



June 13, 2012

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: ICE Clear Credit LLC: Request for Exemptive Relief Pursuant to Section 713(a) of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act re: Maintaining Customer Funds in Single Customer Omnibus Accounts for Positions in Single-Name Credit Default Swaps and Broad-based Credit Indices and Portfolio Margining [File No. 4-641]**

Dear Ms. Murphy:

Managed Funds Association<sup>1</sup> appreciates the opportunity to provide comments to the Securities and Exchange Commission (the “**Commission**”) regarding ICE Clear Credit LLC’s (“**ICE Clear Credit**”) petition<sup>2</sup> for exemptive relief pursuant to Section 713(a) of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “**Dodd-Frank Act**”) <sup>3</sup>, to

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<sup>1</sup> Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and all other regions where MFA members are market participants.

<sup>2</sup> ICE Clear Credit LLC – Request for order pursuant to Section 36(a)(1) of the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”), to provide exemptive relief from the application of Section 15(c)(3) of the Exchange Act and Rule 15c3-3 thereunder re: commingling of customer funds and portfolio margining, dated November 7, 2011, submitted to the Commission by Michael M. Philipp, Partner, Winston & Strawn LLP, as counsel to ICE Clear Credit LLC (the “**ICE SEC Petition**”). ICE Clear Credit has also filed a companion petition on October 4, 2011 with the Commodity Futures Trading Commission (the “**CFTC**”) seeking similar exemptive relief pursuant to Section 713(a) of the Dodd-Frank Act (the “**ICE CFTC Petition**”). See MFA’s comment letter in support of the ICE CFTC Petition, dated December 21, 2011 (the “**MFA CFTC Letter**”), available at: [http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/mfa\\_122111.pdf](http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/mfa_122111.pdf). Copies of the MFA CFTC Letter were delivered to each Commissioner, as we also expressed our support for the ICE SEC Petition. Both petitions of ICE Clear Credit are together referred to herein as the “**ICE Petitions**”.

<sup>3</sup> Pub. L. 111-203, 124 Stat. 1376 (2010). Section 713(a) of the Dodd-Frank Act amended Section 15(c)(3) of the Exchange Act to authorize the Commission to grant exemptions under section 36 of the Exchange Act or to adopt rules or regulations that permit securities to be held in a portfolio margining account that is regulated as a futures account under Section 4d of the Commodity Exchange Act (“**CEA**”) pursuant to a portfolio margining program approved by the CFTC. The ICE SEC Petition noted that Congress’s broad reference to a “futures account subject to section 4d” in Section 713(a) would encompass section 4d(f) thereunder, which provides for the

permit ICE Clear Credit to: (a) maintain customer funds in single customer omnibus accounts subject to Section 4d(f) of the CEA (“**cleared swaps customer accounts**”) for positions in single-name credit default swaps (“**Security-Based CDS**”) and broad-based credit indices (“**Index CDS**”); (b) calculate margin for cleared swaps customer accounts pursuant to a portfolio margining program approved by the Commission and the CFTC; and (c) provide similar relief to entities that are dually registered as futures commission merchants (“**FCMs**”) and securities broker-dealers (“**BDs**”) (such dually registered entities referred to herein as “**BD/FCMs**”) that maintain clearing accounts for customers at ICE Clear Credit.

## Executive Summary

MFA believes that the authority to calculate margin for cleared swaps customer accounts on a portfolio margin basis is essential to encourage increased clearing of swaps, enhance customer hedging and reduce systemic risk through clearing, and provide capital efficiencies for market participants. Thus, MFA supports the ICE SEC Petition because of the significant benefits to customers in the form of capital efficiencies and clearing access that result from portfolio margining and netting. MFA also supports the ICE SEC Petition’s request to hold customer positions in Index CDS and correlated Security-Based CDS, and related assets supporting such positions, in cleared swaps customer accounts to implement its portfolio margining program.

