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April 22, 2013

Ms. Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File Number SR-ICC-2013-05; Comments in Response to ICE Clear Credit LLC's Proposal to Add Proposed Rule 211 (Regulatory Reporting of Swap Data)

Dear Ms. Murphy:

The Depository Trust & Clearing Corporation ("DTCC"),[1] in conjunction with its provisionally registered swap data repository ("SDR"), DTCC Data Repository (U.S.) LLC ("DDR"), submits this letter to the Securities and Exchange Commission ("SEC" or "Commission") in response to ICE Clear Credit LLC's ("ICC") submission to add, in Chapter 2 of the ICC Rules, proposed Rule 211, dated March 25, 2013, which requests that the Commission grant accelerated approval of the proposed rule change under Section 19(b)(2)(C)(iii) of the Securities Exchange Act of 1934 ("Exchange Act") ("Rule 211").[2]

On April 9, 2013, the Commission approved on an accelerated basis proposed Rule 211 pursuant to Section 19(b)(2) of the Exchange Act ("Approval Order").[3] The Commission states in the Approval Order that, in its consideration and approval of proposed Rule 211, the Commission is mindful of the jurisdiction of the Commodity Futures Trading Commission ("CFTC") over swap data reporting and SDRs.[4] The

[1] The Depository Trust & Clearing Corporation ("DTCC") provides critical infrastructure to serve all participants in the financial industry, including investors, commercial end-users, broker-dealers, banks, insurance carriers, and mutual funds. DTCC operates as a cooperative that is owned collectively by its users and governed by a diverse Board of Directors. DTCC's governance structure includes 344 shareholders.

[2] ICE Clear Credit LLC's ("ICC") submission to add proposed Rule 211 [hereinafter "ICC Submission"] is *available at* https://www.theice.com/publicdocs/regulatory_filings/ICC_SEC_040813.pdf.

[3] *See* 15 U.S.C. § 78s(b)(2)(C) (directing the Commission to "approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of [the Exchange Act] and the rules and regulations issued [thereunder] that are applicable to such organization").

[4] Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Related to Regulatory Reporting of Swap Data, 78 Fed. Reg. 22,350, 22,352 (Apr. 15, 2013).

Commission also notes that proposed Rule 211 "does not significantly affect any securities clearing operations of the clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service" and "applies only to swaps."[5] Given this regulatory context, and based on ICC's representations in its proposed Rule 211 submission, the Commission finds that proposed Rule 211 is "consistent with the requirements of the Exchange Act" and applicable rules and regulations.[6]

The Commission discussed the respective regulatory authorities of the Commission and the CFTC in a recently released final rule related to rule filing requirements for dually-registered clearing agencies.[7] In particular, the Commission noted that the CFTC generally regulates the clearing of swaps as a result of its regulatory authority over derivatives clearing organizations ("DCOs").[8] In part to "eliminate unnecessary delays that could arise due to the differences between the Commission's rule filing process and the CFTC's self-certification process," the Commission expanded the list of categories of proposed rule changes that qualify for effectiveness immediately upon filing, including rules related to swaps that are not mixed swaps or security-based swaps.[9]

DTCC appreciates the Commission's consideration of CFTC's regulatory authority with respect to swap data reporting and SDRs. As the Commission has previously acknowledged, however, "[t]he Exchange Act imposes upon the Commission an independent statutory responsibility to oversee the operations of Registered Clearing Agencies as a whole, and not solely in regard to specific products."[10] Further, the Commission's "continued review of rule filings that primarily affect a Dually-Registered Clearing Agency's operations involving . . . swaps that are not securities swaps or mixed swaps . . . is a necessary and appropriate part of the Commission's statutory mandate."[11]

Pursuant to such independent statutory authority, DTCC respectfully requests that the Commission reconsider its accelerated approval of proposed Rule 211 because ICC's representations, upon which the Commission grants approval, are inaccurate.[12] Though the Commission may have implicitly relied upon

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[5] *Id.*

[6] *Id.* at 22,351.

[7] *See* Amendment to Rule Filing Requirements for Dually-Registered Clearing Agencies, 78 Fed. Reg. 21,046, 21,053 (Apr. 9, 2013) (stating that Registered Clearing Agencies that maintain a futures, swaps, or forwards clearing business regulated by the CFTC are generally required to file proposed rule changes with the Commission and to comply separately with the CFTC's process for rules or rule amendments).

[8] *See id.* at 21,048.

[9] *See id.* at 21,049.

[10] *Id.* at 21,053.

[11] *Id.*

[12] ICC states that "accelerated approval is warranted because the proposed rule change will assist swap dealers' mandatory compliance with CFTC Regulation 45.3 and 45.4" and "the proposed

contemporaneous CFTC approval of rule 211 as additional grounds upon which to grant accelerated approval of proposed Rule 211, the Commission approved proposed Rule 211 when, in fact, the analogous rule 211 filing with the CFTC had been withdrawn. In particular, on April 9, 2013, the Commission granted accelerated approval of proposed Rule 211 at a time when rule 211 was not pending at the CFTC, as ICC had withdrawn the filing with the CFTC as of April 4, 2013 and did not resubmit the amended rule 211 filing until April 10, 2013. The CFTC has yet to concur with ICC's certification of amended rule 211 and, indeed, cannot approve rule 211 for the reasons noted in section I below.

I. *Proposed Rule 211 is Inconsistent with the Commodity Exchange Act and CFTC Swap Data Reporting Regulations*

ICC states in its submission to the Commission that proposed Rule 211 "would [not] have any impact, or impose any burden, on competition."[13] However, for the reasons presented in (1) DTCC's petition to the CFTC to stay ICC's submission for self-certification of proposed rule 211,[14] dated March 26, 2013, and (2) DTCC's letter to the CFTC, dated April 22, 2013, ICC's representations regarding the impact of proposed Rule 211 on competition are inaccurate. DTCC incorporates herewith its March 26 petition and April 22 letter to the CFTC. A copy of the March 26 petition is attached hereto as Appendix A. A copy of the April 22 letter is attached hereto as Appendix B.

