initial ICE Comment Letter").

3 85 FR 36000 (June 12, 2020) (RIN 3038-AE67).

4 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").

5 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.

6 ICE Clear US has elected to be a subpart C DCO pursuant to Commission Rule 39.31.

7 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.

The Commission issued a Supplemental Proposal relating to proposed Rule 190.14(b), which would permit the continued operation of an insolvent DCO for up to six days if approved by the bankruptcy trustee. In the Original Proposal, the Commission stated that proposed rule is designed to facilitate the transfer of positions from an insolvent DCO to another clearing organization and/or the conduct of a resolution proceeding for the DCO under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Orderly Liquidation Authority").

As set out in the Initial ICE Comment Letter, ICE generally supports the Commission's efforts to amend the Part 190 regulations. ICE shares some of the concerns expressed by commenters with respect to Rule 190.14(b) in the Original Proposal. Moreover, ICE has both substantive and procedural concerns regarding the Commission's approach in the Supplemental Proposal. As discussed herein, ICE recommends that the Commission withdraw the Supplemental Proposal and also not finalize the originally proposed Rule 190.14(b).

1. Concerns with Proposed Rule 190.14(b).

As the Commission noted, numerous commenters questioned aspects of Rule 190.14(b), as proposed by the Commission in the Original Proposal.[8] The Commission's Original Proposal recognized that it may not be practicable for a DCO to continue operations following a bankruptcy filing, particularly where the DCO's rules provide for the termination of all outstanding cleared contracts upon a DCO insolvency.

As discussed in the Initial ICE Comment Letter, ICE agrees with the Commission that it is unlikely that a DCO can continue to operate after a bankruptcy filing given termination provisions in DCO rules. ICE recommended that any final rules not amend or interfere with the rights of clearing members under DCO rules to terminate their contracts after a DCO failure. ICE notes that clearing member capital and accounting treatment for cleared positions depends on their having an enforceable right to terminate those cleared positions in the event of a DCO insolvency. For this reason, ICE suggested in the Initial ICE Comment Letter that the Commission clarify that proposed Rule 190.14(b), if adopted, would not interfere with either the automatic termination of contracts upon insolvency or clearing member rights to terminate contracts upon insolvency.

2. Approach in Supplemental Proposal.

The Supplemental Proposal withdraws proposed Rule 190.14(b) and instead proposes a temporary stay of termination rights upon a DCO bankruptcy filing until the later of 48 hours after the commencement of the bankruptcy proceeding or the close of business on the next business day following the commencement of the proceeding. The proposed stay requirement is meant to parallel the resolution stay that applies to the resolution of a financial company under the Orderly Liquidation Authority and would only apply to bankruptcies of systemically important DCOs ("SIDCOs"), not to other DCOs. Notably, the proposed stay regulation would

[8] See Supplemental Proposal, 85 FR at 60111; see. e.g., Futures Industry Association Comment Letter (Jul. 20, 2020), p. 5.

not come into effect until the U.S. bank regulators confirm that the stay would not affect the status of clearing house netting arrangements for bank capital purposes.

In ICE's view, the Supplemental Proposal raises significant concerns, more so than the original Rule 190.14(b) proposal. Specifically, the proposal exacerbates any legal uncertainty around clearing members' rights upon a DCO insolvency and related questions on the capital treatment of cleared positions. These problems are heightened with respect to non-U.S. clearing members as the Supplemental Proposal fails to take into account the potential effects of the stay on non-U.S. clearing members and does not contemplate any formal consultation with non-U.S. regulators. It is also unclear whether the Commission has the authority under Section 20 of the Commodity Exchange Act to override the provisions of the Bankruptcy Code and other applicable law authorizing the termination of cleared contracts upon an insolvency.

a. Overall Implications.

As acknowledged in the Original Proposal and Supplemental Proposal, most DCOs have adopted rules providing for the termination of cleared contracts in the event of the DCO's insolvency. In some cases, these rules provide for automatic termination upon (or automatically at a specified time following)[9] a bankruptcy filing with respect to the DCO. In other cases, they offer clearing members the contractual right to terminate the cleared contracts following the DCO insolvency. As the Commission has recognized, these provisions are critical to the capital treatment of cleared contracts under the Basel capital framework applicable to bank or bank affiliate clearing members. Moreover, at this point, these DCO rules are part of the well settled contractual expectations of clearing members.