We encourage the Commission to grant the requested exemptive relief in the ICE SEC Petition to enable ICE Clear Credit to offer portfolio margining relief with respect to customer-related CDS transactions as soon as possible. MFA’s members strongly urge the Commission to view the expediency of granting such exemptive relief as a priority in order to remove a competitive barrier that customers currently face relative to swap dealers, as proprietary account holders. Specifically, MFA is very concerned that customers cannot benefit from the same capital relief and access to clearing that BD/FCMs have been offered under ICE Clear Credit’s portfolio margining program for clearing participant proprietary positions in Index CDS and correlated Security-Based CDS products. Earlier this year, ICE Clear Credit implemented its clearing participant portfolio margining program after receiving approval from the Commission and submitting its self-certification to the CFTC.<sup>4</sup> To date, customers continue to be unfairly and

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segregation of customer funds used to margin, guarantee or secure cleared swaps, and accordingly, should be construed to facilitate portfolio margining of cleared swaps and security-based swaps by permitting commingling of such products in a Section 4d(f) account. *Id.* at p. 15, n. 66.

<sup>4</sup> The Commission approved ICE Clear Credit’s proposed rule change SR-ICC-2011-03 on December 16, 2011. *See* Release No. 34-66001 (allowing ICE Clear Credit to provide portfolio margining offsets to its clearing participants that maintain proprietary portfolios that hedge index CDS products against single-name CDS products). On November 28, 2011, the CFTC received ICE Clear Credit’s self-certification of the implementation of its enhanced margin methodology to provide appropriate portfolio margining relief between Index CDS and offsetting Security-Based CDS positions for its clearing participants’ proprietary positions. On January 30, 2012, ICE Clear Credit announced that it now offers portfolio margining benefits for clearing participants’ proprietary positions, “allowing for more efficient collateralization of opposite positions in index and correlated single-name credit default swap (CDS) instruments”. *See* ICE Clear Credit’s press release, available at: <http://ir.theice.com/releasedetail.cfm?ReleaseID=643809>.

unjustifiably disadvantaged by the Commission's withholding or delaying approval of the ICE SEC Petition to enable ICE Clear Credit to provide the same portfolio margining relief for customer-related cleared CDS transactions. MFA strongly believes that customers should be able to avail themselves of the ICE Clear Credit portfolio margining offering and not be competitively disadvantaged for a protracted period. ICE Clear Credit has an existing portfolio margining offering under the Section 4d(f) account structure. The Commission's approval of the ICE SEC Petition need not at this time require an alternative account offering. MFA submits that granting the ICE SEC Petition now would not prohibit customers from later choosing a different portfolio margining offering under a Section 3E account structure, if made available.

### **MFA Supports ICE Clear Credit's Petitions Because of the Benefits of Netting and Portfolio Margining to Customers and the U.S. CDS Market as a Whole**

MFA believes that ICE Clear Credit's portfolio margining program, if approved by the Commission and the CFTC, will benefit customers and the U.S. CDS market as a whole by: (1) facilitating systemic risk reduction; (2) providing capital efficiencies; (3) encouraging greater clearing and facilitating the transition to clearing; (4) improving buy-side access to clearing and removing economic barriers to customer clearing; (5) promoting competitive equality; and (6) improving the efficiency and effectiveness of risk management. Without the exemptive relief requested in the ICE Petitions, MFA believes that none of these benefits will be realized.

MFA strongly believes that by granting the requested exemptive relief in the ICE Petitions, the Commission and the CFTC will provide customers in the U.S. CDS market with the economic incentives and capital efficiencies necessary to promote clearing of a broader scope of CDS contracts. The requested exemptive relief would thus facilitate the achievement of the systemic risk reduction goal of the Dodd-Frank Act. By virtue of the ability to net customers' offsetting positions in Security-Based CDS and Index CDS in cleared swaps customer accounts under ICE Clear Credit's margin methodology, customers will benefit by not having to post margin in excess of the margin needed to address the market risk relating to their positions. Moreover, without portfolio margin treatment, many customers may determine that clearing their Security-Based CDS and Index CDS will be prohibitively expensive. MFA believes that such a result would have a continuously limiting effect on both the volume of voluntary clearing prior to the clearing mandate becoming effective, and the breadth of CDS clearing after the clearing mandate becomes effective. These results would be inconsistent with a key Dodd-Frank Act goal to promote greater central clearing of swaps to reduce systemic risk.

