December 8, 2014

Cooperative Capital Markets Regulatory System (Canada)

Submitted via email: commentonlegislation@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

Re: Consultation Drafts of the Provincial Capital Markets Act (PCMA) and the Capital Markets Stability Act (CMSA)

Intercontinental Exchange, Inc. (ICE) appreciates the opportunity to comment on the consultation drafts of the *Capital Markets Stability Act* (CMSA) and the *Provincial Capital Markets Act* (PCMA), which legislation will underpin the Cooperative Capital Markets Regulatory System (CCMRS).

ICE is a leading global operator of exchanges and clearinghouses, currently operating eleven regulated derivatives and equities exchanges and five 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 and ICE Trade Vault operate in various Canadian provinces under recognition, designation or exemptive relief orders.

Introduction

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, as outlined below, ICE is concerned that there is insufficient detail in the draft legislation as to how these objectives will be realized, and that there appears to be significantly expanded powers provided to the Capital Markets Regulatory Authority (the "Authority") which powers are not subject to meaningful oversight, including rights of appeal to the courts in Canada.

In addition, with the exception of the minimal information provided on the CCMRS website on December 5, 2014, there are no provisions in the legislation, or in the guidance or commentary documentation published to date to explain how the Authority will deal with currently existing orders issued by the participating provinces, how the Authority will interface with the securities regulatory authorities in non-participating

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provinces and how the Authority will cooperate with the statutory regulatory authorities in foreign jurisdictions.

Finally, we note that the PCMA and CMSA are platform legislation, thus requiring regulations to implement most aspects of the new regulatory regime. We therefore encourage the federal government and participating provinces to adopt a minimum 90-day comment period for interested parties to comment on all proposed regulations. Given the magnitude of the proposed changes, it is necessary that interested parties have sufficient time to comment on the proposed CCMRS legislative scheme, including all regulations.

Transition Plan, Grandfathering, Interaction with non-participating provinces

ICE notes that under Canada's current system of provincial securities and derivatives regulation, many of its subsidiaries are subject to orders and exemption orders from various provincial securities commissions. For example, ICE Futures Europe and ICE Futures U.S. have 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 has applied to and received designation as a foreign trade repository from the OSC, 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.

The ICE entities that are regulated by the OSC need to understand the transition processes contemplated by the Authority as the OSC transitions from a provincial securities commission to part of the CCMRS. Guidance should be provided to allow entities currently operating under an order of a participating province in the CCMRS to understand how they will be dealt with subsequent to the transition, and in particular, whether their existing orders will be "grandfathered". This is a key concern for ICE as the majority of the orders its subsidiary entities operate under in Canada were obtained over the past five to seven years, at considerable effort and expense. It would be a very unfortunate result if the transition to the CCMRS removed or adversely modified any of those orders, as it would disrupt ICE's ability to do business in Canada, and could indirectly impact the ability of Canadian persons to use ICE services to: (i) access foreign markets, (ii) comply with derivatives reporting obligations, or (iii) hedge commercial risk.

In addition, as three of the four provinces where ICE conducts the majority of its business in Canada have not signed on to the CCMRS, it is important to ICE to understand the proposed interface and practical interaction between the Authority and the non-participating provinces. To date, no transition plan has been proposed and transition timelines are 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.

Finally, the time and resources that the Authority would need to spend on re-approving existing entities operating in Canada would be time and resources that the Authority would not spend on overseeing the markets. Any transition plan should take into

account that the Authority will also have limited time and resources, which should be applied wisely.

Expansion of Powers and Lack of Due Process

ICE is concerned with the significantly increased powers provided to the Authority under both the CMSA and PCMA, particularly as those powers are not subject to rights of appeal to Canadian courts. We note the following two examples;

First, Sections 43-45 of the CMSA deals with "Administrative Monetary Penalties" which can be assessed for any violations of the legislation, apart from Part 5 violations. The current draft legislation provides that the Chief Regulator will determine, without hearing from any of the parties that will be impacted by a decision, that he or she has "*…reasonable grounds to believe that the person has committed a violation*" of the Act (other than Part 5). A party then has thirty (30) days to make representations to the Chief Regulator with respect to the notice. After considering the representations presented, the Chief Regulator must decide, on a balance of probabilities, whether the person committed the violation and, if so, may impose the penalty proposed, a lesser penalty or no penalty. Accordingly, the initial right of appeal is to the *same person* who has already determined that the violation has occurred. The only subsequent right of appeal is to the Tribunal pursuant to Section 103 of the CMSA. The Tribunal is not an independent objective party.

