

13.3 Clearing Agencies

13.3.1 OSC Notice and Request for Comment – ICE Clear Credit LLC – Application for Exemption from Recognition as a Clearing Agency

OSC NOTICE AND REQUEST FOR COMMENT

ICE CLEAR CREDIT LLC

APPLICATION FOR EXEMPTION FROM RECOGNITION AS A CLEARING AGENCY

A. Background

ICE Clear Credit LLC (**ICC**) has applied (the **Application**) to the Commission for an order pursuant to section 147 of the *Securities Act* (Ontario) (**OSA**) to exempt ICC from the requirement to be recognized as a clearing agency in subsection 21.2(0.1) of the OSA. Among other factors set out in the Application, the exemption is being sought on the basis that ICC is subject to an appropriate regulatory and oversight regime in its home jurisdiction in the United States by its regulators, the Commodity Futures Trading Commission and the Securities Exchange Commission.

ICC clears and settles various types of credit default swaps.

B. Proposed Regulatory Approach

In reviewing the Application, staff followed the process and assessed the Application against the criteria set out in OSC Staff Notice 24-702 *Regulatory Approach to Recognition and Exemption from Recognition of Clearing Agencies* (**Staff Notice**). As noted in the Staff Notice, we are prepared to exempt a clearing agency if it does not pose significant risk to Ontario capital markets and is subject to an appropriate regulatory and oversight regime in another jurisdiction by its home regulator(s).

In determining whether a clearing agency posed significant risk to Ontario, staff consider the level of activity of the clearing agency in Ontario (using indicators such as notional value and volume of transactions cleared for Ontario-based market participants) and other qualitative and quantitative factors, such as interconnectedness, size of obligations and the role and central importance of a clearing agency to a particular market. The existence of different regulatory regimes is acknowledged in the recent CPSS-IOSCO's Principles for financial market infrastructures that require authorities to cooperate with each other in promoting the safety and efficiency of financial market infrastructures. The proposed exemption of ICC is based on the level of risk it posed to Ontario at this time and the regulatory regime that it is currently subject to.

C. Draft Order

In the Application, ICC describes how it addresses each of the criteria set forth in the Staff Notice. Subject to comments received, staff propose to recommend to the Commission that it issue to ICC an exemption order with terms and conditions in the form of the proposed draft order (**Draft Order**).

The Draft Order requires ICC to comply with various terms and conditions, including relating to:

1. Regulation of ICC
2. Governance
3. Filing requirements
4. Information sharing
5. Submission to jurisdiction and agent for service

D. Comment Process

The Commission is publishing for public comment the Application and Draft Order. The Draft Order is published in the same edition of the OSC Bulletin as is this notice and on the OSC website. The Application can be found on the OSC website. We are seeking comment on all aspects of the Application and Draft Order.

You are asked to provide your comments in writing, via e-mail and delivered on or before November 22, 2013 addressed to the attention of the Secretary of the Commission, Ontario Securities Commission, 20 Queen Street West, 22nd floor, Toronto, Ontario, M5H 3S8, e-mail: comments@osc.gov.on.ca.

The confidentiality of submissions cannot be maintained as comments received during the comment period will be published.

Questions may be referred to:

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[DRAFT ONLY]

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, CHAPTER S.5, AS AMENDED
(the Act)

AND

IN THE MATTER OF
ICE CLEAR CREDIT LLC (ICC)

ORDER
(Section 147 of the Act)

WHEREAS ICC has filed an application (**Application**) with the Ontario Securities Commission (**Commission**) pursuant to section 147 of the Act requesting an order exempting ICC from the requirement to be recognized as a clearing agency under subsection 21.2(0.1) of the Act (**Order**);

AND WHEREAS the Commission issued an interim order (**Interim Order**) exempting ICC from the requirement to be recognized as a clearing agency under subsection 21.2(0.1) of the Act, until the earlier of (i) December 30, 2013 and (ii) the effective date of a subsequent order exempting ICC from the requirement to be recognized as a clearing agency under section 147 of the Act;

