January 16, 2024

Via Electronic Submission

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219

James P. Sheesley
Assistant Executive Secretary
Attention: Comments/Legal OES (RIN 3064-AF29)
Federal Deposit Insurance Corporation
550 17th Street NW, Washington, DC 20429

Re: Notice of Proposed Rulemaking: Regulatory Capital Rule: Large Banking Organizations and Banking Organizations with Significant Trading Activity

To Whom It May Concern:

Intercontinental Exchange Inc., on behalf of itself and its subsidiaries (collectively "ICE"), appreciates the opportunity to respond to the notice of proposed rulemaking related to the Large Banking Organizations and Banking Organizations With Significant Trading Activity[1] ("Basel III Endgame" or "Proposal") issued by the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Federal Reserve"), and the Federal Deposit Insurance Corporation ("FDIC") (collectively, "the Agencies").

ICE operates regulated marketplaces for the listing, trading and clearing of a broad array of derivatives contracts and financial securities, such as commodities, interest rates, foreign exchange and equities as well as corporate and exchange-traded funds, or ETFs. We operate multiple trading venues, including 13 regulated exchanges and six clearing houses, which are strategically positioned in major market centers around the world, including the U.S., U.K., European Union, or EU, Canada, Asia Pacific and the Middle East. ICE's six clearing houses are regulated as follows:

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[1] Federal Reserve, FDIC, OCC, Regulatory capital rule: Amendments applicable to large banking organizations and to banking organizations with significant trading activity (July 27, 2023), available at available at Link. https://www.federalreserve.gov/aboutthefed/boardmeetings/frn-basel-iii-20230727.pdf.

- ICE Clear Credit ("ICC") and ICE Clear U.S.[2] are regulated by the CFTC as Derivative Clearing Agencies ("DCO") under the Commodity Exchange Act ("CEA"). The Financial Stability Oversight Council has designated ICE Clear Credit as a systemically-important financial market utility under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. ICC is also regulated by the Securities and Exchange Commission ("SEC") as a clearing agency because it clears security-based swaps.

- ICE Clear Europe Limited ("ICE Clear Europe"), which is primarily regulated in the U.K. by the Bank of England as a Recognized Clearing House, is also subject to regulation by the CFTC as a DCO and by the European Securities and Markets Authority ("ESMA").

- In Canada, ICE NGX is recognized as an exchange and clearing house by the Alberta Securities Commission ("ASC") and is also registered by the CFTC as a Foreign Board of Trade ("FBOT") and as a DCO.

- In the EU, ICE Clear Netherlands is an authorized central counterparty ("CCP") and is regulated by the Dutch National Bank ("DNB") and Authority for Financial Markets ("AFM").

- In Singapore, ICE Clear Singapore is an approved clearing house supervised by the Monetary Authority of Singapore ("MAS").

ICE appreciates the opportunity to comment on the Proposal. ICE closely follows regulatory reforms that have the potential to impact the centrally cleared ecosystem and incentives to clear. ICE supports the development of risk-based capital requirements. ICE is however concerned about the Proposal's impact on the cleared derivatives markets as the proposed capital requirements could make hedging significantly more expensive for market participants, reduce capacity and willingness of banks to provide clearing services and conflict with public policy objectives to promote central clearing.

Background

Banks and bank holding companies (collectively, "banks") are required to hold capital for the market, credit, and operational risks of operating their business. The Agencies jointly set minimum U.S. regulatory capital requirements designed to ensure banks are well capitalized in the event of losses. The minimum capital standards have grown significantly since the global financial crisis, driven largely by the post-crisis reforms of Basel III, which sets international standards for banks' capital and liquidity requirements and was implemented following the 2008 financial crisis. The Agencies' recently proposed the Basel III Endgame to complete the U.S. implementation of the Basel framework. The Basel III Endgame proposes substantial changes to the capital framework applicable to banks, including additional capital charges related to client cleared derivative activities. In addition to the Basel III Endgame, the Federal Reserve has also recently proposed changes to the capital surcharge that applies to U.S. global systemically important banking organizations (the "G-SIB Surcharge Proposal").[3] These proposals could negatively impact capital markets, degrade market liquidity, and adversely effect end-users ability to access funding through debt and equity markets. In addition, the Basel III Endgame Proposal would increase capital requirements for residential mortgages without taking into consideration the regulatory reforms to origination, servicing, and mortgage insurance made following the 2008 financial crisis.

[2] ICE Clear U.S. has elected to be a "subpart C" DCO under Commission Rule 39.31.

[3] 88 Fed. Reg. 60,385 (Sept. 1, 2023). ICE is separately commenting on the G-SIB Surcharge Proposal.

The impact of the proposed changes would discourage mortgage lending, diminish demand and liquidity of mortgage servicing and increase costs for consumers.

