December 23, 2015

Cooperative Capital Markets Regulatory System (Canada)

Submitted via email: commentonlegislation@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

Re: Consultation Draft of the amended Capital Markets Act (CMA) and draft regulations

Intercontinental Exchange, Inc. (ICE) appreciates the opportunity to comment on the amended consultation draft of the *Capital Markets Act* (CMA) (formerly the *Provincial Capital Markets Act)* and some of the regulations and the companion policies which are to form part of the legislative framework for the Canadian Capital Markets Regulatory System (CCMRS).

ICE is a leading global operator of exchanges and clearinghouses, currently operating eleven regulated derivatives and equities exchanges and seven clearing houses in the United States, Europe, Canada and Singapore. ICE also operates over-the-counter markets and is a provider of market data, technology, benchmark administration and post-trade services. ICE's global marketplaces serve a broad array of markets for energy, environmental and agricultural commodities, interest rates, credit derivatives, equity derivatives, metals and currency derivative contracts, as well as equity and equity option securities. A number of ICE subsidiaries, including ICE Futures Europe, ICE Futures U.S., ICE Clear Credit, ICE Futures Canada, ICE Clear Canada, ICE Swap Trade, Creditex Securities Corporation and ICE Trade Vault operate in various Canadian provinces under recognition, designation or exemptive relief orders.

ICE supports the objectives of the CCMRS, which include strengthening Canada's financial system, more efficient regulation of capital market participants, enhanced investor protection and reducing or eliminating fragmentation and duplication of regulatory oversight. However, we have concerns with a number of aspects of the CCMRS proposal. Our detailed comments are organized under the following five headings:

1) CCMRS rulemaking process and transparency
2) Transition Planning and the Authority's Interaction with the Non-participating Provinces
3) Concerns with the current draft CMA with matter that were previously commented on but not addressed
4) Concerns with new provisions in the draft CMA
5) Proposed CMRA Regulations

1) Comments on CCMRS Rulemaking Process and Transparency

ICE remains concerned that there is insufficient detail in the draft legislation as to how the objectives of the CCMRS will be realized. In particular, ICE is concerned that the draft legislation provides for significantly expanded powers, including the power to make law through

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regulation, which powers are not subject to meaningful oversight, including the provision of an effective right of appeal to the courts in Canada.

There have also been new provisions added to the draft CMA that were not requested by any of the commentators who filed letters in response to the initial consultation drafts of the *Provincial Capital Markets Act* and the *Capital Markets Stability Act*, some of which should not apply to derivatives marketplaces and others which have the potential to result in significant harm to derivatives markets and market participants. In this respect, we make reference to the "*September 14 Consultation Draft: Summary of Comments received and Ministerial/Regulatory Responses"* (the "Summary"). The Summary provides minimal explanation as to why so many of the concerns raised in comment letters were not accepted. There were an unprecedented number of comments letters which provided thoughtful and detailed comments. The response in the Summary to many of the issues raised does not evidence a meaningful review. This is unfortunate. Many of the proposed revisions would have significantly improved the draft legislation. Without a meaningful response to comments received on the initial consultation drafts (an accepted practice of the Canadian Securities Administrators when new regulation is proposed), commenters were left with the impression that the new regulator, the Capital Markets Regulatory Authority (the "CMRA" or the "Authority"), is not interested in forging relationships with the numerous stakeholders in the Canadian capital markets. In our view, it is important that all parties work together, cooperatively, in a respectful manner with the Authority acknowledging that, like any regulator, it requires the assistance and input of all stakeholders.

Additionally, we note disappointment with the inability to have any contact or discussions with staff of the participating provinces who have been involved with formulating the legislation and regulations. To date, the only contact information available on the CCMRS website has been for press enquiries. Many concerns of commentators could likely have been addressed if interested parties could speak directly to staff and get clarification as to the meaning or purpose of a particular provision. Given the proposed scope of the CMA and accompanying regulation, and the significant impact it will have on all market participants in Canada's capital markets, the level of transparency and accountability has been insufficient.

