November 11, 2022

Via Electronic Submission

Vanessa Countryman
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Clearing Agency Governance and Conflicts of Interest

Intercontinental Exchange Inc., on behalf of itself and its subsidiaries ("ICE"), appreciates the opportunity to comment on the notice of proposed rulemaking by the U.S. Securities and Exchange Commission (the "Commission" or the "SEC"), titled "Clearing Agency Governance and Conflicts of Interest" (the "Clearing Agency Governance Proposal" or the "Proposal").[1]

ICE currently operates two clearing agencies registered with the Commission ("SEC Registered CAs"): ICE Clear Credit LLC ("ICE Clear Credit")[2] and ICE Clear Europe Limited ("ICE Clear Europe").[3] ICE Clear Credit and ICE Clear Europe are also derivatives clearing organizations ("DCOs") registered with the Commodity Futures Trading Commission ("CFTC"). ICE also operates ICE Clear US, Inc. and ICE NGX Canada Inc., which are DCOs registered with the CFTC, and ICE Clear Netherlands and ICE Clear Singapore, which are registered clearing organizations in other jurisdictions.

As an operator of clearing houses, ICE is keenly interested in the issues raised by the Clearing Agency Governance Proposal. Each ICE clearing house maintains governance processes and committee structures particular to its products, members, and overall strategy and which reflect the interests of market participants and stakeholders. ICE therefore appreciates the opportunity to comment on the Proposal.

Background

The Commission proposes to establish new governance requirements on board composition, nominating committees, and risk management committees. The Proposal would require SEC Registered CAs to implement new policies and procedures regarding conflicts of interest, board oversight of relationships with service providers, and consideration of stakeholder viewpoints. ICE supports robust governance arrangements and values shareholder input. ICE however believes the Commission's approach unnecessarily imposes significant new, prescriptive demands on

[1] 15 U.S.C. 78a et seq., Exchange Act Release No. 95431 (Aug. 8, 2022), 87 Fed. Reg. 51812 (August 23, 2022).
[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 ("Dodd-Frank Act").
[3] ICE Clear Europe is also an authorized as a central counterparty under the European Market Infrastructure Regulation (EMIR) and a recognized clearing house under English law.

SEC Registered CAs, including altering governance arrangements, processes, and committee structures, without clear justification.

ICE is unclear of the problems that the SEC believes its proposals would address. Currently, all SEC Registered CAs must comply with applicable Securities Exchange Act of 1934 ("Exchange Act") obligations, which are consistent with internationally accepted standards. Moreover, when the Commission adopted governance rules in 2016, it stated that "Rule 17Ad–22(e) does not prescribe a specific tool or arrangement to achieve its requirements. The Commission believes that when determining the content of its policies and procedures, each covered clearing agency must have the ability to consider its unique characteristics and circumstances."[4] The Proposal moves away from this approach without explaining what has changed or why it is not working.

Moreover, ICE notes that many SEC Registered CAs, including ICE Clear Credit and ICE Clear Europe, are also registered as DCOs with the CFTC.[5] The CFTC proposed rules on governance requirements for DCOs (the "DCO Governance Proposal")[6] overlap with the Proposal, and ICE urges coordination between the agencies to ensure that any final rules are structured so that dually registered clearing houses can efficiently comply with both agencies' rules. For example, and as discussed in more detail below, the DCO Governance Proposal contemplates advisory risk management committees, while the Proposal contemplates requiring risk management committees to be board-level committees.

The items below respond to the Commission's specific requests for comments regarding the proposed governance measures.

Board Composition. The Commission proposes that a "majority of the directors of a registered clearing agency must be independent directors" and defines an independent director to mean a "director that has no material relationship with the registered clearing agency, or any affiliate thereof."[7] ICE does not object to the SEC's Proposal, which is consistent with the independent director requirements incorporated into the governance structures of its clearing houses.