Further, the Commission states in the Approval Order that, "[b]ased on ICC's representations, the Commission understands that [Rule 211] is designed to codify in ICC's Rules the way in which ICC intends to comply with certain of the CFTC's swap data reporting rules and to facilitate its Clearing Participants' compliance with the same."[15] The Commission concludes that, "by facilitating compliance with the swap data reporting requirements of [the CFTC], the proposed rule change is consistent" with requirements under the Exchange Act.[16]

DTCC submits, however, that ICC's representations regarding its compliance with CFTC regulations related to the reporting of swap data are inaccurate. Though the CFTC's final Part 45 and 43 regulations provide that a reporting counterparty may

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changes do not raise any issues that would require a lengthier review process under Section 19(b) of the Exchange Act." ICC's representations in its request for accelerated approval are misleading. Swap dealers are capable of complying with applicable CFTC reporting regulations without ICC's implementation of proposed Rule 211. Further, for the reasons presented in this letter, proposed Rule 211 raises a multitude of legal issues that merit a lengthier review process under the Exchange Act and the Commission's attendant regulations.

[13] ICC Submission, *supra* note 2, at 9.

[14] The text of proposed rule 211 in ICC's submission to the CFTC for self-certification on March 22, 2013, is identical to proposed Rule 211.

[15] Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Related to Regulatory Reporting of Swap Data, 78 Fed. Reg. at 22,351.

[16] *Id.* at 22,351-22,352.

contract with a third-party service provider to facilitate reporting,[17] the reporting counterparty bears the ultimate responsibility in fulfilling its reporting obligations.[18] For the reasons presented in DTCC's April 22 letter to the CFTC, however, proposed Rule 211 would not "facilitate" clearing participant compliance with applicable CFTC regulations. Rather, contrary to prior IntercontinentalExchange, Inc. ("ICE") statements acknowledging the importance of reporting counterparty choice,[19] proposed Rule 211 would remove the ability of clearing participants to choose an SDR in order to satisfy CFTC reporting obligations. Further, by stating that ICC would "relieve" clearing participants of their reporting obligations as a third-party service provider, ICC implicitly and properly acknowledges that its clearing participants retain their reporting obligations following novation.[20] Accordingly, ICC may not rely on the CFTC's novation rationale with respect to Chicago Mercantile Exchange ("CME") Rule 1001, which is erroneous and contrary to law, to certify compliance of Rule 211 with the CFTC's regulatory reporting framework.[21]

II. *Proposed Rule 211 Would Conflict with the Exchange Act and the Commission's Security-Based Swap Data Reporting Framework*

DTCC recognizes that the Commission was mindful of the CFTC's regulatory authority over swap data reporting and SDRs in reviewing proposed Rule 211. Still, DTCC wishes to preliminarily outline additional issues with proposed Rule 211 beyond its fundamental inconsistency with the Commodity Exchange Act ("CEA") and the CFTC's swap data reporting framework. In particular, DTCC submits that an ICC proposed rule for security-based swaps ("SBS") comparable to proposed

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[17] *See* Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2,136, 2,208 (Jan. 13, 2013); *see also* Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1,182, 1,236 (Jan. 9, 2012).

[18] *See* Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2,167; *see also* Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. at 1,199; Division of Market Oversight Advisory, CFTC, at 2 (Mar. 8, 2013) (reminding market participants that "[a] party with reporting obligations under the swap data recordkeeping and reporting rules remains fully responsible for the timely and accurate fulfillment of its reporting obligations, regardless of whether it contracts with a third party service provider to facilitate reporting"), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/dmoadvisory030813.pdf.

[19] *See* Letter from Bruce Tupper and Carrie Slagle, IntercontinentalExchange, Inc., to David Stawick, Secretary, CFTC (Feb. 7, 2011), at 3 (acknowledging that "the reporting counterparty is ultimately responsible for managing the swap in the SDR for the entire life of the transaction" and recommending that "the Commission require SEFs and DCMs to submit swap creation data to a SDR according to the preferences of the reporting counterparty"), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27635&SearchText=.

[20] This line of reasoning is substantially dissimilar to Chicago Mercantile Exchange's ("CME") misguided justification for assuming the reporting obligations of reporting counterparties in its Rule 1001.

[21] As provided in its April 22 letter to the CFTC, DTCC preserves all of its objections to CME Rule 1001 and the Statement of the Commission in response to CME's request for approval of new Chapter 10 and Rule 1001, including that the CFTC's actions violated the Administrative Procedure Act.

Rule 211 ("comparable SBS rule") would raise anticompetitive concerns under the Exchange Act.

Pursuant to the Exchange Act, during the review of a rule of a self-regulatory organization, the Commission is required to "consider, in addition to the protection of investors, whether [an] action will promote efficiency, competition, and capital formation."[22] In addition, the Exchange Act requires that "[t]he rules of the clearing agency do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act.]"[23] As a result, prior to the approval of proposed Rule 211, the Commission was required to determine that proposed Rule 211 was not anticompetitive. The Commission states in its Approval Order that the "proposed rule change does not impose any burden on competition"[24] and adds that, "in approving these proposed rule changes, the Commission has considered . . . the impact on efficiency, competition, and capital formation."[25]

As the Commission did not further elaborate upon the basis of its anticompetitive considerations, DTCC is unable to directly evaluate the merits of the Commission's analysis. DTCC notes, however, that courts have previously overruled the Commission's finding that a rule of a national securities exchange did not impose any burden on competition.[26] In *Clement v. Securities and Exchange Commission*, the Commission approved a Chicago Board Options Exchange ("CBOE") internal rule that had the effect of preventing Chicago Board of Trade ("CBT") market makers from trading on the CBOE, which the court concluded was anticompetitive.[27] The court's holding counsels that the Commission should not "assume[] away any anticompetitive effect of the rule change,"[28] but rather should carefully consider all of the relevant facts indicating the anticompetitive impact of proposed Rule 211.

A comparable SBS rule would also conflict with the reporting framework contemplated in the Commission's proposed Regulation SBSR. Pursuant to Section 13(m)(1)(F) and 13A(a)(3) of the Exchange Act, Rule 901(a) of Regulation SBSR specifies which counterparty is the "reporting party" for a SBS.[29] The Commission

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[22] 15 U.S.C. § 78c(f).

[23] *Id.* § 78q-1(b)(3)(I).

[24] Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Related to Regulatory Reporting of Swap Data, 78 Fed. Reg. at 22,352.

[25] *Id.* at 22,352, n.30.