Without the exemptive relief requested in the ICE Petitions, ICE Clear Credit and its BD/FCMs would be required to maintain separate accounts subject to the different margin rules of the Commission and the CFTC to hold customer collateral relating to Index CDS and Security-Based CDS, respectively. Separate accounts would make clearing significantly more expensive for customers because they would be required to fully margin both accounts. For example, a customer that sells single-name CDS to offset the risk of a correlated Index CDS will, without the ability to net margin under a portfolio margining program, have to post full margin for both assets. The resulting inability of BD/FCMs clearing such transactions on behalf of

customers to net the margin of correlated Index CDS and Security-Based CDS held in separate accounts would eliminate the economic efficiencies that can be gained from portfolio margining and that are inherent in a wide range of hedging strategies. MFA believes these inefficiencies will act as an economic disincentive, not only to customers' efficient portfolio risk management, but also to moving the CDS marketplace in the U.S. to central clearing. Any such significant disincentive would be inconsistent with, and would severely undermine, a fundamental objective of the Dodd-Frank Act to reduce systemic risk through promotion of greater clearing of swaps and the reduction of systemic risk.<sup>5</sup>

MFA's support for the ICE Petitions is also based on our understanding that the Dodd-Frank Act expressly sought to encourage portfolio netting for the systemic risk management reasons set forth, charging the Commission and the CFTC with issuing exemptive orders under Section 713(a) of the Dodd-Frank Act in support of portfolio margining. There is ample regulatory and academic support for the benefits of portfolio margining. For example, in the Federal Reserve Bank of New York Staff Report no. 424, "Policy Perspectives on OTC Derivatives Market Infrastructure," published January 2010 and widely referenced in the deliberations of the Dodd-Frank Act's language, Darrell Duffie, Ada Li and Theo Lubke stated:

Furthermore, because posting margin is a material cost of participating in a CCP, market participants have an additional incentive to clear more if they can reduce the amount of margin to post against their exposures. Regulators should therefore encourage methods for reducing the use of margin whenever this can be done without increasing systemic risk. In particular, the joint clearing of different derivative products in the same CCP improves the opportunity to net positive against negative counterparty exposures, and increases the incentives for market participants to clear their derivatives trades, without increasing systemic risk.<sup>6</sup>

In addition, the Commission and FINRA's Rule 4240 illustrates that the Commission appreciates the benefits of portfolio margining, and acknowledges that approved portfolio margining (Rule 4240 included approval of the ICE portfolio margining program in discussion here) is beneficial to indirect clearing participants and consistent with the risk management requirements of the Dodd-Frank Act.<sup>7</sup>

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<sup>5</sup> MFA notes that the proposed European Market Infrastructure Regulation ("EMIR") in the European Union ("EU") does not have any such jurisdictional bifurcation regarding collateral segregation requirements for derivatives positions relating to commodities and securities. Thus, the U.S. CDS market could be competitively disadvantaged relative to the CDS markets in the EU, particularly if the requested exemptive relief in the ICE Petitions is not granted by the Commission and the CFTC.

