



January 10, 2019

Via Electronic Submission

FMI Regulatory Reforms Consultation Submissions,
FMI Section
Payments Policy Department, Reserve Bank of Australia
GPO Box 3947
Sydney, NSW, 2001

Via email at: FMIconsultation@cfr.gov.au

Re: Comments on Financial Market Infrastructure Regulatory Reform Consultation

Dear Sir/Madam:

Intercontinental Exchange, Inc., on behalf of itself and its subsidiaries (collectively, "ICE") appreciates the opportunity to comment on the consultation published by the Council of Financial Regulators ("CFR") in Australia, titled "Financial Market Infrastructure Regulatory Reforms" (the "Consultation").¹ ICE looks forward to constructively working with the CFR.

As background, ICE owns and operates six geographically diverse clearing houses that serve global markets and customers across North America, Europe and Asia. Each of these clearing houses is subject to direct oversight by its home country national regulators, often in close coordination and communication with other regulatory authorities with important interests, and subject to regulations reflective of the G-20 reforms and CPMI-IOSCO Principles for Financial Market Infrastructures ("PFMIs"). The following two clearing houses owned and operated by ICE clear for exchanges that hold an Australian Market License ("AML"):²

- ICE Clear U.S., Inc. is primarily regulated by the U.S. Commodity Futures Trading Commission (CFTC) and clears a variety of agricultural and financial derivatives listed and traded on ICE Futures U.S., Inc. ICE Futures U.S. holds an AML.
- ICE Clear Europe, ICE's London-based clearing house, is primarily regulated by the Bank of England, CFTC and U.S. Securities and Exchange Commission (SEC) and clears derivatives in several asset classes, including energy, interest rates and equity derivatives, as well as credit default swaps. ICE Clear Europe clears products listed and traded on ICE Futures Europe and ICE Futures U.S., which hold AMLs.

Consultation

Among other matters, the CFR is proposing to introduce formal standards to determine if an overseas clearing and settlement facility must obtain a Clearing and Settlement Facility License ("CFSL") or an exemption from licensing under the Australia Corporations Act. A clearing and settlement facility ("CSF") would be required to be licensed (or exempt from licensing) in Australia if it operates in the jurisdiction. Australian law does not clearly define what constitutes "operating in the jurisdiction" for the

¹ Financial Market Infrastructure Regulatory Reforms, a Consultation Paper by the council of Financial Regulators (Nov. 2019).

² An AML allows an exchange to make trading on its market available to participants located in Australia.



purpose of triggering the licensing requirement. Under the current guidance, factors are assessed by relevant regulators to determine if there is a “nexus between the operation of the regular operation of the CSF and Australia.”

In its 2015 consultation, and in the current Consultation, the CFR proposed the introduction of a formalized standard for determining if an overseas exchange or CSF is “operating in the jurisdiction.” The Consultation proposes a “material domestic connection” standard, which would have two components, a domestic connection test and a materiality standard. The test for a domestic connection would be objective, and the 2015 consultation lists a number of factors that would constitute a domestic connection, including (1) having direct clearing participants in Australia, (2) clearing certain products denominated in Australian dollars or referencing Australian products or markets, and (3) clearing for an exchange with an AML. The test for materiality would be subjective and determined by the Australian Securities and Investments Commission (“ASIC”) and/or the Reserve Bank of Australia (“RBA”). The Consultation also proposes an ongoing reporting requirement so that “materiality” of a CSF can be monitored over time by ASIC and RBA.

ICE understands and supports the CFR’s policy goals to ensure appropriate supervision of CSFs that may materially affect persons or markets in Australia. In general, ICE believes that when the CFR, or other regulators, are considering the appropriate scope of regulation for a CSF located and regulated in another jurisdiction, they can and should rely principally on international standards such as CPMI-IOSCO’s PFMI, as implemented by home country regulators. Together with continued cooperation and information-sharing agreements among CCP supervisory authorities, such an approach can provide the CFR with the information and oversight it requires, while leaving the principal decision-making and oversight in the hands of the home country regulators, so as to avoid unnecessary duplication of effort or the risk of inconsistent or conflicting regulations being applied to a CSF.

In the context of the Consultation, ICE believes that the CFRs proposed domestic connection and materiality standards may give rise to legal uncertainty and a lack of clarity for overseas CSFs. With respect to the “domestic connection” standard, ICE does not believe that certain of the characteristics listed in the 2015 consultation should constitute such a “domestic connection.” In particular, clearing contracts denominated in Australian dollars, or contracts related to Australian securities or other financial instruments, should not be considered to create a domestic connection for purposes of the CSF licensing requirement, absent additional nexus with Australia (such as having direct participants located in Australia). We note in this regard that other jurisdictions, such as the U.S., generally focus on the location of participants rather than the underlying instrument for the products cleared.

With respect to the materiality standard, the proposal would, in ICE’s view, confer on ASIC and RBA overly broad discretion, which could lead to inconsistent assessments across CSFs. In addition, due to the lack of specificity in the Consultation, it is difficult for a CSF to assess in advance its risk of being determined to have a material connection to Australia. The Consultation further fails to set out the relative context for assessing the materiality of a CSF, including the absence of clear guidance on how ASIC intends to apply each factor mentioned in the Consultation.

Therefore, if the CFR proceeds to implement the reforms in the Consultation, ICE believes it is necessary for the CFR to provide additional detail and clarification on the criteria ASIC will take into account as part of its assessment of materiality. Although ICE understands the CFR’s desire to maintain a flexible standard, ICE believes that a fair, predictable, suitable, and consistent application of the criteria to CSFs requires the CFR to develop minimum objective, and ideally quantitative, criteria. Such criteria would at least provide clarity that a CSF with only small amounts of business with Australian clients or clearing members would not be determined to have a material connection to Australia.



ICE is also concerned about the proposed authority for the ASIC and RBA to impose location requirements on overseas CSFLs, such that they would be required to transfer from having an overseas license to a domestic license held by a domestically incorporated entity. Any such action would be very disruptive to the ongoing business of an existing CSF, and could have significant implications for market participants outside of Australia, as well as the interests of regulators in other jurisdictions. ICE believes that any regulatory concerns that the CFR may have with an overseas CSF, even one with material importance to the Australian market, could better be addressed through appropriate implementation of regulation on that CSF, in cooperation with its home country regulators. In addition, the Consultation does not clearly indicate the standards and procedures under which any such action could be taken. Any such standards and procedures should be made clear to CSFs and other market participants in advance.

Conclusion

ICE appreciates the opportunity to comment on the Consultation. ICE shares the CFR's goals of ensuring robust oversight of clearing activity, both within a jurisdiction and on a cross-border basis, consistent with the framework of the PFMI. ICE respectfully requests that the CFR consider the comments in this letter in light of those goals.

Sincerely,

A handwritten signature in blue ink that reads "Scott Hill". The signature is fluid and cursive, with the first name "Scott" being more prominent than the last name "Hill".

Scott Hill
Chief Financial Officer
Intercontinental Exchange, Inc.