2) Transition Planning and the Authority's Interaction with Non-participating Provinces

In the ICE comment letter submitted on December 8, 2014 (the "December 2014 Letter"), we noted that there was insufficient information on the transition plan of the Authority and the interaction with the non-participating provincial securities regulatory authorities.

The *Summary of Proposed Transition Approach* (the "Transition Approach") published on the CCMRS website on December 7, 2015 provides an overview of the general approach that the Authority intends to apply, but does not specifically address the transition approach to current registrants and/or holders of recognition orders or exemption orders. Additionally, although the Transition Approach speaks to how matters are proposed to be dealt with between a "predecessor regulator" and the Authority, it does not address whether the Authority intends to continue operating under the system of "principal" and "exempting" regulator model with non-participating jurisdictions, as is currently employed by the CSA with respect to exchanges and

quotation and trade reporting systems and, more recently, clearing agencies and trade repositories.[1]

Many of ICE's subsidiaries are subject to recognition, designation or exemption orders from numerous provincial securities commissions. As noted previously, ICE Futures Europe and ICE Futures U.S. operate under exemption orders from the Ontario Securities Commission (OSC), the Alberta Securities Commission (ASC) and the Autorité des marchés financier du Québec (AMF). ICE Trade Vault operates under a designation order from the OSC and recognition orders from the Manitoba Securities Commission ("MSC") and the AMF. ICE Futures Canada and ICE Clear Canada have recognition orders from the MSC, and have exemption orders from the OSC, the ASC and the AMF. Creditex Securities Corporation has exemption orders from the OSC and the AMF.

Three of the four provinces where ICE conducts the majority of its business in Canada have not signed on to the CCMRS. To date, no transition plan has been proposed and transition timelines remain uncertain. We submit that it is very important that the federal government and participating provinces provide clarity around how they will interact and cooperate with the non-participating provinces. The continued uncertainty in this area is of significant concern and needs to be resolved with non-participating provinces well in advance of the effective date of the proposed CCMRS.

The ICE entities that are regulated by the OSC also need to be informed of the transition processes contemplated by the Authority as the OSC transitions from a provincial securities commission to part of the CCMRS. Additional detailed guidance is necessary to allow entities currently operating under an order of a participating province in the CCMRS to understand how they will be regulated subsequent to the transition. We therefore respectfully request that, as part of the CCMR transition, all recognition, designation and exemption orders be grandfathered, to avoid duplication of regulatory requirements and costs for market participants.

3) Concerns on the revised draft CMA with matters that were previously commented on but not addressed

Expansion of Powers and Lack of Due Process

ICE remains very concerned with the significantly increased powers provided to the Authority, including the unfettered right to make law through regulations without effective oversight, either at the time the regulations are written or as they are implemented and applied subsequent to promulgation.

Part 15, at section 202 and following, sets out the areas in which the Authority can make regulations. The list expands to six pages and touches on every aspect of the capital markets. The only exception to the extraordinarily broad powers provided to the Authority to make law is to the definition of "*security*" in "*…section 2 or paragraph 12 of subsection (1)*".

There were a number of comment letters filed in December 2014, including by leading Canadian law firms, which detailed the very significant issues inherent in providing the Authority with the

[1] See (a) the Memorandum of Understanding respecting the Oversight of Exchanges and Quotation and Trade Reporting Systems among the AMF, ASC, BCSC, MSC, OSC and SFSC, effective January 1, 2010 and (b) the Memorandum of Understanding Respecting the Oversight of Clearing Agencies, Trade Repositories and Matching Service Utilities, among the ASC, AMF, BCSC, FCAA, FCNB, MSC, NSSC and OSC, to be effective.

ability to make legislation through regulation, including in areas in which elected government officials were previously responsible, and then acting as both the enforcement and judicial bodies in applying the regulations. In addition, the legislation has been written such that there is no effective oversight by an impartial body since the right of appeal to a court is limited and cumbersome. Our concern with this lack of oversight is magnified given the issues with the CCMRS process to date, as noted above in Part 1 of this letter.