AND WHEREAS the Interim Order will be replaced by this order and therefore be automatically revoked upon issuance of this order;

AND WHEREAS ICC has represented to the Commission that:

1. ICC is a limited liability corporation incorporated under the laws of the State of Delaware in the United States (**U.S.**) and is a wholly-owned subsidiary of ICE U.S. Holding Company L.P. which in turn is a wholly-owned subsidiary of IntercontinentalExchange, Inc. (**ICE**);
2. ICE is a publicly traded corporation organized under the laws of Delaware and listed for trading on the New York Stock Exchange. ICE is an operator of regulated exchanges and clearing houses serving the risk management needs of global markets for agricultural, credit, currency, emissions, energy and equity index products;
3. ICC is a DCO within the meaning of that term under the U.S. Commodity Exchange Act (**CEA**). As a DCO, ICC is subject to regulatory supervision by the United States Commodity Futures Trading Commission (**CFTC**), a U.S. federal regulatory agency. The CFTC reviews, assesses, and enforces a DCO's adherence to the CEA and the regulations promulgated thereunder on an ongoing basis, including but not limited to, the DCO's compliance with "Core Principles" relating to financial resources, participant and product eligibility, risk management, settlement procedures, treatment of funds, default rules and procedures, rule enforcement and system safeguards. ICC is subject to ongoing examination and inspection by the CFTC;
4. ICC is also a clearing agency within the meaning of that term under the Securities Exchange Act of 1934, as amended (**Exchange Act**), and as such is regulated by the United States Securities and Exchange Commission (**SEC**). As a SEC registered securities clearing agency, ICC is subject to regulatory supervision by the SEC, a federal regulatory agency that reviews, assesses and enforces a clearing agency's adherence to the Exchange Act and the regulations promulgated thereunder on an ongoing basis, including but not limited to, the clearing agency's compliance relating to risk management, participant access, records of financial resources and audited financial statements and minimum operating standards. ICC has frequent contact with the SEC, which includes regular reporting as well as reporting that arises on an "as needed" basis;
5. On July 18, 2012, ICC was designated as a systemically important financial market utility (**SIFMU**) by the Financial Stability Oversight Council. SIFMUs receive increased oversight by regulators including the Board of Governors of the Federal Reserve;
6. ICC currently offers clearing services for 64 North American CDS Indices, 7 Emerging Markets CDS Indices, 47 European CDS Indices, 161 North American Corporate Single Names, 4 Sovereign Single Names and 121 European Corporate Single Names (collectively, the **Clearing Products**). New product launches may require the approval of the CFTC and/or SEC;

7. ICC serves as the central counterparty for all OTC trades submitted for clearing;
8. ICC's risk model includes clear and certain rules and procedures (and other aspects of its legal framework) governing ICC's role as central counterparty, as well as appropriate membership criteria that are risk-based. ICC operates a robust pricing and margining/collateral methodology. ICC also has in place appropriate banking and custody arrangements, default resources and management processes. These components are linked by daily monitoring and oversight, undertaken by an experienced risk management team, with appropriate oversight by the Board of Managers;
9. The membership requirements of ICC are publicly disclosed and are designed to permit fair and open access, while protecting ICC and its Clearing Participants as defined in Schedule "A" to this order. The clearing membership requirements include fitness criteria, financial standards, operational standards and appropriate registration qualifications with applicable statutory regulatory authorities. ICC applies a due diligence process to ensure that all applicants meet the required criteria and conducts on-going monitoring of Clearing Participants;
10. All ICC Clearing Participants, including those that are incorporated/domiciled in non-U.S. jurisdictions, must complete an application for participation and make a deposit into the ICC guaranty fund;
11. ICC's Clearing Participants consist of banks and futures commission merchant (**FCM**)/broker dealers (**BD**);
12. ICC does not have any offices or maintain other physical installations in Ontario or any other Canadian province or territory. ICC does not have any plans to open such an office or to establish any such physical installations in Ontario or elsewhere in Canada. However, ICC offers or proposes to offer direct clearing access in Ontario for clearing OTC derivatives products to entities that have a head office or principal place of business in Ontario (**Ontario Clearing Participants**);
13. ICC currently has one Ontario Clearing Participant that has a head office or principal place of business in Ontario, with privileges to clear CDS products on its own behalf, and on behalf of its branches and affiliated companies;
14. ICC currently carries on business in Ontario pursuant to the Interim Order;
15. ICC submits that it does not pose a significant risk to the Ontario capital markets and is subject to an appropriate regulatory and oversight regime in a foreign jurisdiction;
16. Section 21.2(0.1) of the Act prohibits clearing agencies from carrying on business in Ontario unless they are recognized by the Commission as a clearing agency or exempted from such recognition under section 147;