Importance of Central Clearing

Clearing houses play an important role in financial markets and are a critical market infrastructure that fosters financial stability in global markets. Clearing has consistently proven to be a fundamentally safe and sound process for mitigating systemic risks through multilateral netting and standardization. Moreover, the clearing house financial resources and default management processes also reduce the likelihood that a default of one member results in losses for other members. The risk-reducing benefits of central clearing have long been recognized by users of exchange-traded derivatives (futures), and the performance of the clearing model throughout even the most challenging financial situations made it one of the foundations of financial reforms. Observers frequently point to non-cleared derivative contracts as a significant factor in the broad reach and complexity of the 2008 financial crisis, while noting the relative stability of cleared markets. The commitments of the Group of 20 nations ("G-20") after the financial crisis highlighted central clearing as a fundamental reform to reduce risk, increase transparency, and increase market integrity and stability. Those commitments were implemented in the U.S. under the Dodd-Frank Act and in other jurisdictions' own financial reforms. In the years since the financial crisis, clearing has been the backbone of financial reform and provides an essential service allowing market participants to efficiently and effectively hedge their risks.

Moreover, central clearing mitigates systemic risk, provides greater transparency and reduces the complexity and interconnectedness of banking organizations by replacing bilateral transactions between market participants with a transparent central counterparty ("CCP") system. Clearing members act as agents or intermediaries for their clients, in effect guaranteeing the performance of the clients to the CCP and assuming any payment obligation that arises to the CCP if a client defaults. Initial margin is pledged by the client to the clearing member and placed in a segregated account separate from the clearing member's own assets and then passed on to the CCP. The CCP marks-to-market cleared positions on a daily basis and any losses occurring from a clearing member or customer position must be paid to the CCP by a specified deadline. This mark-to-market process is unique to cleared instruments and reduces risk by ensuring that unpaid losses do not amass over time.

The Proposal could also further reduce the ability for U.S. bank affiliated clearing members to provide client clearing services due to increased capital requirements for such activities. Many clearing members have left the business over the past several years and a smaller clearing member community adversely impacts the financial markets by concentrating risk while reducing the availability of clearing services to end-users. The Proposal's failure to recognize the cleared derivative market's risk reducing structure is counterintuitive and the Proposal could increase systemic risk by disincentivizing banks from using and providing access to their customers to cleared instruments to manage their risk. Any reduction in access to these clearing services could result in higher costs to consumers as companies depend on central clearing to mitigate their business risks.

By not fully considering the risk reducing benefits of central clearing and the robust protections for end-users provided under law and regulation, the Proposal is inconsistent with the goal of the G-20 to incentivize central clearing by reducing the availability of client clearing. Under the U.S.

regulatory framework, clearing members are required to collect collateral from their customers[4] to offset the potential future exposures arising from a given customer's derivatives positions at a CCP and further to segregate those positions and collateral from the clearing member's own positions and collateral. The Agencies are proposing to require additional capital charges on client cleared activities which would be duplicative of the credit risk charges banks already apply to client exposures. To date, these protections have been recognized by policymakers in other jurisdictions as a reason for not imposing additional capital charges for client clearing activity, but not by banking regulators in the U.S.

The increased capital requirements in the Proposal may also increase systemic risk by lowering the probability of the successful porting of solvent customers of a defaulting clearing member of a CCP. For background, in the event of a clearing member default and to maintain market stability and preserve risk management capabilities for clients by minimizing portfolio liquidation, a CCP will look to port the positions and margin of solvent customers of the defaulting clearing member to another solvent, clearing member. During a period of financial stress in which clients may need to be ported to solvent clearing members, bank-affiliated clearing members may not be in a position to accept, or willing to accept ported customers' positions if the capital requirements to take the client ported positions are onerous. If porting to a new clearing member cannot be arranged, the customer positions and margin at the defaulting clearing member will need to be liquidated, causing disruption for those customers and the markets generally. The increased capital charges under the Proposal thus increase liquidation risk for customer portfolios in the event of a clearing member default because of the risk that non-defaulting clearing members will be unable or unwilling to accept ported customers. In addition, the resulting need to liquidate client positions may risk significant price deterioration in markets as bank-affiliated clearing members or bank-affiliated market participants will have less incentive to bid in a voluntary auction of the portfolio being liquidated for fear of the punitive capital requirements. The increased likelihood of forced liquidation during a market stress event can elevate overall systemic risk and exacerbate volatility in an already-stressed market.

Finally, the Proposal would negatively impact the ability of U.S. banks to compete with their European counterparts. The Proposal deviates from the Basel committee framework and is more restrictive than legislation implemented in other jurisdictions creating competitiveness concerns for U.S. banks.