Notwithstanding the numerous comments on the need for adherence to the rule of law, the Authority continues to have the ability in the draft CMA to make *ex parte* orders, and cease trade orders, both for situations of "*extraordinary circumstances*" (section 86) and "*market fluctuations*" (Section 87). Such orders can be made without notice and without an opportunity for the person(s) at issue to be heard[2]. The duration of such orders can be for a period of time up to fifteen days. It is notable that these provisions in the CMA would not be focussed on addressing serious systemic risks related to the Canadian capital markets, given that system risk is meant to be addressed in the Capital Market Stability Act.

In particular, section 87(2) reads;

> Derivatives
>
> (2) On application by the Chief Regulator, the Tribunal may, without giving an opportunity to be heard, order that all trading in a derivative cease, if the Tribunal considers it to be in the public interest and
>
> (a) considers that there are unexplained and unusual fluctuations in the volume of trading or in the market price or value of the derivative or the underlying interest of the derivative;
>
> (b) becomes aware of information, other than information filed under capital markets law, that if generally disclosed may cause or is likely to cause unusual fluctuations in the volume of trading in the derivative or the underlying interest of the derivative or in the market price or value of the derivative or the underlying interest of the derivative;
>
> (b.1) in the case of a derivative that is a related financial instrument, considers that there may have been a material change in the business or operations of the issuer of the security that, if generally disclosed, could significantly affect the market price of the security; or
>
> (c) considers that circumstances exist or are about to exist that could result in other than orderly trading of the derivative.

With respect to the derivative markets in particular, a cease trade order of just one day would cause extreme stress and uncertainty. A cease trade order of fifteen days would effectively destroy the market and cause irrevocable harm to the market participants.

Derivatives markets, particularly the exchange-traded derivative markets, have historically not been a key regulatory focus of Canadian securities regulators. Although this is gradually changing, particularly given the recent attention to OTC markets and drafting regulations pertaining to those markets, there has been very little economic, legal and/or regulatory research conducted by Canadian academics and regulators into exchange traded derivative marketplaces and the relationship of those markets to the underlying cash markets. We

[2] Similar problems were identified with the initial draft federal *Capital Markets Stability Act* (which has not been included in the current consultation process).

therefore emphasize that the Authority must proceed very carefully and cautiously in order to exercise the sweeping powers it will possess in a prudent and appropriate manner.

In particular we submit that there should be a carve-out in Part 10 of the revised CMA for exchange traded derivative marketplaces and products. There is no reason that notice and an opportunity to be heard could not be provided in any circumstance in which a Part 10 order is contemplated for exchange traded derivative marketplaces and products. It is submitted that it should be only in the most egregious of circumstances when a matter of national systemic importance is at issue, that a Part 10 order should be issued for exchange traded derivative marketplaces and products. In such a situation we submit that the Authority must provide an opportunity for all impacted persons to be heard within 24 hours of the initial issuance of the order. As noted elsewhere in this letter, even a cease trade order of 24 hours would have very negative consequences on derivatives marketplace participants, including in ways in which the Authority could not reasonably foresee at the time it issues the cease trade order. For all practical purposes, a freeze or cease-trade order issued against a derivatives marketplace or an exchange traded derivatives product will result in permanent and irrevocable negative consequences, including to market participants globally. Prior notice and direct appeal rights to the courts are reasonable in these circumstances.

The right to be heard by an independent objective trier of fact before a decision is made is a fundamental right of due process under Canadian law. ICE submits that taking away these rights should only be granted in the most extreme and egregious cases, and even in such extreme situations, the right to be heard should be provided for *as soon as is practicable* after an Urgent Order is issued. Accordingly, we submit that many of the provisions in the revised CMA that provide for arbitrary powers need to be reviewed and revised.