The Supplemental Proposal would impose a stay on the exercise of termination rights, which would be a significant change to longstanding arrangements. The Commission has attempted to minimize the potential adverse effects by requiring, before a final regulation imposing the stay becomes effective, confirmation from U.S. bank regulators that the stay will not have adverse consequences for clearing members from a bank capital perspective. Even with this condition, the proposal would modify longstanding rules and expectations without clear benefit. Although the Commission asserts that the stay would make it easier for a bankruptcy trustee to transfer cleared positions or transition to a resolution proceeding, it is unclear whether

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9 We note that under the ICE Clear Credit Rules 805 and 810, termination of cleared contracts would automatically occur in the case of a DCO insolvency, with the termination valuation occurring as of 5 p.m. New York time on the second ICE Business Day following the insolvency filing. This approach is designed to provide certainty as to termination of contracts upon an insolvency, while providing a delay for the close out valuation process to facilitate an orderly and fair valuation of closed positions after the market has had an opportunity to react to the news of the insolvency. It is not at all clear how the proposed stay under the Supplemental Proposal would apply in the context of the existing ICE Clear Credit rules. At a minimum, even if it did not add any overall time to the termination process, the stay would create uncertainty as to the ultimate result of termination, and potentially affect the ability of the clearing house to continue to manage risk in the interim. At best the requirement would not improve upon the functioning of the existing ICE Clear Credit rule. As such, ICE does not see any regulatory benefit to the Supplemental Proposal as it would apply to ICE Clear Credit that would outweigh the potential uncertainty created.

this would in fact be the case or whether transferring cleared positions is preferable to termination. The Supplemental Proposal additionally prevents a DCO from effectively managing its risk during the stay period. In ICE's view, the potential for a stay is likely to create uncertainty as to the status of cleared contracts at precisely the time when such uncertainty will only increase market stress.

ICE also notes that the remainder of the Part 190 framework adopted for DCOs does not depend on proposed Rule 190.14(b) and that it is not necessary to impose a stay on termination rights in order to implement the other provisions of the Part 190 framework. The Commission could withdraw Rule 190.14(b) without adopting the changes in the Supplemental Proposal, which would avoid interfering with the existing termination rules of DCOs.

b. Implications for Non-U.S. Clearing Members.

The Supplemental Proposal raises significant concerns regarding the treatment of cleared contracts under the Basel capital rules. To address these concerns, the CFTC has provided that the stay regulation will not become effective until U.S. bank regulators confirm that the stay would not cause cleared contracts to fail to be eligible for netting treatment under the U.S. implementation of the Basel capital rules. While consultation with the U.S. bank regulators is helpful, ICE is concerned that there is no similar consultation with supervisors of non-U.S. clearing members. Certain DCOs, including ICE Clear Credit, have clearing members that are organized outside of the U.S. and are subject to bank capital rules of their home jurisdictions. For such clearing members, the question is whether their home country capital regimes will continue to permit netting treatment of cleared positions notwithstanding a stay imposed under the Supplemental Proposal. Even if U.S. bank regulators provide the confirmation requested by the Commission, it is unclear whether non-U.S. bank regulators would take a similar position. If the Commission proceeds with adopting the stay regulation, an adverse determination by non-U.S. regulators would have significant capital implications for non-US clearing members. That in turn could affect such clearing members' utilization of a U.S. DCO for clearing which could have an adverse impact on the business of DCO's and the stability of the overall clearing ecosystem.

As such, ICE believes the Supplemental Proposal should not be implemented without consideration of the implications for all clearing members and without the opportunity for consultation with non-U.S. and U.S. bank regulators.

c. Commission Authority.