Although the section makes note that the purpose of the penalty is to seek compliance, rather than to penalize, very significant sanctions attach to a determination by the Chief Regulator that a person has contravened a provision of the Act. The amount of the fines that the Chief Regulator can award include up to $1 million dollars per individual and up to $15 million dollars per non-individual.

We are also concerned that Section 47 of the CMSA provides that liability for any violation committed by a non-individual can attach to its directors or officers if they "*…authorized, permitted or acquiesced in the contravention…*" It is unclear as to how the Chief Regulator could come to such a determination without hearing from the individuals at issue. We believe that directors or officers should have notice of an alleged violation and opportunity to make representations before the Chief Regulator makes a finding that they are liable under Section 47. This is important to ensure due process and fairness.

Second, Section 34, Urgent Orders, provides the Authority (in consultation with the Chief Regulator) with the ability to make *ex parte* decisions and to issue an "Urgent Order" to address a "*…serious and immediate systemic risk*"

The Authority is not required to consult with anyone other than the Chief Regulator prior to making a Section 34 Urgent Order and can make orders that "*…prohibit or restrict a person from trading in a security or derivative, reducing their capital or financial resources, engaging in a practice* ***or doing anything else****, suspend or restrict trading in a security or derivative, or class of securities or derivatives or suspend or restrict trading on a trade facility…".* [emphasis added]

Accordingly, the Authority has the right, under Section 34, to make sweeping orders without first hearing from any of the affected parties, and such *ex parte* orders cannot be

amended or responded to for as long as thirty (30) days. Parties impacted have no right of appeal or representation and their only recourse is to seek judicial review of the Urgent Order. We are also concerned that Section 34 does not require the Authority to give reasons when it issues an Urgent Order. We are unaware of any other regulator in the G20 that has been granted such sweeping and extraordinary powers in the area of securities and derivatives regulation.

The extent and lack of fairness and due process is in stark contrast to the obligations of registrants, including exchanges, clearing houses, trade repositories and others who must ensure that they treat their members and participants with fairness and due process. This is the appropriate standard and must also be applied to the Authority with respect to the entities it regulates. The right to be heard before a decision is made is a fundamental right of due process under Canadian administrative 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. The fact that the CMSA contemplates that the Authority can make an Urgent Order that extends up to thirty (30) days, a length of time that would effectively destroy the operations of entities named in the Urgent Order, is extremely troubling.

Although ICE is supportive of the national regulator having the power to make urgent orders, on a timely basis, to address a serious systemic risk related to the Canadian capital markets, it is profoundly concerned by the proposed legislation as written. Basic rights of administrative due process are not being recognized. There is also no guidance on what the Authority may consider to be a serious systemic risk, or how the Authority may reach such a conclusion. For example, given the significant efforts undertaken internationally to develop protocols for assessing systemic risk, it would be very helpful to get clarity on whether or not (and to what extent) the Authority will apply such protocols.

We urge that the many provisions in the CMSA that provide for arbitrary powers be reviewed and revised.

Reciprocal Arrangements with Foreign Regulators

ICE submits that the Authority should ensure that it operates in cooperation with the statutory regulatory authorities of other countries, including, but not limited to, the US Commodity Futures Trading Commission (CFTC) , the US Securities and Exchange Commission, the UK Financial Conduct Authority and the Bank of England, the European Securities and Markets Authority (ESMA) and the Monetary Authority of Singapore. In this respect, it is noted that the majority of ICE subsidiaries that currently have exemptive orders in Canada are primarily regulated by the statutory regulatory authorities in their own countries, and the Authority should defer to and cooperate with authorities in countries that provide for a comparable regulatory system. It is important that reciprocity be provided to such jurisdictions as Canadian businesses, including exchanges and clearinghouses, currently rely upon reciprocal treatment. Examples include the CFTC's Foreign Board of Trade designation and ESMA's third country CCP

process. Further, relying on reciprocal arrangements will appropriately focus the Authority on Canadian marketplace activity, thereby increasing regulatory efficiency.

Systemically Important Designation

The proposed CMSA does not provide clarity as to how the Authority plans to use its new powers to designate trading facilities, clearing houses, credit rating organizations, benchmarks, capital markets intermediaries[1] products and practices as "*systemically important"*. The proposed legislation is silent as to the process for how such a designation will be made, the scope of such designation, or what rights the affected entities have to make representations before the designation is made or to request modifications or the termination of a designation. We seek clarity on the processes that the Authority plans to follow in designating an entity to be "systemically important." For example, it is unclear as to whether a non-Canadian entity could be designated as systemically important under the CMSA, if the entity is subject to equivalent regulation in its home jurisdiction. ICE urges the CCMRS to permit *any* interested parties to make representations before a determination of "systemically important" is made. This is particularly important for benchmarks, products and practices, since the CMSA does not currently contemplate any party having the opportunity to make representations before a systemically important designation. For example, if a product is proposed to be designated systemically important, the exchanges, dealers and investors that trade the product should have an opportunity to make representations before any designation.