<sup>6</sup> Policy Perspectives on OTC Derivatives Market Infrastructure; Darrell Duffie, Ada Li, and Theo Lubke; Federal Reserve Bank of New York Staff Reports, no. 424; January 2010; revised March 2010, at page 14; [http://www.ny.frb.org/research/staff\\_reports/sr424.pdf](http://www.ny.frb.org/research/staff_reports/sr424.pdf)

<sup>7</sup> FINRA Rule 4240, as revised, Effective Date: July 16, 2011, and Regulatory Notice 11-31 (July 2011) (addressing FINRA approval of margin methodologies used by clearing agencies or derivatives clearing organizations for purposes of Rule 4240, and extending the interim pilot program for CDS margin requirements to

## Competitive Concerns

ICE Clear Credit currently clears Security-Based CDS and Index CDS proprietary positions for ICE Clear Credit's direct clearing members, the largest swap dealers, and offers portfolio margining for these accounts. Such proprietary account holders thus are gaining the significant benefits in capital efficiencies that result from portfolio margining. However, these benefits will not be realized by customers until the Commission and the CFTC grant the requested exemptive relief in the ICE Petitions. As a result, the capital required for clearing will be significantly greater for customers than for direct clearing members' proprietary positions. This inequality puts customers at a substantial competitive disadvantage, with no justification under the Dodd-Frank Act. This inequality will not only create a significant economic barrier to buy-side clearing, but will substantially restrain the healthy evolution of increased liquidity that should develop with increased clearing. Burdened by unequal margining, all participants in the market that are not direct clearing members will be unable to offer competitive bids and offers. Liquidity will thus remain concentrated, as it is today in the bilateral markets, in a relatively small number of the largest swap dealer desks, both undermining price competition and concentrating risk in the swaps markets.

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Without portfolio margining, MFA is concerned that customers will have to dedicate increasing funds to initial margins which are not risk-driven, directly reducing customers' ability to support their trading and hedging activities. Thus, the amount of clearing that customers could implement for all of their CDS contracts will be limited, a result that is inconsistent with the systemic risk reduction goal of the Dodd-Frank Act. Further, the inability of customers to net Security-Based CDS with offsetting Index CDS, and *vice versa*, will inhibit open access to clearing for all market participants. This result is inconsistent with Sections 723 and 763 of the Dodd-Frank Act, which require open access and nondiscriminatory clearing of swaps and security-based swaps for all market participants. Clearing by the "buy-side" remains relatively low because of continuing material structural and economic barriers to clearing access for customers. Removal of this specific excess margin cost barrier will help to level the playing field on margin – between cleared and uncleared, and between customers and dealers – at a critical time in the progress toward enabling and expanding buy-side clearing.

For the reasons set forth above, MFA believes the requested exemptive relief, if granted, will promote greater clearing and more efficient and effective risk management in the U.S. CDS market as a whole. Therefore, MFA respectfully requests that the Commission grant the requested exemptive relief in the ICE SEC Petition as soon as possible.

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January 17, 2012); <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124089.pdf>. More recently, the Commission granted accelerated approval of a proposed rule change from FINRA to extend to July 17, 2012, retroactively from January 17, 2012, the existing interim pilot program under FINRA Rule 4240 with respect to margin requirements for Security-Based CDS; <http://www.sec.gov/rules/sro/finra/2012/34-66528.pdf>.

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MFA thanks the Commission for the opportunity to provide comments to support ICE SEC Petition. Please do not hesitate to contact Laura Harper or the undersigned at (202) 730-2600 with any questions the Commission or its staff might have regarding this letter.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell  
Executive Vice President & Managing  
Director, General Counsel

cc: The Hon. Mary L. Schapiro, Chairman  
The Hon. Elisse B. Walter, Commissioner  
The Hon. Luis A. Aguilar, Commissioner  
The Hon. Troy A. Paredes, Commissioner  
The Hon. Daniel M. Gallagher, Commissioner

Robert W. Cook, Director, Division of Trading and Markets  
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The Hon. Gary Gensler, CFTC Chairman  
The Hon. Jill E. Sommers, CFTC Commissioner  
The Hon. Bart Chilton, CFTC Commissioner  
The Hon. Scott D. O'Malia, CFTC Commissioner  
The Hon. Mark P. Wetjen, CFTC Commissioner