



June 11, 2013

Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Attention:    Elizabeth Murphy  
                  Secretary

Re:    Request for Exemption from Clearing Agency Registration for ICE Clear Europe Limited under Section 17A(b) of the U.S. Securities Exchange Act of 1934

Ladies and Gentlemen:

ICE Clear Europe Limited (“ICE Clear Europe”) hereby requests that the Securities and Exchange Commission (the “Commission”) grant it an exemption from registration as a securities clearing agency (an “SCA”), pursuant to Section 17A(b) of the U.S. Securities Exchange Act of 1934, as amended (the “Exchange Act”), in connection with its clearing of certain securities options and security futures traded on the LIFFE Administration and Management market (“LIFFE A&M”).

### **Introduction and Background**

ICE Clear Europe is currently registered with the Commission as an SCA for the purposes of clearing security-based swaps pursuant to Section 17A(l) of the Exchange Act.<sup>1</sup> ICE Clear Europe is also registered as a derivatives clearing organization with the U.S. Commodity Futures Trading Commission and is a recognised clearing house supervised by the Bank of England. It is also the operator of a “designated system” for purposes of the EU Settlement Finality Directive and an “inter-bank payment system” supervised by the Bank of England. ICE Clear Europe is incorporated under the laws of England and Wales and is located in London, UK.

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<sup>1</sup> Pursuant to Section 17A(l) of the Exchange Act, ICE Clear Europe became a registered SCA for security-based swaps on July 16, 2011, the date of effectiveness of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. In this request, ICE Clear Europe is not seeking any change in its status as a registered SCA with respect to the clearing of security-based swaps.

ICE Clear Europe has agreed to become the clearing organization for futures and option contracts traded on LIFFE A&M (the “LIFFE Contracts”),<sup>2</sup> a recognized investment exchange under the UK Financial Services and Markets Act of 2000. Among the LIFFE Contracts are certain futures and options contracts on underlying securities, which we refer to herein as the “LIFFE Securities Products.”<sup>3</sup> Currently, the LIFFE Securities Products are cleared by LIFFE A&M, with certain clearing functions performed by LCH Clearnet Limited,<sup>4</sup> as described in the no-action relief previously provided to LIFFE A&M and its predecessor entities by Commission staff. ICE Clear Europe proposes to provide substantially the same clearing functions for the LIFFE Securities Products as are currently being provided by LIFFE A&M and LCH Clearnet.

As a registered SCA, ICE Clear Europe has submitted to the Commission for approval under Section 19(b)(2) of the Exchange Act proposed amendments to its rules and procedures (the “LIFFE Clearing Proposed Amendments”) that implement the clearing relationship for the LIFFE Contracts, including the LIFFE Securities Products.<sup>5</sup>

As the Commission is aware, ICE Clear Europe proposes to commence clearing of the LIFFE Contracts as of July 1, 2013. Significantly, the transfer of the clearing relationship to ICE Clear Europe also requires the transfer of the open interest in LIFFE Contracts and related margin to ICE Clear Europe, which is scheduled to occur on or about that date. Clearing members and other market participants, as well as ICE Clear Europe itself, have undertaken significant efforts to prepare for the transition. ICE Clear Europe believes that a delay in the transition could cause significant and unnecessary disruption to the LIFFE markets and market participants.

### **Purpose of Requested Exemption**

ICE Clear Europe requests that the Commission grant an exemption from clearing agency registration under Section 17A(b) of the Exchange Act and Commission Rule 17Ab2-1 thereunder solely in connection with ICE Clear Europe’s proposed clearing activity involving the

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<sup>2</sup> The LIFFE Contracts also include futures and options on interest rates and physical commodities.

<sup>3</sup> For purposes of this request, the term “LIFFE Securities Products” does not include LIFFE Contracts that are futures contracts on broad-based security indices (as such products are within the jurisdiction of the CFTC). Commodity Exchange Act Section 2(a)(1)(C); Exchange Act Section 3(A)(55).

<sup>4</sup> We note that neither LIFFE A&M nor LCH Clearnet is registered as an SCA or has obtained a formal exemption from registration in connection with the clearing of such products, consistent with the precedents discussed below.

