July 5, 2016

Cooperative Capital Markets Regulatory System (Canada)

Submitted via email: comment@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

Re: Revised Consultation Draft of the federal Capital Markets Stability Act (CMSA)

Intercontinental Exchange, Inc. (ICE) appreciates the opportunity to comment on the revised consultation draft of the federal *Capital Markets Stability Act* (CMSA), which, together with the *Provincial Capital Markets Act* (PCMA), 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 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 continues to support 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 six headings:

1. Lack of Clarity and Transparency on Transition Plans and Process

As noted previously by several other commenters, the CCMRS represents a significant change to the Canadian regulatory regime. ICE appreciates that information has been published with respect to the transition plans of the participating provinces, and that these plans generally adopt the request of many commentators to grandfather/adopt, to the extent possible, current orders, regulations and National Instruments. However, it remains of concern that there is no clear transition plan with respect to the non-participating provinces, including Québec, Manitoba and Alberta. As these provinces are significant to ICE, and the business it conducts in Canada, it is important that direction on the proposed interface and practical interaction between the Cooperative Capital Markets Authority (the Authority) and the non-participating provinces be provided well in advance of the implementation date. To date, no transition plan has been proposed for public comment and transition timelines are uncertain. We submit that it is very

INTERCONTINENTAL EXCHANGE
5660 New Northside Drive NW
3rd Floor
Atlanta, GA 30328
Tel: 770.857.4700
Fax: 770.937.0020
theice.com

important that the federal government and participating provinces provide clarity around how the transition and ongoing interaction and cooperation with the non-participating provinces will function to the benefit of all participants in the Canadian markets. This is particularly important since the CMSA will apply in all Canadian jurisdictions, not just the participating provinces,

The closed nature of the legislative process also continues to be problematic. To date, some 18 months after the first publication of the draft CMSA, there is no ability to contact anyone, unless it is a media matter. This has resulted in market participants having no ability to ask questions or discuss next steps with the CCMRS policymakers. This lack of transparency was raised by ICE previously; we recommend again that CCMRS policymakers be identified and available for contact by market participants with questions or comments on the CCMRS proposal.

2. Information Collection

ICE is concerned that the CMSA will require an additional layer of reporting by market participants. Although we note the proposed amendment whereby the Chief Regulator is required to "*…consider the extent to which it is practicable to obtain the records and information in a timely manner from another source*" [per section 10 (2)], ICE remains concerned that this is insufficient, particularly in light of the fact that there has been nothing published on the plans of the Authority to deal with the non-participating provinces.

We submit that market participants should not be required to submit duplicate information to multiple regulators, which we are concerned could be a consequence of political disagreements between the Authority and non-participating provinces. Participants in the Canadian capital markets are already subject to additional and expensive obligations given the fragmentation of the regulatory regime.

It was noted in initial comment letters that the new federal regulator should enter into MOUs with the non-participating provinces in order to share information. If there is information that is already provided by a market participant to one or more provincial regulators, the Authority should obtain the information from those provinces, rather than seeking it again from market participants. This will be an issue for all market participants given that the CMSA will apply equally across Canada - including in the non-participating provinces. The Authority should not be taking the position that it is not "practicable" (per new section 10(2)) to seek information from one of the non-participating provinces if it has not made best efforts to enter into information sharing MOUs.

3. Designation of Trade Repositories

The CMSA contemplates that a trade repository will apply for and be designated as a "*designated trade repository*". ICE is concerned that this power substantially overlaps existing provincial rules and the proposed *Capital Markets Act* regulations for the regulation of derivatives trade repositories. ICE Trade Vault has incurred significant expense to apply for and obtain designation and recognition orders across Canada to operate a trade repository. It should

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5660 New Northside Drive NW
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Atlanta, GA 30328
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Fax: 770.937.0020
theice.com

not have to apply again to be designated as a trade repository under the CMSA nor should it face new ongoing compliance obligations if regulated by the Authority pursuant to the CMSA.

4. Powers to Issue Urgent Orders and Administrative Monetary Penalties

While ICE acknowledges that there have been amendments to the powers of the Authority to issue Administrative Monetary Penalties and Urgent Orders, there remains a concern that these amendments are not sufficiently comprehensive to address the issues raised previously. In particular, it is ICE's respectful view that the ability of the Authority to issue urgent orders, without first being required to hold a hearing for all Persons that could be directly impacted, is inconsistent with administrative law best practices. The amendment that permits directly affected parties to be heard *after the fact* does not satisfy ICE's concerns. ICE maintains its view that 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 of situations. ICE reiterates the position in its letter of December 2014, that orders which can remain in place without the ability to be challenged for up to thirty (30) days could severely and permanently damage market participants.

The legislation pertaining to Administrative Monetary Penalties in the CMSA also remains a concern to ICE. The Chief Regulator can still 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). Although a person now has sixty (60) days to make representations to the Tribunal (rather than the Chief Regulator) with respect to a notice, this process remains costly and problematic. We remain concerned that the Tribunal will not be entirely independent or objective in relation to the Chief Regulator. It is also important to note that persons in the non-participating provinces will be impacted more significantly as their costs in attending a hearing will be greater than that of persons in the participating provinces (where presumably the Authority will have offices).

5. Cooperation with Foreign Regulators

ICE wishes to reiterate its previous comment that the Authority should ensure that it will cooperate with the securities regulatory authorities of other countries, including, but not limited to, the U.S. Commodity Futures Trading Commission (CFTC), the U.S. 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. The 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 to offer their services and products in those foreign jurisdictions. Examples include the CFTC's Foreign Board of Trade designation and ESMA's third country CCP process. To date there has been no indication that the Authority will move expeditiously to enter into MOUs and otherwise cooperate with foreign regulators.

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theice.com

6. Systemic Risk

ICE acknowledges the reduction in scope of these provisions, to now include only benchmarks and products as systemically important, and practices as systemically risky. ICE appreciates this reduction of scope, which is more appropriate given the nature and size of the Canadian capital markets. However, ICE continues to have concerns with the system risk provisions of the CMSA, including the following:

- While the CMSA has been amended to provide the opportunity for affected persons to be heard prior to designating a benchmark has been added, the same opportunity is absent for products and practices. If a product is proposed to be designated systemically important, the exchanges, dealers and investors that list and or offer and trade the product should have an opportunity to make representations before any designation is made. Similarly, before a practice is deemed systemically risky, the opportunity to be heard should be granted to all affected parties.

- There is a general lack of clarity as to what may constitute a systemically risky practice. What do CCMRS policymakers continue to be a systemically risky practice? Clearer interpretive guidance should be provided so that interested parties can meaningfully participate in the public comment process.

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Thank you for the opportunity to comment on the revised consultation draft of the 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 kara.dutta@theice.com or 1-770-916-7812. Thank you.

Yours truly,

Kara Dutta
Intercontinental Exchange, Inc.

INTERCONTINENTAL EXCHANGE
5660 New Northside Drive NW
3rd Floor
Atlanta, GA 30328
Tel: 770.857.4700
Fax: 770.937.0020
theice.com