[26] *See Clement v. Secs. and Exch. Comm'n.*, 674 F.2d 641 (7th Cir. 1982).

[27] *Id.* at 647.

[28] *See id*.

[29] *See* Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 75 Fed. Reg. 75,208, 75,211 (Dec. 2, 2010) (providing as follows: "[w]ith respect to a SBS in which only one counterparty is a security-based swap dealer ('SBS dealer') or major security-based swap participant ('major SBS participant'), the SBS dealer or major SBS participant shall be the reporting party; [w]ith respect to a SBS in which one counterparty is a SBS dealer and the other counterparty is a major SBS participant, the SBS dealer shall be the reporting party; and [w]ith respect to any other

explains in the preamble to the proposed rule that the Exchange Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, "does not explicitly specify which counterparty should be the reporting party for those SBSs that are cleared by a clearing agency or [DCO]."[30] The Commission states, however, that "for the sake of uniformity and ease of applicability, the duty to report a SBS should attach to the same counterparty regardless of whether the SBS is cleared or uncleared."[31] Though proposed Rule 901(a) "would not prevent a reporting party to a SBS from entering into an agreement with a third party to report the transaction on behalf of the reporting party," "a SBS counterparty that is a reporting party would retain the obligation to ensure that information is provided to a registered SDR in the manner and form required by proposed Regulation SBSR."[32]

Under proposed Regulation SBSR, a clearing agency, such as ICC, is not a potential reporting counterparty.[33] Even if an entity other than a SBS counterparty were to report SBS data, proposed Rule 901(a) contemplates that the reporting party would enter into an agreement with such third party to report on its behalf. In contrast, a comparable SBS rule would summarily designate ICC as the reporting counterparty without a prior affirmative agreement with the counterparty who has the reporting obligation under Regulation SBSR.

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In summary, proposed Rule 211 is fundamentally inconsistent with the CEA and the CFTC's implementing swap data reporting regulations. Accordingly, DTCC requests that the Commission reconsider its accelerated approval of proposed Rule 211 because ICC's representations, upon which the Commission grants approval, are inaccurate. At minimum, DTCC submits that the serious implications of proposed Rule 211 merit detailed review given that a comparable SBS rule would conflict with not only the requirements in the Exchange Act related to anticompetitive considerations, but also the Commission's proposed reporting framework in Regulation SBSR.

SBS not described in the first two cases, the counterparties to the SBS shall select a counterparty to be the reporting party").

[30] *Id*.

[31] *Id*.

[32] *Id.* at 75,211-75,212.

[33] The Commission's preference of requiring a counterparty, as opposed to a clearing agency, to report SBSs is further evidenced in the following request for comment: "Should the Commission require one or more entities other than a SBS counterparty, such as a registered SB SEF, a national securities exchange, a clearing agency, or a broker, to report SBSs? Or do commenters agree with the Commission's approach of assigning the responsibility to report to a counterparty, while allowing the counterparty to have an agent (such as a SB SEF) act on its behalf?" *See id.* at 75,212.

DTCC appreciates the opportunity to comment on proposed Rule 211. Should the Commission wish to discuss these comments further, please contact me at 212-855-3240 or lthompson@dtcc.com.

Sincerely yours,

Larry E. Thompson
General Counsel

Appendix A

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March 26, 2013

Ms. Melissa Jurgens
Office of the Secretariat
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Petition to Stay the Certifications of ICE Clear Credit's Proposed Rule 211 (Regulatory Reporting of Swap Data) and ICE Clear Europe Limited's Proposed Rule 410 (Swap Data Repository ("SDR") Reporting)

Dear Ms. Jurgens:

The Depository Trust & Clearing Corporation ("DTCC"),[1] in conjunction with its provisionally registered swap data repository ("SDR"), DTCC Data Repository (U.S.) LLC ("DDR"), submits this petition to the Commodity Futures Trading Commission ("CFTC" or "Commission") in response to the submissions for self-certification pursuant to Commission Rule 40.6 of amended Rule 211, dated March 14, 2013,[2] and amended Rule 211, dated March 22, 2013[3] (together, "Rule 211"), as well as proposed new Rule 410 ("Rule 410"), dated March 15, 2013,[4] by ICE Clear Credit and ICE Clear Europe Limited, respectively (together, "ICE").

Executive Summary

At issue here is an intended self-certification by a clearing house of anti-competitive rules. ICE clears large volumes in certain swaps markets and appears intent on

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[2] ICE Clear Credit's submission for self-certification of proposed new Rule 211 is *available at* http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul031413icc001.pdf.

[3] ICE Clear Credit's submission for self-certification of amended Rule 211is *available at* http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul032213icc001.pdf.

[4] ICE Clear Europe Limited's ("ICE Clear Europe") submission for self-certification of proposed new Rule 410 is *available at* http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul031513iclreu001.pdf [hereinafter ICE Clear Europe Letter].

expanding its market power through the self-certification of two anti-competitive rules. ICE's "extraordinarily high share" in certain cleared contract markets is shown in the accompanying Report.[5]

For the reasons presented in this petition, DTCC requests that the Commission reject the certifications of Rule 211 and Rule 410 (to the extent it is still pending or may be resubmitted),[6] or in the alternative, stay the certifications pursuant to Commission Rule 40.6(c)(1). Should the Commission choose to stay the certifications, DTCC requests that, in accordance with its own regulations, the Commission utilize an additional 90 days from the date of its notification of the stay to conduct a review and, within such 90 days, provide the public with a 30-day comment period.

Discussion

Commission Rule 40.6(c)(1) provides that "[t]he Commission may stay the certification of a new rule or rule amendment . . . on the grounds that . . . the rule or rule amendment is potentially inconsistent with the Act or the Commission's regulations thereunder."[7]

According to Rule 40.6(a)(7), registered entities must certify that rule submissions comply with the Commodity Exchange Act ("CEA") and the Commission's regulations thereunder. In making the inaccurate certifications that Rule 211 and Rule 410 comply with the CEA and attendant Commission regulations, ICE implicitly relies upon the approval order contained in the Statement of the Commission in response to The Chicago Mercantile Exchange Inc.'s ("CME") request for approval of new Chapter 10 and Rule 1001 submission ("Rule 1001") (hereinafter referred to as "CME Approval Order").[8]

In addition to the CME Rule 1001 and the CME Approval Order and process being arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,[9] ICE's reliance on the CME Approval Order is misplaced because of

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[5] NERA Report on ICE Volumes in Cleared Contracts, attached hereto as Appendix A.

