

Customer Documentation Requirements

ICE Clear Europe (the "Clearing House") has received a number of queries from Clearing Members and Customers about the documentation that they should execute to support customer clearing after ICE Clear Europe's authorisation under Regulation (EU) No 648/2012 of the European Parliament and of the Council ("EMIR") and in relation to current models for customer clearing. This Circular clarifies the customer documentation requirements that Clearing Members are expected to take to comply with ICE Clear Europe Rule 1516(b) (which is to be replaced by Rule 202(b) pursuant to the Rule changes consulted upon in Circular 13/039 dated 31 May 2013).

Requirements of Rule 1516(b)/202(b)

Rule 1516(b)/202(b) requires Clearing Members to ensure that their Customers have agreed to the relevant Standard Terms annex applicable to Customer-CM Transactions relating to the relevant cleared contract class ("Standard Terms"). The Standard Terms are annexed to the Clearing Rules. The current Standard Terms apply only to CDS but pursuant to draft rules published with Circular 13/039, similar Standard Terms annexes will apply for F&O and OTC FX clearing. These rules do not apply to FCM/BD Clearing Members ("FCM/BDs").

An agreement between Customers and Clearing Members to the Standard Terms is an important part of ICE Clear Europe's implementation of EMIR. The Standard Terms provide a contractual framework for the porting of Customer Account contracts and margin following an Event of Default. Customers and Clearing Members must agree to the Standard Terms so as to reduce the risks of porting not taking place or being challenged and to mitigate potential losses accruing to ICE Clear Europe or contributors to its Guaranty Funds as a result of it seeking to handle defaults in compliance with EMIR.

The Standard Terms structure means that the Clearing House is able to offer customer clearing under EMIR without prescribing the execution of significant additional bespoke documentation between Customers and Clearing Members. ICE Clear Europe instead relies on Clearing Members ensuring that they have complied with Rule 1516(b)/202(b).

Pursuant to Rule 1516(b)/202(b):

- The Standard Terms or Rules must be duly cross-referenced in an agreement between the Customer and Clearing Member. An agreement of a Customer that it will be bound by the Rules is deemed under the Rules to be an agreement to be bound by the Standard Terms;
- The agreement referencing the Standard Terms (or Rules) must be duly executed and duly authorised by the Customer and the Clearing Member. Relevant local formalities must be complied with;
- The obligations of the Customer must be enforceable. This is deemed to be satisfied under Rule 202(b) where the Customer is incorporated in the jurisdiction of incorporation of any Clearing Member (provided that the other requirements of Rule 202(b) are complied with). A list of Clearing Members and their jurisdictions of incorporation is available at <https://www.theice.com/ClearEuropeMembers.shtml>, as updated through additional Circulars concerning new clearing members.

CIRCULAR C14/055

02 May 2014

Category:

General

Attachments:

Attachment 1: FOA Clearing Module

Attachment 2: Annexe ICE Clear Europe

Attachment 3: Annexe ICE Clear Europe

Summary of content:

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- "Automatic early termination" must not apply as between the Customer and Clearing Member for Customer-CM Transactions (i.e. the contracts entered into on a back-to-back basis with contracts cleared at ICE Clear Europe), unless one of the parties is in Switzerland, Germany or another jurisdiction approved by the Clearing House for this purpose. No other jurisdictions are currently so approved.

Pursuant to the Standard Terms, the Standard Terms prevail over any inconsistent provision in any agreement between a Customer and its Clearing Member. Documentation specifying anything to the contrary would not comply with Rule 1516(b)/202(b).