AND WHEREAS ICC has agreed to the respective terms and conditions as set out in Schedule "B" to this order;

AND WHEREAS based on the Application and the representations ICC has made to the Commission, the Commission has determined that ICC satisfies the criteria set out in Schedule "A" and that the granting of the order exempting ICC from the requirement to be recognized as a clearing agency under subsection 21.2(0.1) of the Act would not be prejudicial to the public interest;

AND WHEREAS the Commission will monitor developments in international and domestic capital markets and ICC's activities on an ongoing basis to determine whether it is appropriate that ICC continue to be exempted from the requirement to be recognized as a clearing agency and, if so, whether it is appropriate that it continue to be exempted subject to the terms and conditions in this order;

IT IS HEREBY ORDERED by the Commission that, pursuant to section 147 of the Act, ICC is exempt from recognition as a clearing agency under subsection 21.2(0.1) of the Act;

PROVIDED THAT ICC complies with the terms and conditions attached hereto as Schedule "B".

DATED ●, 2013.

SCHEDULE "A"

**Criteria for Exemption from Recognition by the Ontario Securities Commission
as a Clearing Agency pursuant to section 21.1(0.1) of the *Securities Act* (Ontario)**

PART 1. Governance

- 1.1 The governance structure and governance arrangements of the clearing agency ensures:
- (a) effective oversight of the clearing agency;
 - (b) the clearing agency's activities are in keeping with its public interest mandate;
 - (c) fair, meaningful and diverse representation on the governing body (Board) and any committees of the Board, including a reasonable proportion of independent directors;
 - (d) a proper balance among the interests of the owners and the different entities seeking access (participants) to the clearing, settlement and depository services and facilities (settlement services) of the clearing agency;
 - (e) the clearing agency has policies and procedures to appropriately identify and manage conflicts of interest;
 - (f) each director or officer of the clearing agency, and each person or company that owns or controls, directly or indirectly, more than 10 percent of the clearing agency is a fit and proper person; and
 - (g) there are appropriate qualifications, limitation of liability and indemnity provisions for directors and officers of the clearing agency.

PART 2. Fees

- 2.1 All fees imposed by the clearing agency are equitably allocated. The fees do not have the effect of creating unreasonable barriers to access.
- 2.2 The process for setting fees is fair and appropriate, and the fee model is transparent.

PART 3. Access

- 3.1 The clearing agency has appropriate written standards for access to its services.
- 3.2 The access standards and the process for obtaining, limiting and denying access are fair and transparent. A clearing agency keeps records of
- (a) each grant of access including, for each participant, the reasons for granting such access, and
 - (b) each denial or limitation of access, including the reasons for denying or limiting access to an applicant.

PART 4. Rules and Rulemaking

- 4.1 The clearing agency's rules are designed to govern all aspects of the settlement services offered by the clearing agency, and
- (a) are not inconsistent with securities legislation,
 - (b) do not permit unreasonable discrimination among participants, and
 - (c) do not impose any burden on competition that is not necessary or appropriate.
- 4.2 The clearing agency's rules and the process for adopting new rules or amending existing rules should be transparent to participants and the general public.
- 4.3 The clearing agency monitors participant activities to ensure compliance with the rules.
- 4.4 The rules set out appropriate sanctions in the event of non-compliance by participants.