[6] DTCC observes that the status of the filing for Rule 410 is uncertain, as the CFTC website reflects that it was withdrawn on March 21, 2013. However, in an abundance of caution and because ICE representatives provided details about the proposed rule amendment during a webinar about SDR reporting on March 22, 2013, DTCC is including a petition to stay Rule 410. Information on the webinar is *available at* http://www.cadwalader.com/view_event.php?event_id=806&archive=archive.

[7] In addition to being potentially inconsistent with the CEA, ICE's rule submissions must be stayed because they also present "novel or complex issues that require additional time to analyze [and] the rule or rule amendment is accompanied by an inadequate explanation." Indeed, ICE's rule filings with the Commission are in a frequent state of change, making Commission action to stay or reject certification and provide a comment period all the more necessary. *See* 17 C.F.R. § 40.6(c)(1).

[8] *See* CME Approval Order *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/statementofthecommission.pdf.

DTCC maintains all of its objections to Rule 1001 and the CME Approval Order, including that the CFTC's actions violated the Administrative Procedure Act. *See* Letter from Larry Thompson,

significant substantive differences between Rule 211 and Rule 410, on the one hand, and Rule 1001. First, both Rule 211 and Rule 410 are anticompetitive in light of ICE's relevant market share and the dictates of CEA Section 19(b) and Derivatives Clearing Organization ("DCO") Core Principle N. Further, Rule 410 contains an additional requirement related to valuation data that Rule 1001 did not include, which is inconsistent with swap dealer ("SD") and major swap participant ("MSP") reporting obligations under Part 45 of the Commission's regulations.

Anti-Competitive Considerations

Rule 211 and Rule 410 are inconsistent with Core Principle N, which provides: "[u]nless necessary or appropriate to achieve the purposes of this Act, a derivatives clearing organization shall not—(i) adopt any rule or take any action that results in any unreasonable restraint of trade; or (ii) impose any material anticompetitive burden."[10] They are also inconsistent with CEA Section 19(b), which provides that the Commission must "take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anti-competitive means of achieving the objectives of this chapter."[11]

In approving CME Rule 1001, the Commission summarily (and erroneously) concluded that CME did not have the requisite market power necessary to find that an anti-competitive arrangement existed, asserting that CME's relevant market shares were three percent or less.[12] DTCC disagrees with the Commission's conclusions both with respect to CME's market power and with respect to whether a static market power measurement is the relevant measure, as the Commission failed to conduct a sufficiently rigorous analysis and failed to take into consideration other appropriate facts and circumstances. However, as the CFTC acknowledged, Congress intended for the potential anti-competitive effects of a particular practice or rule to be evaluated and considered by both regulated entities and the

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General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Nov. 20, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58974&SearchTex;

see also Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Dec. 5, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58975&SearchText;

Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Dec. 7, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58976&SearchText;

Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Dec. 20, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59009&SearchText=;

Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Jan. 3, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59025&SearchText=.

[10] 7 U.S.C. § 7a-1(c)(2)(N).

[11] *Id.* § 19(b)

[12] *See* CME Approval Order, at 12.

Commission. Therefore, ICE was required to do so before self-certifying that Rule 211 and Rule 410 comply with Core Principle N and CEA Section 19(b).[13] Under its own admission, the CFTC must do so as well with respect to these new proposed rules.

To date, it appears the Commission has not done any analysis of ICE's market share. However, ICE unquestionably demonstrates strong market power in the product areas that it clears. For example, ICE clears approximately 96 percent of the open interest in cleared credit default swaps contracts, and is quite significant in other cleared product areas such as commodities.[14] In fact, ICE proclaims on its website that it is "[t]he world's largest clearing house for credit default swaps (CDS)."[15]

Reporting Obligations of Swap Dealers and Major Swap Participants

In proposed Rule 410 (b), ICE includes an obligation not contained in Rule 1001 that "would provide that ICE Clear Europe, in the capacity of a third-party facilitator, will, on behalf of a clearing member that is a swap dealer or major swap participant, report valuation data related to a swap cleared at ICE Clear Europe."[16] In particular, ICE Rule 410(b) states, in relevant part, as follows:

> In order to promote consistency with respect to reported valuation data and to minimize operational risk . . . the Clearing House, in the capacity of a third-party facilitator, will report valuation data on behalf of a Clearing Member that is a swap dealer or major swap participant.[17]

Rule 410(b) is facially inconsistent with Commission Rule 45.4(b)(2), which explicitly requires both the DCO and a reporting counterparty that is an SD or MSP to report *their respective* valuation data for a swap on a daily basis.[18] In the preamble to the final rule, the Commission explained that "[b]ecause the prudential regulators have informed the Commission that counterparty valuations are useful for systemic risk monitoring even where valuations differ . . . SD and MSP reporting counterparties [are required] to report the daily mark for each of their swaps, on a daily basis."[19] Elsewhere in the preamble, the Commission similarly notes the

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[13] *See id.* at 11.

[14] *See* Appendix A. DTCC estimates such values upon comparing data available at: https://www.theice.com/marketdata/reports/ReportCenter.shtml#report/101; http://www.cmegroup.com/trading/cds/?tabs=21#data; http://www.lchclearnet.com/cdsclear/data.asp; and http://www.eurexclearing.com/clearing-en/cleared-markets/eurex-otc/eurex-otc-clear/eurex-credit-clear/.

[15] *See* ICE Clear Credit, https://www.theice.com/clear_credit.jhtml.

[16] *See* ICE Clear Europe Letter, *supra* note 3.

[17] *See id.*

[18] *See* 17 C.F.R. § 45.4(b)(2).