In addition, the Proposal requests comment on whether the Commission should be more prescriptive in requiring certain types of stakeholders, such as smaller participants and customers, to be represented on clearing agency boards. ICE does not believe that such additional prescriptive requirements are necessary as this potential concern is already sufficiently addressed by Section 17A of the Exchange Act, which requires clearing agencies to assure the fair representation of owners and participants in the selection of directors and the administration of its affairs.[8] Furthermore, mandating prescriptive requirements on the types of stakeholders represented on clearing agency boards does not further the policy goals of including stakeholders in the decision making process and increasing transparency to meet the public interest. To be

[4] See 17 C.F.R. 240.17ad-22. Exchange Act Release No. 78961 (Sept. 28, 2016), 81 Fed. Reg.70786, 70800 (Oct. 13, 2016) ("CCA Standards Adopting Release").
[5] As noted above, ICE Clear Europe is also an authorized as a central counterparty under EMIR and a recognized clearing house under English law. ICE Clear Credit is recognized as a third-country CCP in both the UK and EU.
[6] 87 Fed. Reg. 49559 (August 11, 2022) (RIN 3038-AF15).
[7] Exchange Act Release No. 95431 (Aug. 8, 2022), 87 Fed. Reg. 51812, 51820 (August 23, 2022).
[8] 15 U.S.C. 78q-1(b)(3)(C).

effective, a board must be composed of suitable members with the appropriate skills and incentives to effectively discharge its duties, including the possession of strong personal attributes (e.g., leadership, integrity) and relevant business and risk management experience to assure effective service. Accordingly, ICE does not believe a clearing agency should be required to have certain types of stakeholder representation and instead believes that the Commission's focus should be on SEC registered CAs' boards being composed of members with the requisite skills and background necessary to provide guidance to and oversight of the important functions performed by clearing agencies.

Nominating Committees. The Proposal requires "each registered clearing agency to establish a nominating committee and a written evaluation process whereby such nominating committee shall evaluate individual nominees to serve as directors."[9] The Commission is also proposing to require that boards of SEC Registered CAs have a majority of independent directors. To ICE's knowledge there is no concern about the qualifications of SEC Registered CA board members today. Moreover, it is unclear how a written evaluation process by a separate committee composed of the independent directors of a board that is already a majority independent directors would improve the quality of nominees. Moreover, the additional burdens on these independent directors could discourage qualified individuals from being willing to serve on SEC Registered CA boards.

ICE appreciates the SEC's objective of strengthening governance standards in the nomination process but cautions against limiting the ability of SEC Registered CAs to establish a governance structure that is appropriate to their business model. In this regard, ICE believes that a nominating committee is not the sole approach to evaluating director nominees and ICE clearing houses have structures to facilitate the evaluation and nomination of clearing house directors without establishing separate nominating committees. For example, the ICE Clear Credit Risk Committee is composed of twelve members, nine of which represent clearing member participants. The remaining three members include two members of management and one independent board member as the Chair. The nine clearing member participants of the ICE Clear Credit risk committee annually nominate four of the nine ICE Clear Credit directors. Such structure has proven to be both effective and efficient. The Proposal's imposition of a prescriptive nominating committee structure would require clearing agencies to alter existing governance arrangements and processes, without any clear benefit. ICE believes its current clearing agency processes and structures are successful at identifying and nominating qualified directors and that the Proposal would interfere with this success and does not address any problem that has been identified.

Risk Management Committees. The Proposal requires "a registered clearing agency to establish a risk management committee (or committees) to assist the board of directors in overseeing the risk management of the registered clearing agency" and "each risk management committee would be required to reconstitute its membership on a regular basis."[10] ICE agrees that risk committees are an important way for clearing agencies to engage with market participants and consider their perspectives. For this reason, all of ICE's SEC Registered CAs and DCOs presently have risk committees that include market participants. ICE's SEC Registered

[9] Exchange Act Release No. 95431 (Aug. 8, 2022), 87 Fed. Reg. 51812, 51828 (August 23, 2022).
[10] Id. at 51852.

CAs also have working groups that solicit industry feedback and consult with management on different issues. ICE supports the Commission's proposal to require a SEC Registered CA to establish a risk management committee but disagrees with the requirement that a risk management committee be a committee of the board.