ICE reiterates the statements made in the December 2014 Letter pertaining to concerns as to both the extent of the expanded powers for the Authority and the lack of fairness and due process which have not been fully addressed in the revised CMA. Although there are provisions that provide that orders made by the Chief Regulator can be appealed to the Tribunal and ultimately to the courts, we submit that such appeal processes are insufficient. Given the close interaction between the Chief Regulator and the Tribunal, we are concerned that the Tribunal cannot be a truly independent body. In addition, the time and costs attached to the appeal process effectively results in the ability to appeal being restricted to only those entities of sufficient size to support the process and only to matters that are very significant in scope. The costly and cumbersome process of appeal in the revised CMA requiring first an appeal to the Tribunal and then to a court mean that the majority of decisions of the Chief Regulator will not be subject to review and appeal.

We again note how this approach is in contrast to the obligations of regulated entities, including exchanges, clearing agencies, trade repositories and others that must ensure that they treat their members and participants with fairness and due process in accordance with Canadian administrative law requirements. We submit that, given the extent of the expanded powers in the CMA, it is incumbent upon the Authority to ensure it also strictly adheres with these Canadian administrative law requirements and provides for a right of appeal directly to the court from decisions of the Chief Regulator.

4) Concerns with new provisions in the draft CMA

We note several new provisions in the revised draft CMA. Our comments are as follows:

a) Large Derivatives Participants

There is a new definition of "*large derivative participant"* added with a corresponding requirement for this entity to be "*…registered in accordance with the regulations*" (Part 4 section 22(1). The definition is not helpful as it references "*…within a class of persons that are prescribed to be large derivative participants*." Presumably this information will be included within a regulation, but at this point we are unable to fully understand the intent of this new category of registrant. It is important that full details be provided in order for meaningful comment to be provided. For example, if the intention in regulating large derivatives participants is to guard against systemic risk, then we would submit that this risk should be addressed in the *Capital Markets Stability Act*, not the *Capital Markets Act.*

b) Opportunity to be heard

In Part 4, Registration, we acknowledge and appreciate that there have been amendments to replace references to "*make representations*" with references to an "*opportunity to be heard"*. However, the Chief Regulator continues to have the right to make temporary suspension orders without the registrant/respondent having a right to be heard and these orders can be made whenever the Chief Regulator believes it "*…could be prejudicial to the public interest"* to provide the impacted party(ies) with an opportunity to be heard. In our view, without an effective right to appeal to a court there is effectively no oversight of the Chief Regulator's decisions. It is difficult to understand why the amended CMA continues to restrict the rights of parties to standard administrative law due processes. As other commentators have noted, if there is not a right in the legislation to appeal directly to a court, the standard of due deference provided to specialized administrative tribunals in current Canadian law results in there being no meaningful right of appeal.

c) Front running

The provisions at section 67 on "front running" have been expanded to include derivatives. Although there is a prohibition on "front running" in the rulebooks of most derivatives exchanges, and in legislation (including *The Commodity Futures Act* (Manitoba)), the provisions at Section 67 and following, as currently drafted, are inconsistent with the manner in which exchange-traded derivative contracts are regulated and will have unintended consequences, resulting in harm to markets and to market participants. As an example, consider the following scenario which will occur dozens or hundreds of times in a typical trading day:

> A grain company, which needs to hedge a cash contract to buy 100,000 tonnes of canola in November 2016, contacts its Future Commission Merchant[3] (FCM), and puts in an order to sell 5,000 contracts of the Nov 2016 canola futures contract.
>
> In order to ensure that it received the best price, the grain company would often give discretion to its FCM to "…*work the order*" over a specific time period, which will allow for the grain company to get the best price possible over that time period (e.g. a morning, or a day). Particularly if the grain company has a large

[3] A Futures Commission Merchant or FCM, is the derivatives term for a broker-dealer (equities).

order, it should not necessarily be placed into the market in its entirety, as that could cause disruption to the market, which harms both the grain company and other participants in the market.[4]

The FCM is required to use discretion and its market knowledge to place the order in a manner that will not disrupt the market and will also obtain the best price possible for the grain company. Often this will mean that the FCM will put in the order utilizing iceberg functionality or take other measures to fill the order over a period of time.