[19] Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2,136, 2,154 (Jan. 13, 2012).

importance of counterparty valuations "even where such valuations represent the view of one party, and even where such valuations may differ."[20]

In addition to the final Part 45 rules, the Commission reiterated the distinct reporting obligations of DCOs and SD/MSP reporting counterparties with respect to valuation data. In the Commission's no-action letter regarding SD and MSP reporting obligations under Rule 45.4(b)(2), dated December 17, 2012, the Commission makes clear that "[t]he obligation of the DCO to provide valuation data for the cleared swap under regulation 45.4(b)(2)(i) is *independent of* the obligation of the SD or MSP to provide valuation for the same cleared swap under regulation 45.4(b)(2)(ii)."[21]

As the Commission has clearly distinguished between the distinct reporting obligations of DCOs and SD/MSP reporting counterparties, ICE's certification of Rule 410(b) is false because it would contravene Rule 45.4(b)(2).[22]

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In summary, ICE's rule proposals are fundamentally inconsistent with both the CEA and the Commission's rules and regulations.[23] Accordingly, the DTCC requests that the CFTC reject the rule certifications, or, in the alternative, stay the certifications of Rule 211 and Rule 410 pursuant to Commission Rule 40.6(c)(1). If the Commission chooses to stay the certifications, the Commission should provide the public with a 30-day comment period to allow market participants sufficient time to develop comments and garner information regarding the operation of the proposed rules, their inconsistency with the statute and the Commission's rules and regulations, the anti-competitive impact of the proposed rules and regulations, and the relative costs and benefits of adopting Rule 211 and Rule 410.

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[20] *Id.*

[21] CFTC Letter No. 12-55 from Richard Shilts, Director of the Division of Market Oversight, to Robert Pickel, Chief Executive Officer, International Swaps and Derivatives Association, Inc. (Dec. 17, 2012) (emphasis added).

[22] ICE's rule also fails to require that ICE report all data, but rather limits its obligations to reporting *available* data. When CME attempted to frame Rule 1001 in a manner that would require CME to report only available data, the CFTC staff required CME to submit an amended Rule 1001 to remove the word "available." *See* CME Amended Rule 1001, *available at:* http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul121412cme001.pdf.

[23] *See also,* Concurring Statement of Commissioner Jill E. Sommers on the CME Request for Commission Approval of New Chapter 10 and New Rule 1001, *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/sommerstatement030613 (stating that "[t]he proper method to eliminate the confusion the Commission has created in this area would have been to amend [the Commission's Part 45] rules"); *see also* Statement of Commissioner Scott O'Malia on CME Request for Commission Approval of New Chapter 10 and New Rule 1001, *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement030613 (stating that Commissioner O'Malia's "preferred approach . . . would have been to re-propose the internally inconsistent Part 45 of the Commission's regulations in compliance with the Administrative Procedure Act."

Should the Commission wish to discuss DTCC's petition further, please contact me at 212-855-3240 or lthompson@dtcc.com.

Sincerely yours,

Larry E. Thompson
General Counsel

Cc: The Honorable Gary Gensler, Chairman, CFTC
The Honorable Bart Chilton, Commissioner, CFTC
The Honorable Scott O'Malia, Commissioner, CFTC
The Honorable Jill Sommers, Commissioner, CFTC
The Honorable Mark Wetjen, Commissioner, CFTC
Ananda Radhakrishnan, Director, Division of Clearing and Risk, CFTC
Office of the General Counsel, CFTC

Appendix A

NERA
ECONOMIC CONSULTING

ICE Volumes in Cleared Contracts

Matthew Evans

Vice President, Global Securities and Finance Practice

March 26, 2013

NERA Economic Consulting ("NERA") was commissioned by Patton Boggs LLP, on behalf of DTCC Data Repository, to provide market volume research and economic analysis of ICE's trading volumes in certain cleared contracts. The figures may be relevant for regulators and stakeholders when considering the potential impacts of ICE Clear Credit's proposed Rule 211 and ICE Clear Europe Limited's proposed Rule 410 for specific cleared product areas in which ICE has significant dealings.

From an economics perspective, not all swaps are alike. For example, credit default swaps (CDSs) are unlikely to be close substitutes for interest rate swaps (IRSs), commodity swaps, or foreign exchange (FX) swaps. As a result, a DCO could have a dominant position in some particular major category of swaps, or certain product areas, without necessarily having a large share of swaps overall. This was historically true in the case of ICE, who, until a recent merger announced with NYSE Euronext, had no presence in cleared interest rate contracts.[1]

Error! Reference source not found. shows the current (figures as of 3/15/2013 or closest date available) reported open interest in cleared credit default swaps from publicly available data:

Table 1

Total Open Interest in Cleared CDS Contracts (All Types) As of Mid-March 2013		
Exchange	**Open Interest (USD, Billions)**	**% of Total**
ICE Clear Credit	$ 753.0	50%
ICE Clear Europe	$ 706.0	46%
CME	$ 44.0	3%
LCH	$ 16.6	1%
Eurex	$ 0.0	0%
Total	**$ 1,519.7**	

Data from:
https://www.theice.com/marketdata/reports/ReportCenter.shtml#report/101,
http://www.cmegroup.com/trading/cds/?tabs=21#data,
http://www.lchclearnet.com/cdsclear/data.asp,
http://www.eurexclearing.com/clearing-en/cleared-markets/eurex-otc/eurex-otc-clear/eurex-credit-clear/

Ignoring differences across CDS contract specifications (e.g., for sovereign, corporate, or index), as of mid-March, ICE Clear Credit and ICE Clear Europe accounted for a combined 96 percent of the open interest in cleared credit default swaps contracts. At a minimum, such an extraordinarily high share calls for careful analysis of the potential effects of ICE's proposed rules. As of today, cleared credit default swaps contracts do not face direct competition from futures contracts. Looking to the future, ICE has announced plans to offer credit default futures

[1] http://online.wsj.com/article/SB10001424127887324461604578191031432500980.html.

contracts, to some unknown extent competing with itself in cleared credit default swaps.[2] Unless other parties also begin to offer credit default futures, however, the possible emergence of credit default futures is unlikely to significantly alter the degree to which ICE has a large share in clearing for credit default swaps.

Cleared credit default is not the only area in which ICE offers products. ICE has a substantial presence in commodity markets as well. There are a variety of contract specifications for commodities, some of which may not be close substitutes for others. For example, a coal contract is unlikely to be a close substitute for a sugar contract.