<sup>5</sup> File No. SR-ICEEU-2013-09. On May 13, 2013, ICE Clear Europe initially filed the LIFFE Clearing Proposed Amendments. On May 22, 2013, ICE Clear Europe submitted Amendment No. 1 to the proposed rule change to, among other things, clarify the scope of products proposed to be cleared, add new Rule 207(f) prohibiting FCM/BD Clearing Members and other Clearing Members organized in the U.S. from clearing LIFFE Contracts that are futures or options on underlying U.S. securities, add additional clarification surrounding the operation of the combined F&O Guaranty Fund and the margining of LIFFE Contracts, and supplement the statutory basis for the proposed rule change. Notice of the proposed rule changes was published by the Commission on May 23, 2013 (Release No. 34-69628, published at 78 Fed. Reg. 32287 (May 29, 2013)) (the “LIFFE Clearing Rule Notice”). On June 4, 2013, ICE Clear Europe submitted Amendment No. 2 to the proposed rule change to set forth more fully the statutory basis for the proposed rule changes and to make certain additional rule changes relevant to changes in margin requirements. Notice of Amendment No. 2 was published by the Commission on June 5, 2013 (Release No. 34-69703).

LIFFE Securities Products. As discussed herein, ICE Clear Europe, as a registered SCA, has submitted to the Commission proposed rule changes to implement the LIFFE clearing relationship. In discussions surrounding those proposed rule changes, Commission staff has indicated a concern that ICE Clear Europe may not be permitted to clear the LIFFE Securities Products without a separate registration as a clearing agency under Section 17A(b) or an exemption from registration. Although ICE Clear Europe does not believe that registration should be required in connection with such activity in light of jurisdictional considerations and relevant precedent, ICE Clear Europe is prepared to seek this exemption (rather than proceed solely on the basis of the proposed rule changes) to provide certainty for itself, its clearing members and other market participants as to the legal status of such activities. ICE Clear Europe further believes that such an exemption is consistent with the policies underlying Section 17A of the Exchange Act, as discussed herein.

In the alternative, or in the interim during any period prior to the grant of any such exemption, ICE Clear Europe seeks confirmation by no-action or interpretive letter that the Division of Trading and Markets and Commission staff would not recommend to the Commission enforcement action against ICE Clear Europe, its clearing members or other market participants as a result of ICE Clear Europe conducting clearing activity involving the LIFFE Securities Products on the terms and conditions set forth in the LIFFE Clearing Proposed Amendments.

### **Analysis**

Section 17A(b)(1) of the Exchange Act requires the registration of securities clearing agencies, as follows:

Except as otherwise provided in this section, it shall be unlawful for any clearing agency,<sup>6</sup> unless registered in accordance with this subsection, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to any security (other than an exempted security). The Commission, by rule or order, upon its own motion or upon application, may conditionally or unconditionally exempt any clearing agency or security or any class of clearing agencies or securities from any provisions of this section or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of this section, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds.

Section 17A does not directly address, other than through its reference to the use of the means or instrumentality of interstate commerce, the application of this requirement in the context of a foreign clearing agency. However, the Commission and its staff have repeatedly taken the position that a foreign clearing agency (clearing securities other than security-based swaps) would be required to register as a securities clearing agency (or obtain an exemption from

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<sup>6</sup> “Clearing agency” is defined as “any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or who provides facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities.” Exchange Act Section 3(a)(23)(A).

registration) only if it provides clearing services for U.S. securities directly to U.S. persons. (This longstanding position is summarized in the Commission's recent proposed regulations addressing the cross-border application of security-based swaps.<sup>7</sup>) Accordingly, the Commission has not required a foreign clearing agency to register (or obtain a formal exemption) where it has solely non-U.S. members and/or clears only non-U.S. securities.

For example, in the case of the Euroclear system, exemption from clearing agency registration was sought so that Euroclear could provide U.S. participants with a means of acquiring, holding, transfer or pledging interests in U.S. government and U.S. agency securities through the Euroclear system. The Commission granted an exemption from clearing agency registration on this basis.<sup>8</sup> By contrast, Euroclear did not seek an exemption with respect to its business of clearing foreign and internationally traded securities.<sup>9</sup> Consistent with the statement of the Commission's policy above, the Commission appears to have accepted this position without requiring registration or an exemption for this business.