The Commission asserts that "a risk management committee of the board is a more effective way to help ensure that the board is engaged with and informed of the ongoing risk management of the clearing agency."[11] The Commission further states that it believes a risk management committee "would help ensure that the board can more effectively oversee management's decisions concerning matters that implicate the clearing agency's risk management, including its policies, procedures, and tools for mitigating risk."[12]

Clearing agency risk management committees are structured differently and sit at different places across clearing agencies, based on clearing agency size, products cleared, and markets served. It is important to recognize that clearing agencies' risk management needs differ and therefore their use of risk management committees varies accordingly. As such, clearing agencies must have the flexibility to organizationally structure their respective risk management committees in a way that best serves their risk management needs and the markets they clear. In ICE's view, a board level risk management committee does not improve the board's engagement with clearing agency risk management, nor is there any evidence that it makes a board's oversight of management's decisions more effective. Clearing agency boards are keenly aware that the principal purpose of a clearing agency is to manage risk and the structure that supports the board's decision making and oversight can be from board level and advisory level committees. A board level risk management committee will be limited in its membership to board members. A risk committee that is not board level can benefit from the expertise of a wider range of individuals and thus better inform the board than a board level risk committee would. For this reason, ICE does not agree with the Commission's premise that board level risk management committees are more effective in engaging and informing the board or in allowing the board to oversee management's decisions more effectively. ICE believes that risk management committees structured as advisory committees can be just as, and in many cases more, effective in engaging and informing the board on risk management matters.

In addition, the Proposal requests comment on whether the Commission should require that the membership of a risk management committee be rotated instead of reconstituted.[13] ICE does not believe the Commission should mandate the rotation of risk management committee members.[14] While ICE recognizes the potential value of fresh perspectives of new risk management committee members, reconstitution requirements must consider the value an experienced and knowledgeable risk management committee member provides to a clearing agencies' risk

[11] Exchange Act Release No. 95431 (Aug. 8, 2022), 87 Fed. Reg. 51812, 51831 (August 23, 2022).
[12] Id.
[13] Id. at 51833.
[14] The Commission requests comment on whether the requirement that a risk management committee "reconstitute" its membership on a regular basis is sufficiently clear. Is there additional guidance needed on what "reconstitute" means? Is it sufficiently clear that the term "reconstitute" refers to the membership of the risk management committee and not to the form of the committee? Why or why not? Should the Commission instead require that the membership be "rotated"?

management function. ICE emphasizes that the most important objective is an engaged and knowledgeable risk management committee that can provide effective risk management opinions to a clearing agencies' board of directors. Of paramount importance to the value of a risk management committee is the expertise and experience of its members, which is often closely correlated with tenure. Moreover, the SEC needs to consider that it can be difficult for clearing agencies to find knowledgeable individuals willing and able, with the support of their employers, to commit resources to a risk management committee. ICE believes that the most effective approach would be to establish high level principles and allow an SEC Registered CA to tailor its risk management committees to its specific needs, including the membership of the risk management committee and how the committee is reconstituted.

The Proposal also requests comment on whether the Commission should require the risk management committee to "include at all times a specific percentage or number of representatives from small participants of the clearing agency."[15] ICE advises against mandating specific risk management committee composition requirements, such as a specific percentage or number of representatives from small participants. Given the differences in clearing agencies and their committee structures, mandating specific requirements risks being arbitrary and will only serve to constrain clearing agencies in attracting qualified risk committee members without clear justification. As discussed above, Section 17A of the Exchange Act already requires that clearing agencies ensure the fair representation of owners and participants in the selection of directors and the administration of its affairs.[16] As the obligation to manage the risks of the clearing agency resides exclusively with the clearing agency, ICE believes the clearing agency has a strong incentive and is best suited to make determinations on risk management committee membership.

Lastly, ICE urges coordination and harmonization with the CFTC given the overlap with the DCO Governance Proposal (e.g., the requirement that risk management committee membership be regularly rotated and the allowance of a consultative and board-level risk committee), such that dually registered clearing houses can comply with both agencies' rules.

Conflicts of Interest. ICE supports the Proposal's requirement that registered clearing agencies have written policies "designed to identify and document existing or potential conflicts of interest in the decision-making process of the clearing agency involving directors or senior managers of the registered clearing agency.[17] The Proposal observes that "[b]ecause organizational structures vary across clearing agencies, as do the products, markets, and market participants served by the clearing agency, the Commission has taken a policies and procedures approach in the proposed rule to manage conflicts."[18] ICE welcomes such approach and believes it would provide SEC Registered CAs with the flexibility necessary for effective governance by allowing such clearing agencies the discretion to design policies that fit their particular structure and characteristics. Accordingly, the Commission should not provide additional requirements or guidance for SEC Registered CAs to evaluate the relationships of their directors and senior managers.

