ICE CLEAR EUROPE

May 23, 2014

By Email: rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Attention: Kevin M. O'Neill
Deputy Secretary

Comments: Standards for Covered Clearing Agencies
File Number S7-03-14

Ladies and Gentlemen:

ICE Clear Europe Limited ("ICE Clear Europe"), a registered securities clearing agency, respectfully submits this comment letter with respect to proposed Rule 17Ab2-2 and proposed amendments to Rule 17Ad-22 (collectively, the "Proposed Rules")[1] to be adopted by the Securities and Exchange Commission (the "Commission") pursuant to Section 17A of the Securities Exchange Act of 1934 ("Exchange Act") and the Payment, Clearing, and Settlement Supervision Act of 2010 ("Clearing Supervision Act").[2] ICE Clear Europe appreciates the opportunity to comment on the Proposed Rules.

ICE Clear Europe welcomes the efforts of the Commission, like other regulators, to implement clearing agency standards consistent with the CPSS-IOSCO Principles for Financial Market Infrastructures (the "PFMIs").[3] ICE Clear Europe supports the goals, as set forth in the PFMIs and the rules of the Commission and other regulators, of comprehensive regulation of clearing houses. As discussed herein, however, ICE Clear Europe is concerned that the approach taken in the Proposed Rules may unnecessarily subject clearing houses to the risk of duplicative or

1 Release No. 34-71699, "Standards for Covered Clearing Agencies," 79 Fed. Reg. 16866 (March 26, 2014) ("Proposing Release").

2 The Clearing Supervision Act is Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

3 Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions ("CPSS-IOSCO"), Principles for Financial Market Infrastructures (April 16, 2012).

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inconsistent regulation, particularly for clearing houses, like ICE Clear Europe, that are regulated by multiple governmental authorities in multiple jurisdictions.

In addition to being a registered securities clearing agency under the Exchange Act,[4] ICE Clear Europe is (i) a U.K. Recognised Clearing House under the U.K. Financial Services and Markets Act 2000, regulated and supervised by the Bank of England; (ii) a "designated system" for purposes of the U.K. Financial Markets and Insolvency (Settlement Finality) Regulations 1999 and Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems; (iii) a recognised inter-bank payment system under the U.K. Banking Act 2009; and (iv) a derivatives clearing organization ("DCO") registered with the Commodity Futures Trading Commission ("CFTC") under the Commodity Exchange Act, as amended. In addition, ICE Clear Europe has applied for authorization as a central counterparty under Regulation 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories and its regulations and implementing technical standards (commonly referred to as the European Market Infrastructure Regulation, or "EMIR").

ICE Clear Europe thus has a unique perspective on the regulation of clearing houses in multiple jurisdictions and the potential for inconsistent or duplicative regulation. ICE Clear Europe urges the Commission, in implementing its heightened standards for covered clearing agencies, to take a more flexible approach that is not "one-size-fits-all" and considers the overall regulatory status of the relevant clearing house.

ICE Clear Europe's principal concerns regarding the Proposed Rules relate to the definition of "covered clearing agencies." The Proposed Rules would apply a heightened set of clearing agency standards to so-called "covered clearing agencies" under proposed new Rule 17Ad-22(e) (referred to herein as the "covered clearing agency standards"). As proposed, covered clearing agencies would include (i) clearing agencies designated as systemically important by the Financial Stability Oversight Council ("FSOC") under the Clearing Supervision Act ("designated clearing agencies"), (ii) clearing agencies involved in "activities with a more complex risk profile" and (iii) clearing agencies otherwise determined to be a covered clearing agency by the Commission under proposed Rule 17Ab2-2. Significantly, a clearing agency providing central

[4] ICE Clear Europe's SCA registration relates to its clearing of security-based swaps. With respect to its clearing of certain LIFFE A&M contracts that constitute securities (other than security-based swaps), ICE Clear Europe has obtained an exemption from clearing agency registration from the SEC. See SEC Release No. 34-69872 (June 27, 2013).

counterparty services for security-based swaps (such as ICE Clear Europe) would be deemed to be involved in "activities with a more complex risk profile," and thus would automatically be deemed a covered clearing agency.[5]

1. *Covered Clearing Agency Standards Should Only be Required for Designated Systemically Important Clearing Agencies.*

As an initial matter, ICE Clear Europe believes that the covered clearing agency standards should be mandated only for designated clearing agencies (i.e., those clearing agencies that have been designated by FSOC as systemically important under the Clearing Supervision Act and for which the Commission is the designated supervisory authority under that Act). The procedures set forth in the Clearing Supervision Act and implementing regulations provide the appropriate standards (both in terms of substance and procedure), consistent with the statute, for determining that the heightened standards of proposed Rule 17Ad-22(e) are necessary or appropriate for a particular clearing house. Requiring other clearing agencies to comply with the same standards undermines the significance of the designated clearing agency determination and is inconsistent with the distinction Congress created between systemically important designated clearing agencies and other (non-designated) clearing agencies.