Similarly, in the case of Cedel Bank (now Clearstream Banking), exemption was sought in order to permit Cedel to offer clearance, settlement and collateral management services to its members involving U.S. treasury and agency securities.<sup>10</sup> No exemption was sought (nor was any issue raised) with respect to Cedel's other clearing activities in non-U.S. securities. In addition, in the context of clearing U.S. securities, the Commission appears to have permitted European Central Counterparty Limited ("EuroCCP") to clear U.S. securities without registration or an exemption, provided that settlement occurred through a U.S. registered clearing agency (DTC).<sup>11</sup>

In ICE Clear Europe's view, its proposed clearing activities with respect to the LIFFE Securities Products should not require clearing agency registration, or exemption, under the Commission's policy statements and these precedents.<sup>12</sup> The LIFFE Securities Products consist of futures and

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<sup>7</sup> See Cross-Border Security-Based Swap Activities; 78 Fed. Reg. 30968, 31039 n. 682 (May 23, 2013). The Commission proposes to take a slightly different position with respect to the clearing of security-based swaps, pursuant to which registration (or an exemption) would be required if a foreign clearing agency clears security-based swaps for a U.S. clearing member. In this regard, the Commission proposes to distinguish the requirement to register under Section 17A(g), which applies only to clearing of security-based swaps, from the requirement to register under Section 17A(b), which applies to clearing of securities generally.

<sup>8</sup> See, e.g., Morgan Guaranty Trust Company of New York, Brussels Office, as Operator of the Euroclear System, Exchange Act Release No. 34-38589 (May 9, 1997) (the "Euroclear Order").

<sup>9</sup> Id. at n. 16. In this regard, the Euroclear Order described foreign and internationally traded securities include debt and equity securities issued by foreign private and governmental issuers that trade principally in their home markets and/or internationally.

<sup>10</sup> See Cedel Bank S.A., Order Approving Application for Exemption from Registration as a Clearing Agency, Release No. 34-38327 (Feb. 24, 1997).

<sup>11</sup> See Order Approving Proposed Rule Change to Allow The Depository Trust Company to Provide Settlement Services to European Central Counterparty Limited for U.S. Securities Traded on European Trading Venues; Release No. 34-61593 (Feb. 25, 2010).

<sup>12</sup> ICE Clear Europe believes that it should be regarded as a foreign clearing agency for these purposes. As described in the LIFFE Clearing Rule Notice, ICE Clear Europe's clearing operations with respect to the LIFFE Securities Products, and particularly those relating to U.S. securities, will be conducted outside the United States (with the exception of certain information technology services obtained from U.S. affiliates). Although ICE Clear

option contracts involving underlying equity securities. For contracts on underlying non-U.S. securities, clearing by a foreign clearing organization such as ICE Clear Europe should not require registration or exemption, even if U.S.-based clearing members have access to such products.

Contracts involving underlying U.S. securities may, on the other hand, constitute U.S. securities. As a result, consistent with the Commission's prior statements and positions, clearing such contracts for U.S.-based clearing members may require registration or an exemption. However, as described in the LIFFE Clearing Rule Notice, ICE Clear Europe proposes to adopt rules that prohibit U.S.-based clearing members from clearing such products.<sup>13</sup> Accordingly, ICE Clear Europe does not believe that it should technically be required to register as a securities clearing agency for such products under Section 17A(b), or obtain a formal exemption from registration, solely for the purpose of clearing such products.

Commission staff has expressed a concern that ICE Clear Europe, because of its particular status and operations, may not fall within these positions. In particular, ICE Clear Europe is currently registered as a securities clearing agency for certain purposes (i.e. security-based swap clearing). In ICE Clear Europe's view, the fact that it is registered as a securities clearing agency for purposes of clearing security-based swaps should not change the registration analysis for other products. ICE Clear Europe's security-based swap clearing activities are for relevant purposes separate from the proposed LIFFE securities product clearing activities, and in particular are supported by a separate guaranty fund. ICE Clear Europe's registration for security-based swap clearing should not preclude it from engaging in other clearing activities that would otherwise be permissible without registration under the Exchange Act.