In this example, under the proposed amendments to Section 67 of the CMA, the grain company is the "*investor*", the FCM is the "*person connected to*" the investor and the information provided with respect to the order to sell 5,000 contracts of the Nov 2016 canola futures contract is the "*material order information*".

As the CMA is currently drafted, once the FCM received the order from the grain company, it would then be precluded from taking any orders that required that FCM to exercise its discretion, since it is in receipt of the material order information and would be in breach of section 67 (3) which prohibits a

> *"…person who is connected to an investor and who knows of material order information relating to a person must not*
>
> *…*
> *(b) trade a derivatives that is the subject of that information: or*
> *(c) trade a derivative that has, as an underlying interest, the underlying interest that is the subject of that information."*

The application of these provisions would effectively paralyze a FCM from conducting its business upon receipt of any market order which could not be fully placed into the Trading System immediately after receipt. None of the defences set out in set in Section 68 and following would be of assistance and in fact, the rules of derivative exchanges that prohibit the sharing of customer information would expressly forbid a trader from utilizing the defences contemplated in sections 68(7.1) and 68(7.2).

Derivative exchanges have specific rules that forbid trading behaviours that can harm market participants and the markets. Front-running is an offence well understood in exchange traded derivatives marketplaces but it does not have the meaning set out in Section 67 of the CMA. Derivatives exchanges forbid an FCM from taking advantage of its knowledge of a customer order to put in its own order and "trade ahead" of its customer, taking advantage of the price moves that often occur when a large order is entered into the trading systems. For example, at ICE Futures Canada there are detailed rules against front-running a client order which are set out in Rule 8 [*Trading Against Customer Orders, Crossed Trades*]. Derivative exchanges also have rules that require FCM traders to place bids and offers into the Trading System in the order in which they are received, thereby ensuring that one client is not advantaged over another client. We submit that front running and similar trading rules are best understood and applied by market participants if they appear in the rulebook of a derivatives exchange, not broad

[4] Note that exchange-traded derivative markets put positive obligations on market participants to ensure that they do not engage in trading conduct that will disrupt the market.

"platform" securities legislation like the CMA. The provisions at Sections 67 and 68 should be amended to exclude all exchange-traded derivatives products.

d) Unfair practice – "*holding*" a derivative

Sub-sections 70(a) and 70(b) have been amended to prohibit unfair practice activities relating to "*holding*" a derivative. It is not clear how this section would be applied. The section is clearly targeted at persons dealing with retail clients, as it references prohibitions against putting unreasonable pressure on persons and not taking advantage of the inability or incapacity of another person, but we do not see how this would be applicable to derivative contracts, or what is meant by "*holding*", particularly as it relates to institutional parties trading exchange traded derivatives or OTC derivatives.

e) Cease Trade Orders

As set out above in Part 3 of this letter, we are very concerned by certain of the amendments to Part 10. These amendments were not requested in any of the comment letters and we don't understand how they could be utilized without ruinous impact on derivatives marketplaces and market participants. Part 10, as amended, provides that a cease trade order can be issued, if there is a:

> "*…major market disturbance characterized by or constituting sudden fluctuations of the market price or value of securities, derivatives or underlying interests of derivatives if the fluctuations threaten fair or orderly capital markets."*

The purpose of derivatives markets is to provide price discovery and risk management options. It is precisely at times when there is price volatility and/or fluctuations in the price of the underlying interest(s) that derivative marketplaces are most necessary. Hedgers need to identify the current price and address the risks that arise in their related businesses in the context price fluctuations. The failure to be able to deal with hedged positions due to a cease-trade order would have extremely negative consequences.