There is no requirement in Rule 1516(b) or Rule 202(b) for Clearing Members to obtain a legal opinion on enforceability of the actual provisions of the Standard Terms or the Rules. Rule 1516(b)/202(b) is intended to require each Clearing Member to ensure that:

- Incorporation by reference of the Standard Terms or Rules into the agreement between it and each of its Customers is done in a manner which is effective under the governing law of the contract into which the Standard Terms are incorporated. For example, under some governing laws, the full name of documents incorporated by reference into a contract must be clearly stated and under other governing laws only unambiguous language is needed or the intention of the parties must be demonstrated.
- The contract between a Clearing Member and each of its Customers (under which they agree that the Standard Terms apply) is of a nature which is generally speaking contractually enforceable (not void) under its governing law and any applicable mandatory provisions of local law. For example, if the entry into of derivatives or access to UK or European clearing houses is unlawful either generally or for a particular kind of legal entity in the relevant jurisdiction of a Customer, then an affected Customer should not be given access to ICE Clear Europe.
- There are no inconsistent provisions in the documentation agreed with Customers which disapply or override the Standard Terms.

Industry forms of documentation

ICE Clear Europe does not review, approve or prescribe specific forms of Customer documentation for usage by Clearing Members. Clearing Members are responsible for ensuring that they comply with Rule 1516(b)/202(b). ICE Clear Europe has had sight of various industry standard forms of customer documentation. In this context, Clearing Members and Customers should note the following:

ISDA/FOA Client Cleared OTC Derivatives Addendum (11 June 2013). This form of documentation complies with the requirements of Rule 1516(b)/202(b). "ICE Clear Europe Limited", "Rules, Procedures, Clearing Membership Agreement, Circulars" and the applicable Standard Terms annex (e.g. "Customer-CM CDS Transactions Standard Terms, Customer-CM F&O Transactions Standard Terms and Customer-CM FX Transactions Standard Terms") need specifying in Table A (paragraph 4) of the Addendum Annex as "Agreed CCP", "Core Provisions" and "Mandatory CCP Provisions" respectively.

FOA Clearing Module (11 October 2013). Subject to one amendment being made or the attached form of "Schedule []: ICE Clear Europe Limited" to the

FOA Clearing Module being executed or included, this form of documentation complies with the requirements of Rule 1516(b)/202(b). "ICE Clear Europe Limited" and the applicable Standard Terms Annex (e.g. "Customer-CM CDS Transactions Standard Terms, Customer-CM F&O Transactions Standard Terms and Customer-CM FX Transactions Standard Terms") need specifying in Table A as an "Agreed CCP" and "Mandatory CCP Provisions" respectively.

The FOA Clearing Module includes a provision under which the Customer (but not the Clearing Member) is bound by the Mandatory CCP Provisions (clause 9.4) but also specifies that both parties agree to the Mandatory CCP Provisions prevailing (clause 1.2). The attention of Clearing Members and Customers is drawn to Rule 1516(b)(ii)/202(d), under which the Clearing House is entitled to direct Clearing Members to execute documentation confirming their agreement to the Standard Terms. To avoid doubt and the risk of such directions, it is recommended that Clearing Members using the FOA Clearing Module make clause 9.4 apply to both parties in respect of clearing at ICE Clear Europe, either by amending the FOA Clearing Module as follows or using the provided form of Schedule.

*"9.4 Mandatory CCP Provisions. Client **and Firm** agrees to be bound by and comply with the Mandatory CCP Provisions of each Agreed CCP Service".*

Bundesverband deutscher Banken Clearing-Rahmenvereinbarung / Association of German Banks Clearing-Framework Agreement (8 May 2013)

Subject to one amendment being made or the attached form of "Annex to the Clearing Framework Agreement for the Clearing of Derivatives via ICE Clear Europe" being executed, this form of documentation complies with the requirements of Rule 1516(b) / 202(b). The last sentence of Paragraph 1(4) of the Clearing-Framework Agreement is inconsistent with the Standard Terms annexes. This wording must be deleted or disapplied in its application to ICE Clear Europe. For the avoidance of doubt, the relevant wording to be deleted or disapplied is shown struck out below. We are working with the Association of German Banks on a possible supplement to be issued by this association in the future, but in the absence of such documentation being published, the existing Clearing-Framework Agreement requires amendment in the manner specified here.