PART 5. Due Process

- 5.1 For any decision made by the clearing agency that affects an applicant or a participant, including a decision in relation to access, the clearing agency ensures that:
- (a) an applicant or a participant is given an opportunity to be heard or make representations; and
 - (b) the clearing agency keeps a record of, gives reasons for, and provides for appeals or reviews of, its decisions.

PART 6. Risk Management

- 6.1 The clearing agency's settlement services are designed to minimize systemic risk.
- 6.2 The clearing agency has appropriate risk management policies and procedures and internal controls in place.
- 6.3 Without limiting the generality of the foregoing, the clearing agency's services or functions are designed to achieve the following objectives:
- 1. Where the clearing agency acts as a central counterparty, it rigorously controls the risks it assumes.
 - 2. The clearing agency minimizes principal risk by linking securities transfers to funds transfers in a way that achieves delivery versus payment.
 - 3. Final settlement occurs no later than the end of the settlement day. Intraday or real-time finality is provided where necessary to reduce risks.
 - 4. Where the clearing agency extends intraday credit to participants, including a clearing agency that operates net settlement systems, it institutes risk controls that, at a minimum, ensure timely settlement in the event that the participant with the largest payment obligation is unable to settle.
 - 5. Assets used to settle the ultimate payment obligations arising from securities transactions carry little or no credit or liquidity risk. If central bank money is not used, steps are to be taken to protect participants in settlement services from potential losses and liquidity pressures arising from the failure of the cash settlement agent whose assets are used for that purpose.
 - 6. If the clearing agency establishes links to settle cross-border trades, it designs and operates such links to reduce effectively the risks associated with cross-border settlements.
- 6.4 The clearing agency engaging in activities not related to settlement services carries on such activities in a manner that prevents the spillover of risk to the clearing agency that might affect its financial viability or negatively impact any of the participants in the settlement service.

PART 7. Systems and Technology

- 7.1 For its settlement services systems, the clearing agency:
- (a) develops and maintains,
 - (i) reasonable business continuity and disaster recovery plans,
 - (ii) an adequate system of internal control,
 - (iii) adequate information technology general controls, including controls relating to information systems operations, information security, change management, problem management, network support, and system software support;
 - (b) on a reasonably frequent basis, and in any event, at least annually, and in a manner that is consistent with prudent business practice,
 - (i) makes reasonable current and future capacity estimates,
 - (ii) conducts capacity stress tests to determine the ability of those systems to process transactions in an accurate, timely and efficient manner,

(iii) tests its business continuity and disaster recovery plans; and

(c) promptly notifies the regulator of any material systems failures.

7.2 The clearing agency annually engages a qualified party to conduct an independent systems review and prepare a report in accordance with established audit standards regarding its compliance with section 7.1(a).

PART 8. Financial Viability and Reporting

8.1 The clearing agency has sufficient financial resources for the proper performance of its functions and to meet its responsibilities and allocates sufficient financial and staff resources to carry out its functions as a clearing agency in a manner that is consistent with any regulatory requirements.

PART 9. Operational Reliability

9.1 The clearing agency has procedures and processes to ensure the provision of accurate and reliable settlement services to participants.

PART 10. Protection of Assets

10.1 The clearing agency has established accounting practices, internal controls, and safekeeping and segregation procedures to protect the assets that are held by the clearing agency.

PART 11. Outsourcing

11.1 Where the clearing agency has outsourced any of its key functions, it has appropriate and formal arrangements and processes in place that permit it to meet its obligations and that are in accordance with industry best practices. The outsourcing arrangement provides regulatory authorities with access to all data, information, and systems maintained by the third party service provider required for the purposes of regulatory oversight of the agency.