For illustrative purposes, we have researched the volumes of cleared energy contracts traded at the two leading energy commodities exchanges, CME and ICE.[3] While it is well known that ICE and CME compete in the energy commodities space, it is unlikely that every one of the dozens of energy contract types included in these aggregate energy volume statistics (comprised of oil, natural gas, refined products, electricity, and other) compete as close substitutes for each other. Ignoring the specific differences in energy product offerings, which could be substantial, Table 2 shows the monthly volumes in cleared energy contracts at both ICE and CME from publicly available data.

Table 2

Cleared Energy Contract Volumes by ICE and CME
January 2013 - February 2013

Exchange	Energy Contracts Volume
ICE Futures - Europe	50,437,935
ICE Futures - US	62,771,642
CME Group	57,725,477

Data from:
http://www.cmegroup.com/wrappedpages/web_monthly_report/Web_Volume_Report_CMEG.pdf,
https://www.theice.com/marketdata/reports/ReportCenter.shtml#report/7,
https://www.theice.com/marketdata/reports/ReportCenter.shtml#report/8

These volume data, like the open interest data for credit default swaps, indicate that ICE's high share in energy contracts calls for careful analysis of potential effects of ICE's proposed rules. Given the breadth of ICE's commodity product offerings within the above energy contracts, and its breadth of offerings in non-energy commodity contracts, such as agricultural and grain contracts, ICE may hold high shares of market volumes in a wide variety of product areas within the commodities space.

[2] http://ir.theice.com/releasedetail.cfm?ReleaseID=713783.

[3] ICE and CME are not the only exchanges to list cleared energy contracts. However, based on 2010-2011 volume data, these two exchanges listed the majority of the world's twenty most actively traded energy contracts. See http://www.futuresindustry.org/files/css/magazineArticles/article-1383.pdf page 30.

In summary, the data collected show that ICE trading volumes are quite significant in cleared product areas such as credit default contracts and commodities. As such, when considering the potential impacts of ICE Clear Credit's proposed Rule 211 and ICE Clear Europe Limited's proposed Rule 410, regulators should recognize the specific cleared product areas in which ICE has significant dealings and has significant shares of volume.

Appendix B

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April 22, 2013

Ms. Melissa Jurgens
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U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Comments in Response to ICE Clear Credit LLC's Certification of Amended Rule 211 (Regulatory Reporting of Swap Data)

Dear Ms. Jurgens:

The Depository Trust & Clearing Corporation ("DTCC"),[1] in conjunction with its provisionally registered swap data repository ("SDR"), DTCC Data Repository (U.S.) LLC ("DDR"), submits this letter to the Commodity Futures Trading Commission ("CFTC" or "Commission") in response to ICE Clear Credit's ("ICC") most recent submission for self-certification pursuant to Commission Rule 40.6 of Rule 211, dated April 10, 2013 ("Amended Rule 211").[2]

Amended Rule 211 raises additional issues not contained in ICC's original Rule 211 submission[3] and, therefore, DTCC is providing the Commission with additional comments to supplement its previously filed petition, dated March 26, 2013, to stay the self-certification of proposed Rule 211 by ICC (the "Petition").[4]

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[1] The Depository Trust & Clearing Corporation ("DTCC") provides critical infrastructure to serve all participants in the financial industry, including investors, commercial end-users, broker-dealers, banks, insurance carriers, and mutual funds. DTCC operates as a cooperative that is owned collectively by its users and governed by a diverse Board of Directors. DTCC's governance structure includes 344 shareholders.

[2] ICE Clear Credit's ("ICC") Amended Rule 211 is *available at* http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul041013icc002.pdf.

[3] ICC's original submission for self-certification of proposed Rule 211 is *available at* http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul031413icc001.pdf.

[4] DTCC originally filed its petition to stay the self-certification of proposed Rule 211 by ICC on March 26, 2013 (the "Petition"). On April 4, 2013, ICC withdrew its original submission for self-certification of proposed Rule 211. Accordingly, following ICC's submission of Amended Rule 211 on April 10, 2013, DTCC resubmitted the Petition to the Commission on April 12, 2013.

For the reasons presented in this letter and the Petition, DTCC requests that the Commission reject the certification of Amended Rule 211 or, in the alternative, stay the certification pursuant to Commission Rule 40.6(c)(1).

The divergent perspectives offered by ICC and DTCC evidence that proposed Amended Rule 211 involves complex issues that should be given due consideration by the Commission and market participants and, therefore, is inappropriate for consideration under the Commission's Rule 40.6 self-certification process. Further, in reviewing the anticompetitive implications of Amended Rule 211, the Commission and market participants would benefit from additional clearing data as the clearing requirements are phased-in according to the Commission's compliance and implementation schedule.[5]

Therefore, DTCC requests that, should the Commission choose to stay the certification, in accordance with its own regulations, the Commission utilize an additional 90 days from the date of its notification of the stay to conduct a review and, within such 90 days, provide the public with a 30-day comment period.

Anticompetitive Considerations

DTCC's Petition detailed the inconsistency of ICC's proposed Rule 211 with the Commodity Exchange Act ("CEA" or "Act"), including the Act's prohibition against anticompetitive practices. However, ICC raises detailed assertions regarding its market power in its Amended Rule 211 submission, which are questionable and must be addressed. Specifically, ICC argues that it does not have market power because it claims that the market for credit default swap ("CDS") derivatives clearing is not a relevant market for purposes of evaluating competition issues.[6]

These unsupported statements are self-serving and mischaracterize current market conditions and the views of the U.S. Department of Justice ("DOJ") regarding market definition. First, ICC ignores that its exchanges host the vast majority of CDS clearing that currently occurs in the marketplace, establishing not only market power but likely monopoly power in the market for clearing CDS derivatives. Second, the *Horizontal Merger Guidelines* issued by the DOJ and the Federal Trade Commission ("FTC") do not support the notion that CDSs cannot represent a relevant market. Rather, the *Horizontal Merger Guidelines* state that "[w]hen a product sold by one merging firm (Product A) competes against one or more products sold by the other merging firm, the [DOJ and FTC] define a relevant product market around Product A to evaluate the importance of that competition. Such a relevant product market consists of a group of substitute products including

[5] *See* Swap Transaction Compliance and Implementation Schedule: Clearing Requirement Under Section 2(h) of the CEA, 77 Fed. Reg. 44,441 (July 30, 2012) (establishing a phased compliance schedule of the clearing requirement based on the type of market participant entering into swaps subject to the clearing requirement).