It is also noted that Section 86(2), as currently drafted, provides that the Authority can make a cease trade order against a derivative product or recognized exchange without notice - and that such order takes effect for up to fifteen (15) days (section 86(3)). Although section 86(6) provides for a persons who is affected by the order an opportunity to be heard, it is after the fact "*…as soon as practicable after making an order*". Derivatives are not like securities and being "cease traded" for a day or two is a very significant issue. Were the Authority to make such an order it would effectively destroy the market for a particular derivative product.

We are very concerned about the proposed insertion of derivatives into Part 10. Respectfully, the insertion suggests that staff have not given adequate consideration to the role of derivatives in the Canadian capital markets and/or how derivatives marketplaces operate differently from securities marketplaces. It also reinforces our view that there is a need for a meaningful, face to face consultation process with market participants on the CCMRS proposal, instead of or in addition to this comment letter process.

5) Proposed CMRA Regulations

We appreciate the publication of draft initial regulations of the *Capital Markets Act*. Our comments are as follows:

a) Proposed International Dealer Exemption for Exchange Contracts (Part 3 of CMRA Regulation 91-501)

We are supportive of this proposed international dealer exemption for exchange contracts in principle; however we believe that the exemption should not be limited to dealers registered in the United States or the United Kingdom. There is no explanation provided for this limitation, and it does not match the requirements of the international dealer exemption for securities in section 8.18 of National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("NI 31-103") (on which this exemption is based). The international dealer exemption in NI 31-103 is not limited to dealers registered in "*designed foreign jurisdictions*", but instead to any Person that satisfied the exemption requirements. Sophisticated permitted clients should be able to choose to trade non-Canadian exchange contracts with a dealer based in continental Europe, Japan or Australia, for example. We cannot see a rationale for excluding dealers registered in these jurisdictions (all of which are IOSCO members and G-20 members) from the proposed exemption.

We also disagree with the proposal that a dealer relying on the proposed international dealer exemption for exchange contracts file a completed Form 91-501F2 Notice of Regulatory Action. If the intention is to pattern this exemption after the international dealer exemption in NI 31-103, then this regulatory reporting should not be required. The reporting obligation would be very burdensome, given that reporting is required for the dealer relying on the exemptive relief and any predecessors or specified affiliates. As noted above, ICE is a global financial services company with dozens of operating companies (most of which have no connection to Canada). If an ICE affiliate sought to rely on the proposed exemption, it would be impossible to collect regulatory and litigation information from global affiliates and file updates to that information within 10 days of a change with the Authority. It is also unclear what the Authority would do with such information, if filed, as part of the Authority's mandate to regulate Canadian capital markets activity.

b) Regulating OTC Derivatives as Securities for Prospectus Requirements

We are concerned with s. 2(2) of 91-501, which proposes that derivatives are prescribed to be securities for purposes of Part 5 of the CMA [Prospectus Requirements] and related regulations. As noted throughout this letter, derivatives are not the same as securities, and requiring the preparation and filing of a prospectus does not make sense for a bilateral derivatives contract. For firms that wish to sell derivatives to retail investors (e.g. sales of OTC foreign exchange contracts), there is a precedent for CSA jurisdictions granting exemptive relief from the prospectus requirement, so long as the dealer provides a clear and plain language risk disclosure document. This precedent could be codified in 91-501 so that there is a clearer, predictable and transparent option available for dealers that wish to trade OTC derivatives with parties in Canada that are not permitted clients or qualified parties.

c) Trade Reporting Rules

We note that the OSC has recently proposed amendments to the Ontario trade reporting rule, and that final trade reporting rules are soon expected in other participating jurisdictions. We would therefore expect that the proposed CMRA Regulation 91-502 governing trade repositories will be updated to reflect these recent developments. In light of the differences between the Ontario rule and the proposed rule in other jurisdictions, market participants should be given another chance to comment on the proposed final rule to be adopted by the CCMRS.