ICE is also concerned that the Commission lacks the statutory authority to implement the Supplemental Proposal. Section 20 of the CEA grants the Commission authority to determine the meaning of certain terms used in the Bankruptcy Code related to the insolvency of a commodity broker such as a DCO, particularly including what property constitutes customer property and/or member property. Although Section 20 also allows the Commission to address the method by which the business of a commodity broker is to be conducted after the filing of the bankruptcy petition, it is far from clear that this general authority permits the Commission to override the express and unambiguous provisions of the Bankruptcy Code, including Sections

556, 560 and 561[10] that permit a party to exercise contractual rights to terminate and net contracts upon an insolvency. ICE is not aware of any other aspect of the Part 190 regulations (current or proposed) that would similarly purport to contradict express provisions of the Bankruptcy Code. The proposed stay is also inconsistent with the clearing organization netting protections of FDICIA.[11] As a result, there is a risk that the Supplemental Proposal could be subject to challenge as beyond the Commission's authority, at precisely the time of the disruption caused by a DCO insolvency.

d. Limitation to SIDCOs.

The stay under the Supplemental Proposal would be limited to SIDCOs. Although ICE has concerns about the adoption of the Supplemental Proposal, if the Commission nonetheless determines to proceed with adopting a stay requirement, ICE agrees that it should only be extended to SIDCOs.

e. Procedural Considerations.

ICE also has procedural concerns with the Supplemental Proposal. First, the proposal does not set forth the text of any actual rules. Given the importance of the proposed stay, ICE would expect the Commission to propose regulatory language on which market participants can comment before adopting any final rule.

In addition, insolvency stays and the relationship between an insolvency proceeding and resolution raise significant policy issues that warrant further consideration before adopting any final rules. ICE believes that if the Commission wants to explore these issues, it should do so in a separate Part 39 rulemaking rather than as a supplement to the broader Part 190 rules. In ICE's view it is not necessary to address the Supplemental Proposal in order to finalize the remainder of the Part 190 rules. ICE therefore recommends that the Commission raise these issues separately after the completion of the other Part 190 rules.

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10 11 U.S.C. 556, 560, 561. For example, Section 556 provides in relevant part: "The contractual right of a commodity broker, financial participant, or forward contract merchant to cause the liquidation, termination, or acceleration of a commodity contract, as defined in section 761 of this title, or forward contract because of a condition of the kind specified in section 365(e)(1) of this title, and the right to a variation or maintenance margin payment received from a trustee with respect to open commodity contracts or forward contracts, shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by the order of a court in any proceeding under this title. As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act)…."

11 12 U.S.C. 4404 (providing that covered contractual payment obligations and entitlements of a member of a clearing organization shall be terminated, liquidated, accelerated and netted in accordance with the terms of the applicable netting contract, including clearing organization rules), 4405 (providing that no stay, injunction or similar proceeding or order, whether issued by a court, administrative agency or otherwise, shall limit or delay application of an otherwise enforceable netting contract in accordance with Section 4404).

Conclusion.

As discussed in the Initial ICE Comment Letter, ICE appreciates the efforts of the Commission and its staff with respect to the Part 190 rule revisions. ICE also believes that the Supplemental Proposal raises important policy considerations regarding DCO insolvency and resolution. However, the Supplemental Proposal would likely cause more problems than it solves by disrupting the existing rule frameworks of DCOs and the expectations of clearing members. Moreover, the Supplemental Proposal does not adequately take into account the position of clearing members located outside the U.S. and could have significant adverse capital consequences for them. Finally, ICE believes there are questions as to the Commission's authority to adopt the proposal.

All of these factors could increase rather than reduce legal uncertainty, which is contrary to the goals of the Part 190 revisions and the overall Part 39 rule framework. ICE believes the Commission would be better served by not proceeding with the Supplemental Proposal at this time and simply withdrawing proposed Rule 190.14(b). Such an approach would not interfere with the implementation of the other proposed changes to Part 190 rules.

ICE appreciates the opportunity to comment on the Supplemental Proposal. ICE would be pleased to discuss any of the issues in our comments with the Commission and its staff as the Commission considers the final Part 190 rule amendments.

Respectfully submitted,

Chris Edmonds

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