PART 12. Information Sharing and Regulatory Cooperation

12.1 For regulatory purposes, the clearing agency cooperates by sharing information or otherwise with the Commission and its staff, self-regulatory organizations, exchanges, quotation and trade reporting systems, alternative trading systems, other clearing agencies, investor protection funds, and other appropriate regulatory bodies.

SCHEDULE "B"

Terms and Conditions

DEFINITIONS

For the purposes of this Schedule "B":

"Clearing Participant" means a clearing participant as defined under ICC's rules;

"client clearing" means the ability of a Clearing Participant to clear transactions at ICC for and on behalf of a client who is not a Clearing Participant;

"rule" means any provision or other requirement in ICC's rulebook, operating procedures or manuals, user guides, or similar documents governing rights and obligations between ICC and the Clearing Participants or among the Clearing Participants;

"U.S. Authorities" means the CFTC and SEC. Unless the context otherwise requires, other terms used in this Schedule "B" have the meanings ascribed to them in Ontario securities law (including terms defined elsewhere in this exemption order).

REGULATION OF ICC

1. ICC will maintain its registration as a DCO and as a registered securities clearing agency in the United States and will continue to be subject to the regulatory oversight of the U.S. Authorities.
2. ICC will continue to comply with its ongoing regulatory requirements as a DCO and as a registered securities clearing agency in the United States.
3. ICC will continue to meet the criteria for exemption from recognition as a clearing agency as set out in Schedule "A".

GOVERNANCE

4. ICC will continue to promote a corporate governance structure that minimizes the potential for any conflicts of interest between IntercontinentalExchange, Inc. (and its affiliates) and ICC that could adversely affect the clearance and settlement of trades in contracts or the effectiveness of ICC's risk management policies, controls, and standards.

FILING REQUIREMENTS

Filings with U.S. Authorities

5. ICC will promptly provide staff of the Commission the following information, and to the extent that it is required to file such information with the U.S. Authorities it will file such information concurrently with staff of the Commission:
 - (a) the annual audited financial statements of ICC;
 - (b) details of any material legal proceeding instituted against it;
 - (c) notification that ICC has failed to comply with an undisputed obligation to pay money or deliver property to a Clearing Participant for a period of thirty days after receiving notice from the Clearing Participant of ICC's past due obligation;
 - (d) notification that ICC has instituted a petition for a judgment of bankruptcy or insolvency or similar relief, or to wind up or liquidate ICC or has a proceeding for any such petition instituted against it;
 - (e) the appointment of a receiver or the making of any voluntary arrangement with creditors; and
 - (f) material changes to its bylaws and rules.

Prompt Notice

6. ICC will promptly notify staff of the Commission of any of the following:
 - (a) any material change to its business or operations or the information as provided in the Application;

- (b) any material problem with the clearance and settlement of transactions in contracts cleared by ICC that could materially affect the safety and soundness of ICC;
- (c) any event of default by a Clearing Participant;
- (d) any material system failure of a clearing service utilized by an Ontario Clearing Participant;
- (e) any material change or proposed material change in ICC's status as a DCO or registered securities clearing agency or to the regulatory oversight by the U.S. Authorities;
- (f) the admission of any new Ontario Clearing Participant or any other Ontario resident that has entered into a direct connection arrangement with ICC for facilitating the Ontario resident's direct access to one or more ICC systems; and
- (g) the clearing of new products that are proposed to be offered to Ontario Clearing Participants or products that will no longer be available to Ontario Clearing Participants.