[6] *See* ICC's Amended Rule 211, *supra* note 2, at 3.

Product A. Multiple relevant product markets may thus be identified."[7] In other words, the DOJ and FTC would recognize and certainly would not exclude the notion that the product in which ICC is dominant—CDS derivatives clearing—can very well constitute a relevant product market.

Furthermore, while it is true that many entities offer clearing services for swaps, it is not true that all such entities are equally attractive to traders who need to clear an over-the-counter ("OTC") CDS. For example, a company that desires to hedge its exposure to credit defaults may be interested in engaging in a CDS; it will not find the trading and clearing of salmon derivatives by NOS Clearing ASA to be an acceptable substitute. While the *Horizontal Merger Guidelines* are primarily intended for evaluating potentially anticompetitive effects of mergers, rather than for evaluating exclusionary rules issued by market participants, it advises that market definition begins and ends with demand-side analysis:

> Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis. They are considered in these Guidelines in the sections addressing the identification of market participants, the measurement of market shares, the analysis of competitive effects, and entry.[8]

ICC has ignored these demand-side issues. Counterparties enter into different types of swaps—including interest rate swaps, foreign exchange swaps, CDSs, and different kinds of commodity swaps (*e.g.*, salmon versus crude oil)—for different reasons. Other types of swaps will not be good substitutes for a CDS. As a result, CDSs are almost certainly not in the same markets as other categories of swaps.

Further, as derivatives clearing organizations ("DCOs") differ substantially in the types of swaps that they accept for clearing, a counterparty wanting to clear a CDS must use a DCO that handles those swaps, which largely means using ICC, as discussed below. Whether "the clearing of CDS is no different from the clearing of numerous other categories of swaps" in some technical sense is irrelevant to real-world customers who need to clear OTC CDSs and overwhelmingly use ICC to do so.

ICC also incorrectly describes how market shares should be calculated to properly analyze its market power. It states:

> In a rapidly changing area such as clearing where competitors are not capacity constrained, shares of a particular line of business are not helpful to assessing market power. Nonetheless, if one were to

[7] U.S. DEP'T OF JUSTICE AND THE FED. TRADE COMM'N., HORIZONTAL MERGER GUIDELINES § 4.1 (Aug. 19, 2010) [hereinafter "*Horizontal Merger Guidelines"*], *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[8] *Id.* § 4.

> attempt to calculate market shares, one would include market shares of all clearing organizations in related lines of business, including the clearing of all other types of swaps or even all types of futures.[9]

As discussed above, market shares should *not* be calculated for a so-called market that includes services of vendors of different products (*e.g.*, clearing of other types of swaps). In addition, ease of entry is considered in assessing market power. According to the DOJ and the FTC:

> Firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.[10]
>
> Firms that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a [Small but Significant and Non-transitory Increase in Price], without incurring significant sunk costs, are also considered market participants . . . .[11]
>
> The [DOJ and the FTC] normally calculate market shares for all firms that currently produce products in the relevant market, subject to the availability of data. The [DOJ and the FTC] also calculate market shares for other market participants if this can be done to reliably reflect their competitive significance.[12]

ICC has made no attempt to explain why DCOs that do not clear CDSs could nonetheless enter easily. Further, ICC has made no attempt to explain how DCOs with small shares of CDS clearing nonetheless place substantial competitive constraints on ICC. For example, ICC states:

> A clearing organization with a high share would be unable to charge prices above competitive levels because there are simply too many clearing organizations that could enter that line of business quickly if they observed prices above competitive levels.[13]

This is unsubstantiated assertion, not analysis. The available data suggest that ICC has not made an attempt to provide analysis because it is incorrect with respect to the ease of entry into CDS clearing. As shown in Appendix A of the Petition, as of mid-March of 2013, ICC and ICE Clear Europe combined account for 96 percent of the total open interest in cleared CDS contracts.

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[9] ICC's Amended Rule 211, *supra* note 2, at 3-4 (citing *Horizontal Merger Guidelines*, *supra* note 7, §§ 5.2, 5.3).

[10] *Horizontal Merger Guidelines*, *supra* note 7, § 5.1.

[11] *Id.* § 5.1.

[12] *Id.* § 5.2.

[13] ICC's Amended Rule 211, *supra* note 2, at 4 (citing *Horizontal Merger Guidelines*, *supra* note 7, § 9).

ICC also takes the view that another reason why it cannot have market power over cleared CDSs is because CDS counterparties could choose not to clear their swaps:[14]

> Moreover, because the swap reporting requirement applies to cleared and uncleared swaps, the relevant market is not the market for cleared CDS, but rather the market for all CDS, both cleared and uncleared and any firm's share would be even lower.[15]

This assertion is unconvincing. ICC is the largest entity that clears CDSs. A comparison of the volume of uncleared swaps with the volume of cleared swaps sheds no light on the extent of ICC's market power in the clearing of CDSs. By definition, counterparties who choose not to clear a swap are not customers in the market in which ICC's market power is being judged. The issue at hand is whether ICC's market power in cleared swaps, coupled with Amended Rule 211, would adversely affect competition in the provision of SDR services. That not all CDSs are cleared has no bearing on whether ICC has market power in the clearing of swaps.

Third-Party Facilitation of Swap Data Reporting

The language of Amended Rule 211 is materially identical to Chicago Mercantile Exchange's ("CME") Rule 1001 and would achieve the same anticompetitive result—namely, no choice but to automatic reporting of swap data to ICC's captive SDR. ICC, however, provides a substantively new justification from its original submission for certification. ICC asserts itself as a third-party service provider with respect to the reporting obligations of its clearing participants, by stating that Amended Rule 211 "*relieves* ICC's Participants of arduous reporting obligations by reporting swap creation and continuation data *on their behalf*."[16] This can be further inferred given ICC's corresponding rule 211 filing with the Securities and Exchange Commission ("SEC"), which provides that "ICC, *in the capacity of a third-party service provider*, will be responsible for reporting required swap creation and continuation data *on behalf of* ICC's Clearing Participants."[17]

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[14] ICC's suggestion that CDS counterparties could choose not to clear swaps is misleading given that 15 major over-the-counter ("OTC") derivatives dealers have already committed to increase the use of central clearing for OTC credit and interest rate derivatives. *See* FEDERAL RESERVE BANK OF NEW YORK, MARKET PARTICIPANTS COMMIT TO EXPAND CENTRAL CLEARING FOR OTC DERIVATIVES (Sept. 8, 2009), http://www.newyorkfed.org/newsevents/news/markets/2009/ma090908.html.