Specific Basel III Endgame Concerns

CVA Charges

The Agencies have proposed to include client cleared derivatives in the Credit Valuation Adjustment ("CVA") framework.[5] In ICE's view, this different treatment for client cleared derivatives is not appropriate. A clearing member's risk to the clearing house is when there is an actual default of the client and losses incurred on liquidating the client portfolio exceed the client initial margin. This loss exposure is already captured through the existing counterparty credit risk default charge within SA-CCR. Both the current Basel III framework and the proposed Basel III

[4] See 17 C.F.R. §§ 1.20-1.30; 17 C.F.R. §§ 22.2-22.7

[5] See Federal Register, op.cit., at page 64151: "The proposed definition of a CVA risk covered position would include client-facing derivative transactions and would recognize the potential CVA risk of such exposures through the risk-based requirements for these exposures, as described in sections III.I.3.a and III.I.4 of this Supplementary Information."

Endgame generally recognize this aspect of the customer clearing model in calculating the risk weighted assets of a clearing member.

Moreover, the Basel III Endgame would impose an additional CVA charge on banks for client clearing activity in effect treating a client cleared position as if it were an uncleared OTC transaction and ignoring the nature of cleared transactions and significant risk benefits of clearing as compared to an OTC transaction. The proposed CVA charge on client cleared activity is duplicative of the credit risk charges banks are already applying to client exposures as outlined above. In the proposed definition of CVA Risk Covered Position, the Agencies have recognized that a CVA charge is generally not appropriate for cleared transactions,[6] and have not provided a rationale for deviating from this position for client cleared transactions. Imposing a CVA charge on client cleared transactions would further raise the cost of capital for banks providing clearing services.

In addition, other jurisdictions, including the European Union[7] and the UK,[8] have excluded client cleared transactions from their CVA frameworks. The Agencies should align with other global regulators to not create a competitive disadvantage to U.S. banking organizations.

Investment Grade Standard

The Basel III Endgame introduces a preferential 65% risk weight for investment grade exposures. To qualify for the preferential 65% risk weight, the Proposal requires a counterparty or its parent to have issued publicly traded securities.[9] A large segment of derivatives market participants are not publicly traded companies or subsidiaries of such companies, despite being highly creditworthy including funds, pension funds and agricultural businesses. The publicly traded securities requirement penalizes non-publicly traded companies because their derivatives transactions carry higher capital charges than other customers. Bank-affiliated clearing members could pass these costs to the customers in the form of higher clearing fees and could even discontinue providing clearing services altogether. As a result, the costs for non-publicly traded companies to access the derivatives markets would be increased or denied altogether. As such, ICE recommends the Agencies remove the requirement for an investment grade entity to be publicly traded to be eligible for a lower risk weight.

Operational Risk

The Proposal amends the services component of the operational risk capital measure by replacing the Advanced Approach with the Standardized Measurement Approach (SMA). The

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[6] See Federal Register, op.cit., at pages 64150-64151.

[7] *See* EU Capital Requirements Regulation (CRR), Art. 382(3), *available at* https://www.eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook/1568 ("Transactions with a qualifying central counterparty and a client's transactions with a clearing member, when the clearing member is acting as an intermediary between the client and a qualifying central counterparty and the transactions give rise to a trade exposure of the clearing member to the qualifying central counterparty, are excluded from the own funds requirements for CVA risk"); European Banking Authority Q&A No. 2016_3009 (Jan. 20, 2017), *available at* https://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2016_3009 (clarifying that "centrally cleared clients' trades should be exempted from both the perspective of the clearing member and the client").

[8] Bank of England, CP16/22 – Implementation of the Basel 3.1 standards: Credit valuation adjustment and counterparty credit risk, § 7.10 (Nov. 30, 2022), *available at* https://www.bankofengland.co.uk/prudential-regulation/publication/2022/november/implementation-of-the-basel-3-1-standards/credit-valuation-adjustment.

[9] See Federal Register, at page 64053- 64054.

SMA includes a "services" component, which incorporates clearing fees and expenses and commission income on the gross fees charged to the end-user. The new SMA standard would impose additional capital requirements for derivatives clearing activities on clearing members because the calculation of fee services businesses would be based on fee revenue and expenses on a gross basis, rather than the net fee revenue after deduction of expenses. By assigning capital charges for operational risk on a gross basis, the Proposal would effectively levy a 'tax' on clearing volumes as opposed to looking at the overall net economic operational risk. Such an approach could discourage the use of clearing with the loss of the benefits described above. As such, ICE recommends the Agencies revise the approach to calculating the SMA service component of operational risk.

Conclusion

ICE appreciates the opportunity to comment on the Proposal. ICE supports appropriately calibrated capital reform. As noted in this letter, ICE believes that certain aspects of the Proposal fail to consider the potentially negative impact on the centrally cleared derivative markets and would discourage the use of clearing by increasing its costs. ICE encourages the Agencies to consider capital reform that more appropriately reflects the structure and the financial stability and risk-reducing benefits of centrally cleared markets.

Sincerely,

Elizabeth K. King
Global Head of Clearing & Chief Regulatory Officer
Intercontinental Exchange, Inc.