ICE Clear Europe believes that the approach taken by the CFTC in its subpart C rules[6] (which adopt similar heightened standards for systemically important DCOs) is instructive in this regard. Under those rules, the heightened standards are only required for systemically important DCOs that are designated as such under the Clearing Supervision Act. Other derivatives clearing organizations may elect to become subject to the higher standards, but are not obligated to do so. (There may be good reasons for clearing houses to so elect, as clearing houses that comply with the heightened standards based on the PFMIs can be treated as a qualified central counterparty for applicable Basel III capital standards. Some DCOs have in fact made this election. Others may determine that compliance with the PFMIs is not necessary for their businesses, or that they are already subject to the PFMIs under the rules of another regulator and do not need in addition to comply with the CFTC's additional standards.) ICE Clear Europe believes that such an

5 It bears noting that clearing agencies that are also systemically important DCOs, for which the CFTC is the designated supervisory authority under the Clearing Supervision Act, would not be deemed to be covered clearing agencies.

6 *See* Derivatives Clearing Organizations and International Standards, 78 Fed. Reg. 72476 (Dec. 2, 2013).

approach would be equally appropriate in the context of a securities clearing agency, and ICE Clear Europe respectfully suggests that the Commission revise the definition of covered clearing agency to be limited to designated clearing agencies and those clearing agencies that opt in to the covered clearing agency standards.

2. *Security-Based Swap Clearinghouses Should Not Automatically be Covered Clearing Agencies*.

To the extent the Commission nonetheless determines to require non-designated clearing agencies to comply with the covered clearing agency standards, ICE Clear Europe believes that the categorical inclusion of all security-based swap clearing houses is inappropriate. It is not clear that security-based swap clearing inherently raises issues that require the heightened standards for covered clearing agencies, as compared to other securities clearing activities. Moreover, even to the extent that security-based swaps may raise additional risks or regulatory concerns, the proposed rule does not take into account the scope of a particular clearing agency's security-based swap activities or the risks presented by them. The categorical rule is particularly of concern where security-based swap activities represent only a portion of the clearing house's overall activities.

ICE Clear Europe believes that the Commission should be required to make a particularized determination that the additional regulatory standards are warranted for a specific clearing house engaging in security-based swap activities, rather than making a categorical determination that all security-based swap clearing houses should be covered.[7] Such an analysis should consider the particular security-based swap activities involved, in light of the overall business of the clearing house, and the particular risks presented by that activity, before determining that the covered clearing agencies standards are warranted for that institution.

3. *The Commission Should Take into Account Supervision of a Clearing House by Other Regulators*.

In ICE Clear Europe's view, any such decision to apply the heightened covered clearing agency standards should take into account whether, and the extent to which, the clearing house is already

[7] It is incongruous that such a particularized determination is required under the Clearing Supervision Act for designated clearing agencies, but not required for security-based swap clearing houses that would become subject to nearly the same level of regulation.

subject to similar or comparable standards under other regulation. The Proposed Rules in fact take this approach with respect to systemically important DCOs for which the CFTC is the designated supervisory authority under the Clearing Supervision Act, as such DCOs are excluded from the covered clearing agency definition. ICE Clear Europe believes that a similar exclusion would be appropriate for clearing agencies subject to other regulatory frameworks.

In ICE Clear Europe's case, for example, the clearing house is subject to comprehensive regulation by the Bank of England under existing U.K. legislation. In addition, upon its authorization as a central counterparty under EMIR, ICE Clear Europe will be subject to comprehensive regulation under EMIR. As has been publicly stated by the Bank of England, E.U. and U.K. regulation of clearing houses will be consistent with the PFMIs.[8]

In such a circumstance, where the clearing house has a home country regulatory that enforces comparable standards based on the PFMIs, ICE Clear Europe believes that the Commission should not also require compliance with the Commission's covered clearing agency standards. At a minimum, imposing the covered clearing agency standards in this case exposes the clearing house to duplicative regulation. This is costly for both the clearing house and the regulators involved and serves no meaningful regulatory purpose. (Even absent the covered clearing agency standards, the Commission would continue to have access to the clearing agency and its books and records for surveillance and supervision purposes, and rule changes of the clearing agency would be subject to the existing rule approval process under Section 19(b) of the Exchange Act and the regulations thereunder.)

It is also critical that clearing houses not be subject to inconsistent regulations in different jurisdictions. Such inconsistencies can arise not only when relevant regulations are different, but also where regulations are substantially similar but regulators interpret those regulations in different ways. Regulators inevitably may take somewhat different views, based on their particular backgrounds, markets and background law, even when implementing the same regulations. As a result, a clearing house can still be significantly burdened by being subject to two substantially similar sets of regulations. In ICE Clear Europe's view, it would be preferable not to impose multiple versions of the same requirements on clearing houses, but instead to allow clearing houses, where possible, to be subject to a single set of standards.