[15] ICC's Amended Rule 211, *supra* note 2, at 4.

[16] *See id.* at 2 (emphasis added).

[17] *See* ICC's submission to add proposed Rule 211 is *available at* https://www.theice.com/publicdocs/regulatory_filings/ICC_SEC_040813.pdf (emphasis added). ICC specifically explains that it seeks to act as a third-party service provider for swap counterparties in its request to the Securities and Exchange Commission ("SEC") on March 25, 2013 for accelerated approval of proposed rule 211, which is identical to Amended Rule 211. *See* Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Related to Regulatory Reporting of Swap Data, 78 Fed. Reg. 22,350, 22,350-22,351 (Apr. 15, 2013).

Under the Commission's final Part 45 and 43 regulations, a reporting counterparty may contract with a third-party service provider to facilitate reporting.[18] Despite such an arrangement, the reporting counterparty bears the ultimate responsibility in fulfilling its reporting obligations.[19] Rule 45.9 states, in relevant part, that "swap counterparties required . . . to report required swap creation data or required swap continuation data, *while remaining fully responsible for reporting . . . may* contract with third-party service providers to facilitate reporting."[20] The Commission reiterates in the preamble to final Part 45 that "the use of such third-party facilitators . . . should not allow the registered entity or counterparty with the obligation to report to avoid its responsibility to report swap data in a timely and accurate manner."[21]

Similarly, under final Part 43, the Commission permits "reporting parties to contract with a third party—including a DCO that clears the swap—to report the data to an SDR."[22] The Commission notes that, as a reporting party "retain[s] the obligation to ensure that the appropriate information is provided in the appropriate timeframe to an SDR for public dissemination," such party "would be liable for a violation of [its reporting obligations] if, for example, a third party acting on behalf of a reporting party did not report the appropriate swap transaction and pricing data to an SDR for public dissemination."[23]

ICC's assertion that it will "facilitate" reporting as a third-party service provider is problematic for several reasons. First, contrary to prior IntercontinentalExchange, Inc. ("ICE") statements acknowledging the importance of reporting counterparty choice,[24] ICC fails to note in its self-certification that, by providing it "*shall* report creation and continuation data,"[25] Amended Rule 211 would effectively eviscerate

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[18] *See* Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2,136, 2,208 (Jan. 13, 2013); *see also* Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1,182, 1,236 (Jan. 9, 2012).

[19] *See* Division of Market Oversight Advisory, CFTC, at 2 (Mar. 8, 2013) (reminding market participants that "[a] party with reporting obligations under the swap data recordkeeping and reporting rules remains fully responsible for the timely and accurate fulfillment of its reporting obligations, regardless of whether it contracts with a third party service provider to facilitate reporting"), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/dmoadvisory030813.pdf.

[20] Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2,208 (emphasis added).

[21] *Id.* at 2,167.

[22] Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. at 1,236.

[23] *See id.* at 1,199, n.155.

[24] *See* Letter from Bruce Tupper and Carrie Slagle, IntercontinentalExchange, Inc., to David Stawick, Secretary, CFTC (Feb. 7, 2011), at 3 (acknowledging that "the reporting counterparty is ultimately responsible for managing the swap in the SDR for the entire life of the transaction" and recommending that "the Commission require SEFs and DCMs to submit swap creation data to a SDR according to the preferences of the reporting counterparty"), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27635&SearchText=.

[25] ICC's Amended Rule 211, *supra* note 2 (emphasis added).

reporting counterparties' *choice* to contract with ICC, as a third-party service provider, in contravention of the Commission's regulations.

Second, ICC states at the outset of its self-certification that Amended Rule 211 is "substantively identical to [CME] Rule 1001 approved by the Commission on March 6, 2013."[26] While Amended Rule 211 suffers from many of the same failings as CME Rule 1001, ICC's characterization of operating as a third-party service provider on behalf of its clearing participants adds additional shortcomings, despite materially identical rule language. Under CME Rule 1001, CME purports to fulfill its own reporting obligations, an interpretation which DTCC maintains is flawed and inconsistent with the Commission's reporting framework.[27] However, by stating that ICC would "relieve" clearing participants of their reporting obligations as a third-party service provider, ICC implicitly acknowledges that its clearing participants retain their reporting obligations following novation.[28] ICC may not, therefore, rely on the Commission's novation rationale with respect to CME Rule 1001 (which is erroneous and contrary to law) to certify compliance of Amended Rule 211 with the Commission's regulatory reporting framework.

* * *

In summary, Amended Rule 211 is fundamentally inconsistent with the applicable statutory requirements in the CEA and attendant Commission regulations related to swap data reporting. Further, ICC may not rely on the Commission's rationale for approval of CME Rule 1001 to certify Amended Rule 211. Accordingly, DTCC requests that the Commission reject the certification of Amended Rule 211 or, in the alternative, stay the certification pursuant to Commission Rule 40.6(c)(1) and

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[26] *Id.* at 1.

[27] DTCC maintains all of its objections to CME Rule 1001 and the Statement of the Commission in response to CME's request for approval of new Chapter 10 and Rule 1001, including that the CFTC's actions violated the Administrative Procedure Act. *See* Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Nov. 20, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58974&SearchTex;

see also Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Dec. 5, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58975&SearchText;

Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Dec. 7, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58976&SearchText;

Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Dec. 20, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59009&SearchText=;

Letter from Larry Thompson, General Counsel, DTCC, to the Honorable Gary Gensler, Chairman, CFTC, CFTC Industry Filing 12-014 (Jan. 3, 2012), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59025&SearchText=.

[28] This line of reasoning is substantially dissimilar to CME's misguided justification for assuming the reporting obligations of reporting counterparties.

provide the public with a 30-day comment period to further examine the inconsistencies of Amended Rule 211 with the CEA and the Commission's regulations.

Should the Commission wish to discuss these comments further, please contact me at 212-855-3240 or lthompson@dtcc.com.

Sincerely yours,

Larry E. Thompson
General Counsel