d) Specific Questions for Comment

The CCMRS drafters have sought comment on four derivatives-related questions. The four questions and are responses are as follows:

QUESTION FOR COMMENT: Section 10 [Registration and prospectus exemptions] of CMRA Regulation 91-501 provides that the registration and prospectus requirements applicable to an OTC derivatives trade do not apply where each party to the trade is a permitted client or a qualified party and where each party is acting as principal. Given the G-20 commitment to require OTC derivatives to be traded on an electronic trading platform, we expect many OTC derivatives trades in the future to involve agents who provide access to the platforms on behalf of the beneficial parties to the trades. Should the registration and prospectus exemptions in section 10 apply where the trade involves an agent acting on behalf of one or both beneficial parties to the trade where the beneficial parties are permitted clients or qualified parties?

RESPONSE: Many OTC derivatives trades today involve an agent acting on behalf of one or both parties to a trade, and this trend will continue as more trades occur on electronic trading platforms. ICE is therefore supportive of the proposed registration and prospectus exemptions for trades involving permitted clients and qualified parties applying where the trade involves an agent acting on behalf of one or both parties.

QUESTION FOR COMMENT: Do you agree with the approaches to the unsolicited trade and hedger exemptions? We ask commenters to consider in their analyses the business trigger for the dealer registration requirement in the CMA.

RESPONSE: In general, ICE agrees with the approach to do away with the unsolicited trade and hedger exemptions, provided that interpretive guidance on the business trigger factors for registration in NI 31-103 make it clear that a hedger is not in the business of dealing in securities. In this regard, the proposed guidance in NI 31-103 should be expanded to make it clear that a commercial user of derivatives that is engaged in hedging activities is not a dealer in respect of those hedging activities, even if the commercial user: (a) solicits and intermediates trades or (b) is remunerated or compensated for the activity.

QUESTION FOR COMMENT: Should the Authority regulate market conduct in all types of Exempt Derivatives or should some or all types of Exempt Derivatives be entirely excluded from capital markets regulation?

RESPONSE: All types of exempt derivatives should be entirely excluded from capital markets regulation. Gaming contracts, insurance contracts, spot currency contracts, spot commodity contracts and bank deposits are either: (a) appropriately regulated by other governmental authorities or (b) commercial contracts that do not require capital markets regulatory oversight because there are not investor protection or systemic risk concerns.

It is confusing for the categories of exempt derivatives to appear in both CMRA Regulation 91-501 and CMRA Regulation 91-502. As additional OTC derivatives regulations are enacted, will each new regulation replicate the same exempt derivative concept? In our view, it would be less confusing and more transparent to market participants if the Authority developed a "Scope" rule (similar to OSC Rule 91-506 – *Product Determination*) to address exempt derivatives. Other CMRA Regulations, such as 91-501 and 91-502, could then cross-reference the "Scope" rule.

QUESTION FOR COMMENT: What is the appropriate threshold for exemption from reporting in relation to a trade in a derivative that is a contract for a commodity (other than cash or currency)? We encourage commenters to explain their suggestions and provide analysis (including data or other information) to support their suggestions.

RESPONSE: As a general matter, ICE is not in favour of establishing an exemption from reporting in relation to a trade in a derivative that is a contract for a commodity. In ICE's experience, monitoring thresholds is cumbersome for market participants and has a negative impact on the quality of data collected by a regulator tasked with monitoring OTC derivatives markets. All trades of in-scope derivatives should therefore be reported.

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Thank you for the opportunity to comment on the revised consultation draft of the CMA and certain of the proposed regulations. We would be pleased to discuss any area of this letter with you, at your convenience. Please do not hesitate to contact me at Trabue.bland@theice.com or 1-770-916-7832.

Yours truly,

Trabue Bland
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