[8] *See* The Bank of England's Approach to the Supervision of Financial Market Infrastructure (April 2013).

Moreover, recognizing existing foreign regulation is consistent with the Commission's proposals on regulation of cross-border activities generally. As the Commission has stated:

> "it may be appropriate to consider an exemption [from clearing agency registration] where the clearing agency is subject to comparable, comprehensive supervision and regulation by appropriate governmental authorities in the home country of the clearing agency, and the nature of the clearing agency's activities and performance of functions within the United States suggests that registration is not necessary to achieve the Commission's regulatory objectives. Exemptions that are carefully targeted could help to improve clearing agency supervision overall by allowing the Commission to devote resources most efficiency where U.S. interests are more directly implicated, while reducing duplication of efforts in areas where its interests are aligned with those of other regulators".[9]

In ICE Clear Europe's view, the approach set out in the proposed cross-border rules sensibly balances the interests of the Commission with those of foreign regulators and appropriately considers the costs and benefits of adding additional regulatory requirements where the home country regulation is comparable. Implementation of the PFMIs represents a clear case where standards are comparable and the U.S. and U.K. regulators have generally aligned interests. Based on the rationale discussed in the proposed cross-border rules, ICE Clear Europe would propose that there be an exception to the definition of covered clearing agency where the relevant clearing agency is subject to comprehensive and comparable regulation by its home country regulator based on the PFMIs.

If there are any areas where the Commission determines that the home country regulation is not comparable and determines that additional regulation may be appropriate, ICE Clear Europe believes that any incremental regulation under the covered clearing agency standards should be targeted to those areas of difference. It is not necessary to subject the clearing agency to a full set of largely duplicative standards in order to address any such gaps or incremental variation.

4. *The Commission Should Apply the Covered Clearing Agency Standards Only to Relevant Activities*.

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[9] Cross-Border Security-Based Swap Activities, 78 Fed. Reg. 30968, 31039 (May 23, 2013). The Commission further proposed that it might consider, as an alternative, targeted rules that are specific to foreign-based clearing agencies that are registered with the Commission.

ICE Clear Europe further believes that any application of the covered clearing agency standards should be targeted to the particular activities of the clearing house that involve securities and warrant the higher standards.

Many clearing houses, including ICE Clear Europe, clear a range of products, some of which may be security-based swaps or other securities within the Commission's jurisdiction and some of which are outside the Commission's jurisdiction. Typically, a clearing house engaged in such activities will be subject to supervision by other regulators. In addition, within the scope of securities activities, only some of those activities (such as security-based swaps as opposed to other securities clearing) would on their own trigger application of the covered clearing agency standards under the Proposed Rules. To the extent possible, ICE Clear Europe believes that the covered clearing agency standards should be limited to those securities activities that trigger covered clearing agency status (such as security-based swap clearing).

This is particularly so where the securities-related activity is substantially separate from other businesses, such as through the use of a separate guaranty fund. ICE Clear Europe recognizes that certain standards may not be easily applied to a particular business line, as opposed to the entire business of the clearing house. However, other standards, including membership standards, product specifications, and risk management, can often be confined to a particular business line. In such cases, ICE Clear Europe believes that regulatory requirements should similarly be focused on the relevant business line. This will limit the likelihood of a clearing house being subject to inconsistent regulation. It will also allow the relevant regulatory authority to focus principally on those activities that would otherwise be within its jurisdiction.

Conclusion

In general, ICE Clear Europe is supportive of heightened standards for systemically important clearing activity, and the efforts of the Commission and other regulators in implementing the internationally agreed PFMI standards. The PFMIs are designed to establish a single set of high standards that will apply to all systemically important clearing organizations. ICE Clear Europe strongly encourages regulators to continue this process of harmonization of regulations in major jurisdictions based on the PFMIs.

In the context of a clearing activities that are subject to multiple regulators, or that are conducted in multiple jurisdictions, however, the Commission should be wary of imposing additional

requirements on top of those imposed by other regulators. This is particularly so where other regulators are attempting to impose (or have imposed) the same or substantially similar standards. ICE Clear Europe believes that avoidance of unnecessarily duplicative (or worse, inconsistent) regulation is key to maximizing effective regulation and use of limited regulatory resources. It will also allow the Commission to focus its resources on the particular activities within its jurisdiction that present increased risks and should be subject to increased supervision. Rather than imposing multiple sets of potentially overlapping or conflicting rules, it would be far preferable, in ICE Clear Europe's view, for regulators to allow a clearing organization to comply with the PFMIs as implemented in the home country, and supplement that regulation with any additional requirements that the regulator believes necessary under its own laws.

ICE Clear Europe would be pleased to discuss the Proposed Rules and the issues discussed in this letter in further detail with the Commission or its staff. As a registered securities clearing agency, ICE Clear Europe is committed to continuing to work with the Commission and its staff in implementing its clearing agency standards.

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Very truly yours,

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