~~"Hiervon abweichend gehen im Falle der Insolvenz im Sinne von Nr. 4 Abs. 2 des Vertragspartners oder im Falle eines Ereignisses, welches die Bank zur Kündigung der Rahmenvereinbarung gegenüber dem Vertragspartner nach Nr. 4 Abs. 1 berechtigt, die Regelungen der Nrn. 4 bis 6 den Bestimmungen des Regelwerkes vor. // In deviation from the above, the provisions set out in Nos. 4 to 6 shall prevail over the rules and regulations in the event of an insolvency within the meaning of No. 4 para. 2 of the contracting party or on the occurrence of an event entitling the bank to terminate the framework agreement in relation to the contracting party in accordance with No. 4 para. (1)."~~

FIA/ISDA Cleared Derivatives Addendum (29 August 2012). This form of documentation is designed for use by FCM Clearing Members, so is not appropriate for use by Non-FCM/BD Clearing Members. It is not designed to comply with the requirements of Rule 1516(b)/202(b) nor needs to do so. Nothing in the Clearing Rules precludes FCM/BD Clearing Members from using this form of agreement or other similar forms of agreement.

Annexe EMIR a la Convention-Cadre FBF 2007 Relative aux Operations sur Instruments Financiers a Terme / EMIR Addendum to the 2007 FBF Master Agreement Relating to Transactions on Forward Financial

Instruments (June 2013). This form of documentation does not yet include a detailed clearing addendum, so requires supplementing with the language set out in the next paragraphs or using the attached form of addendum entitled "ICE Clear Europe addendum to the 2013 FBF master agreement relating to transactions on forward financial instruments".

Forms of documentation without clearing addendum: Parties who have not executed a clearing addendum, clearing framework agreement or clearing module of a nature set out above must minimally execute an agreement including the following or a similar provision. This requirement would also apply to persons using an ISDA Master Agreement, FOA forms of document, Convention-cadre FBF relative aux opérations sur instruments financiers à terme (FBF), Deutscher Rahmenvertrag für Finanztermingeschäfte (DRV) or other master agreements or future documentation that is not supplemented by any of the above addenda or modules or similar detailed documentation concerning clearing house rules or mandatory provisions. The suggested wording below is not intended to constrain Clearing Members and Customers from agreeing to more complex provisions, such as provisions similar to those in the ISDA/FOA Client Cleared OTC Derivatives Addendum on a bespoke basis, but is an example of wording which, if agreed to in accordance with the Rules, can minimally result in compliance with Rules 1516(b) and 202(b).

"In respect of transactions or contracts related to contracts cleared at ICE Clear Europe Limited, [Clearing Member] and [Customer] agree to be bound by and comply with the Customer-CM CDS Transactions Standard Terms, Customer-CM F&O Transactions Standard Terms and Customer-CM FX Transactions Standard Terms (as published by ICE Clear Europe Limited as annexes to its Rules). [Clearing Member] shall be the Clearing Member, [Customer] shall be the Customer, and the Clearing Member and Customer agree that transactions between them related to cleared contracts at ICE Clear Europe Limited constitute "Customer-CM Transactions" for purposes of such Standard Terms. In the event of any inconsistency among or between such Standard Terms, the Rules of ICE Clear Europe Limited, the Procedures of ICE Clear Europe Limited and any agreement between the parties hereto, the following provisions shall prevail in the following order: (i) such Rules, (ii) such Procedures; (iii) the Standard Terms; and (iv) any agreement between the parties. References here to the Standard Terms, Rules or Procedures include the same as amended, modified, restated or supplemented from time to time pursuant to the terms of such document.

Should you have any questions in relation to this Circular or require any further information, please contact Patrick Davis, Head of Legal by phone on +44 (0)20 7065 7738 or by email patrick.davis@theice.com or Mark Woodward, Head of Corporate Development by phone on +44 (0)20 7065 7617 or email mark.woodward@theice.com.

Please ensure that the appropriate members of staff within your organisation and customers are advised of the content of this Circular.

Signed:



Paul Swann
President & Managing Director