Quarterly Reporting

7. ICC will maintain the following updated information and submit such information to the Commission in a manner and form acceptable to the Commission on a quarterly basis (by the end of the month following the end of the calendar quarter), and at any time promptly upon the request of staff of the Commission:
- (a) a current list of all Ontario Clearing Participants;
 - (b) a list of all Ontario Clearing Participants against whom disciplinary action has been taken in the quarter by ICC or, to the best of ICC's knowledge, by the U.S. Authorities with respect to such Ontario Clearing Participants' clearing activities on ICC;
 - (c) a list of all referrals for disciplinary action by ICC relating to Ontario Clearing Participants;
 - (d) a list of all Ontario applicants who have been denied clearing participant status in ICC in the quarter;
 - (e) the maximum and average daily of: open interest, number of transactions and notional value of trades cleared by Clearing Product during the quarter, for each Ontario Clearing Participant;
 - (f) the percentage of average daily open interest, number of transactions and the notional value of trades cleared by Clearing Product during the quarter for all Clearing Participants that represents the average daily open interest, total transactions and notional value of trades cleared during the quarter for each Ontario Clearing Participant;
 - (g) the average daily open interest, number of transactions and notional value of the Single Name CDS products that reference Canadian entities cleared for both Canadian and Non-Canadian Clearing Participants during the previous quarter;
 - (h) the aggregate total margin amount required by ICC ending on the last trading day during the quarter for each Ontario Clearing Participant;
 - (i) the portion of the total margin required by ICC ending on the last trading day of the quarter for all Clearing Participants that represents the total margin required during the quarter for each Ontario Clearing Participant;
 - (j) the Guaranty Fund contribution, for each Ontario Clearing Participant on the last trading day during the quarter, and its proportion of the total Guaranty Fund contributions;
 - (k) a list of Ontario Clearing Participants who have received permission or approval by ICC during the quarter to:
 - 1) perform client clearing at ICC; or
 - 2) clear at ICC new classes of products that the Ontario Clearing Participant was not otherwise permitted or approved to clear under the terms of its ICC membership;
 - (l) a summary of risk management analysis related to the adequacy of required margin and the level of the guaranty funds, including but not limited to stress testing and back testing results;

- (m) based on information available to ICC, the aggregate notional value and volume of transactions cleared during the quarter by Clearing Participants for and on behalf of clients that are Ontario residents; and, where ICC has subsequently verified the accuracy of such aggregate client clearing information for any previous quarters, any summary that describes the results of such verification including any reconciliation of the information previously reported to the Commission;
- (n) to the extent ICC becomes aware of the offering of client clearing to Ontario residents by a Clearing Participant, the identity of such Clearing Participant and its jurisdiction of incorporation (including that of its ultimate parent) that provides such client clearing services to Ontario residents including, where known,
 - 1) the name of each of the Ontario residents receiving such services; and
 - 2) the value and volume of transactions cleared by Clearing Product during the quarter for and on behalf of each Ontario resident;
- (o) any other information in relation to an OTC derivative cleared by ICC for Ontario Clearing Participants as may be required by the Commission from time to time in order to carry out the Commission's mandate; and
- (p) a copy of the bylaws and rules showing all cumulative changes to the bylaws and rules made during the quarter.

INFORMATION SHARING

- 8. ICC will provide such information as may be requested from time to time by, and otherwise cooperate with, the Commission or its staff, subject to any applicable privacy or other laws (including solicitor-client privilege) governing the sharing of information and the protection of personal information.
- 9. Unless otherwise prohibited under applicable law, ICC will share information relating to regulatory and enforcement matters and otherwise cooperate with other recognized and exempt clearing agencies on such matters, as appropriate.

SUBMISSION TO JURISDICTION AND AGENT FOR SERVICE

- 10. With respect to a proceeding brought by the Commission arising out of, related to, concerning or in any other manner connected with the Commission's regulation and oversight of ICC's activities in Ontario, ICC shall submit to the non-exclusive jurisdiction of (i) the courts and administrative tribunals of Ontario and (ii) an administrative proceeding in Ontario.
- 11. For greater certainty, ICC shall file with the Commission a valid and binding appointment of an agent for service in Ontario upon whom the Commission may serve a notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal, penal or other proceeding arising out of or relating to or concerning the Commission's regulation and oversight of ICC's activities in Ontario.