Without necessarily agreeing with the position expressed by Commission staff, ICE Clear Europe recognizes that certain aspects of its operations and regulatory status may create some uncertainty as to its clearing of the LIFFE Securities Products. In particular, ICE Clear Europe recognizes that the Commission has not, to its knowledge, previously addressed the treatment of a foreign clearing agency that is registered as an SCA for some purposes and not required to register for other securities-related activities. As a result, ICE Clear Europe is prepared to seek a formal exemption from registration as a securities clearing agency under Section 17A(b) in connection with its clearing of the LIFFE Securities Products. ICE Clear Europe believes that such an exemption will address any concerns raised by Commission staff as to its authority to clear the LIFFE Securities Products, and provide it, and its clearing members and other market participants, greater certainty as to the legal status of its clearing operations in these products.<sup>14</sup>

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Europe obtains certain services from some of its U.S. affiliates in connection with its security-based swap clearing activities, those services are not relevant to the clearing of the LIFFE Securities Products. Accordingly, ICE Clear Europe does not believe such arrangements would affect the analysis discussed above.

<sup>13</sup> As described in more detail in the LIFFE Clearing Rule Notice, ICE Clear Europe further proposes to implement operational procedures and systems that implement this rule by preventing U.S.-based clearing members from clearing such products.

<sup>14</sup> Because its proposed activities should not, in its view, require registration, ICE Clear Europe believes that an exemption would be a more appropriate way of providing this legal certainty, and permitting such clearing to be performed, than full registration as a clearing agency under Section 17A(b).

In addition, ICE Clear Europe believes that such an exemption would be consistent with the public interest, the protection of investors and the purposes of Section 17A, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds. Significantly, ICE Clear Europe is not seeking an exemption from substantive regulation in connection with its clearing of the LIFFE Securities Products. As set forth in more detail in the LIFFE Clearing Rule Notice, ICE Clear Europe will clear the LIFFE Securities Products in a manner consistent with the requirements of Section 17A of the Exchange Act and Rule 17Ad-22 thereunder, including the requirements as to financial resources, operational and managerial resources, participant requirements, settlement procedures, safeguarding of funds and default procedures, among others. ICE Clear Europe would thus manage its securities clearing activities involving the LIFFE Securities Products to the standards applicable to registered securities clearing agencies.

Indeed, since ICE Clear Europe is a registered clearing agency for other products, ICE Clear Europe's clearing of the LIFFE Securities Products, even if technically exempt from registration, will in practice be subject to the requirements under the Act applicable to a registered clearing agency, notably the rule approval requirements under Section 19(b) of the Exchange Act. In this regard, we also note that the Commission currently exercises supervision and examination over ICE Clear Europe's business generally, including regular on-site examination.

As a result, ICE Clear Europe believes that granting an exemption that permits ICE Clear Europe to clear the LIFFE Securities Products in the manner set forth in the LIFFE Proposed Clearing Rules (as they may be amended consistent with Section 19(b) of the Exchange Act) will further the goals of Section 17A. Notably, the proposed clearing activities will bring the LIFFE Securities Products within a clearing agency that (even if exempt for this purpose) is subject to supervision by the Commission and is required to comply with the standards of Section 17A and Commission regulations. Such clearing will therefore, in ICE Clear Europe's view, benefit the public interest and further the protection of investors and market participants.

As noted above, ICE Clear Europe, its clearing members and market participants have expended significant efforts to prepare for a transition of the LIFFE clearing relationship to ICE Clear Europe as of July 1, 2013. ICE Clear Europe is concerned that a delay in its ability to clear the LIFFE Contracts beyond that date would cause disruption to the market for these products. In addition, we note that by September 2013, all European clearing organizations will need to apply for authorization under the European Markets and Infrastructure Directive (EMIR). The current LIFFE clearing arrangements are not built out for EMIR compliance, and therefore LIFFE A&M, ICE Clear Europe, LCH Clearnet and market participants are relying on this transition taking place in order to be compliant with EU law. ICE Clear Europe thus respectfully requests that the Commission consider this exemption request on an expedited basis.

If you or your staff should have any further questions or require additional information, please do not hesitate to contact the undersigned at [paul.swann@theice.com](mailto:paul.swann@theice.com) or +44 20 7065 7700, Dee Blake, Director of Regulation at [dee.blake@theice.com](mailto:dee.blake@theice.com) or +44 20 7065 7752, or Patrick Davis, Head of Legal and Company Secretary, at [patrick.davis@theice.com](mailto:patrick.davis@theice.com) or +44 20 7065 7738.

Very truly yours,

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