Clearing houses[2]

We have concerns with the proposed approach to regulating clearing houses under the PCMA. The platform legislation is very broad, however there are some suggestions that clearing agency oversight may be different under the PCMA than it is currently in provinces such as Ontario and British Columbia. For example, subsection 13(6) of the PCMA provides that the Tribunal may grant a stay of a decision of a clearing agency with only the consent of the Chief Regulator, and on a without notice, or *ex parte* basis. There are no similar provisions in subsections 21.7(2) or 8(4) of the *Securities Act* (Ontario) or under the *Securities Act* (British Columbia).

We urge the CCMRS to ensure that its processes and actions do not conflict with the *Payment Clearing and Settlement Act* (Canada) (PCSA) or the IOSCO *Principles for Financial Market Infrastructures* (PFMI)[3] which principles have been adopted and

[1] We note that there is no right to deem a "Canadian Financial Institution" as systemically important and that these entities will remain under the regulatory oversight of the Office of the Superintendent of Financial Institutions.

[2] We note that the CMSA uses the term "clearing house" and the PCMA uses the term "clearing agency". Within this comment letter both terms mean the same.

[3] Committee on Payment and Settlement Systems, International Organization of Securities Commissions (CPSS-IOSCO), *Principles of Financial Market Infrastructures* (April 2012). http://www.bis.org/publ/cpss101a.pdf

implemented in many jurisdictions already, including in the United States and in Europe. ICE believes that it is very important that the provisions of the PCMA and any regulations promulgated thereunder pertaining to clearing agency regulation be consistent with the PFMIs. We note proposed National Instrument 24-102 *Clearing Agency Requirements* and the Related Companion Policy 24-102CP, which have very recently been published for comment by the Canadian Securities Administrators (CSA), including the OSC. ICE recognizes the considerable work that has been done in this area by the CSA, which is significantly based on ensuring consistency with the PFMIs. The CSA has acknowledged that the PFMIs are the international standards and we urge the CCMRS to also ensure consistency in its regulations with those standards.

In addition, we note that if a clearing agency is doing business in Canada it currently needs to be recognized or exempted from recognition. The OSC has published staff notices on clearing agency recognition and exemption requirements (i.e., OSC Staff Notice 24-702). We urge the Authority to adopt the processes that the OSC currently operates under in dealing with clearing agencies located in another jurisdiction with a comparable regulatory regime.

Trade Repositories

We note that trade repositories are required to apply to be designated under both the PCMA and CMSA. This 'dual designation' requirement is unique to trade repositories and does not apply to other market participants such as exchanges, clearing houses or dealers. We are unclear as to the connection between the two Acts in relation to trade repositories and submit that it would be preferable for only one of the Acts to require trade repositories to apply to be designated. Alternatively, if a trade repository complies with its regulatory obligations under the PCMA or the CMSA, respectively, that should suffice for compliance with the other Act.

Terminology

The CMSA and the PCMA should be reviewed to ensure that common definitions are adopted. At this time, key definitions, such as the definitions of "security" and "trade", differ between the two proposed Acts. In some cases, the definitions appear to conflict. The PCMA uses the term "clearing agency" while the CMSA uses the term "clearing house", and the definitions are different. Another example is the definition of "derivatives", which is unclear because each Act uses a different definition and neither Act makes a distinction between bilateral over-the-counter (OTC) derivatives, cleared OTC derivatives, futures, commodity contracts or derivatives that are also securities. ICE urges the CCMRS to adopt similar definitions and attempt, wherever possible, to have those definitions be consistent with those already in *The Securities Act (Ontario)* and *The Commodity Futures Act (Ontario).*

Derivatives Regulation Generally

The proposed legislation does not provide guidance or detail on how derivatives will be regulated and dealt with. It would be helpful to understand the intent of the Authority in this area, given the significant regulatory reform efforts underway by the CSA to

implement the Canadian G20 requirements and the currently unharmonized approach to regulation of futures trading in Canada. If any new derivatives regulations will be proposed, the federal government and participating provinces should allow a longer comment period for interested parties to comment on any such regulations.

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Thank you for the opportunity to comment on the consultation drafts of the PCMA and CMSA. 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,

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