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[15] Id.
[16] 15 U.S.C. 78q-1(b)(3)(C).
[17] Exchange Act Release No. 95431 (Aug. 8, 2022), 87 Fed. Reg. 51812, 51833 (August 23, 2022).
[18] Id. at 51835.

Service Providers for Critical Services. The Proposal would require SEC Registered CAs to have written policies "to enable the board to confirm and document that risks related to critical service provider relationships are managed in a manner consistent with the registered clearing agency's risk management framework, and to review senior management's monitoring of relationships with service providers for critical services" including, "enabl[ing] the board to review and approve plans for entering into third-party relationships where the engagement entails being a service provider for critical services to the registered clearing agency."[19] The ICE clearing houses currently have structures in place for boards to oversee management's policies and procedures for the identification, monitoring and contingency planning with respect to critical vendors. The Proposal would require the board to go beyond its oversight responsibilities and tasks the board with a role in managing such relationships. A board of directors relies on the information it is provided by management to perform its oversight function. A responsibility to "confirm" that risks are managed in a manner consistent with clearing agency's risk management framework is not consistent with a board's oversight role. It is unclear how, in practice, a board could satisfy this "confirmation" function without engaging in a management function, which would conflict with and distract from the board's oversight functions. Accordingly, ICE does not support this proposal as it improperly expands upon a board of directors long-standing oversight function.

Moreover, the proposed definition of service provider for critical services is overly broad and ambiguous as it includes any person that is contractually obligated to the clearing agency for supporting clearance and settlement functionality or any other purposes material to its business. This definition goes well beyond services that are critical to the clearing agencies and would not only broaden the board's responsibilities beyond its oversight role as discussed above, but also to service providers who are not critical to the clearing agency operations.

Other stakeholder views.

The Proposal would require SEC Registered CAs to have written policies to "solicit, consider, and document its consideration of the views of participants and other relevant stakeholders of the registered clearing agency regarding material developments in its governance and operations on a recurring basis."[20] This proposed requirement is duplicative of existing advance notice and rule filing requirements.

Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled Payment, Clearing and Settlement Supervision Act of 2010 ("Clearing Supervision Act") [21] requires a designated financial market utility (DFMU) to provide its designated governmental supervisor with at least 60 days' advance notice of changes to its rules or operations that could materially affect the nature or level of risks presented by the DFMU. Title VIII establishes procedures that a DFMU must follow when proposing changes to its rules, procedures, or operations and provides for consultation between the SEC or CFTC, as the designated supervisory authority under Title VIII, and the Federal Reserve Board in reviewing the

[19] Id. at 51835-36.
[20] Exchange Act Release No. 95431 (Aug. 8, 2022), 87 Fed. Reg. 51812, 51838 (August 23, 2022).
[21] 12 U.S.C. 5465(e)(1).

proposal. These requirements have been implemented in Commission Rule 19b-4(n) for clearing agencies where the SEC is the designated supervisory authority under Title VIII and CFTC Rule 40.10 for clearing agencies where the CFTC is the designated supervisory authority under Title VIII. Advance notices are made public by both the supervisory agency and the clearing agency itself providing an opportunity for review and comment by interested persons.

In addition, SEC registered CAs not required to provide advance notices are subject to Exchange Act Rule 19b-4, which requires all material modifications in clearing agency rules, procedures, and operations be submitted to the Commission and published by the Commission for public review and comment. SEC registered clearing agencies also registered as DCOs with the CFTC are additionally subject to requirements for CFTC approval under CFTC Rule 40.5 or self-certification under CFTC Rule 40.6, processes that afford market participants an opportunity to review and comment on modifications to clearing house rules, procedures or operations.

The Commission's proposed requirement that SEC Registered CAs have written policies to "solicit, consider, and document its consideration of the views of participants and other relevant stakeholders of the registered clearing agency regarding material developments in its governance and operations on a recurring basis" would be entirely duplicative of the already existing public notice and comment processes. Accordingly, ICE believes the costs associated with this proposed requirement do not have any benefits that would outweigh such costs.

Conclusion

ICE appreciates the opportunity to comment on the Proposal and the engagement of the Commission and its staff in the rulemaking process. ICE shares the Commission's goals of enhancing clearing agency governance frameworks and regulations. ICE respectfully requests that the Commission consider its comments in light of those goals.

Respectfully submitted,

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