

Dated: May 13, 2019.

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[FR Doc. 2019-10313 Filed 5-16-19; 8:45 am]

BILLING CODE 4310-4R-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85848; File No. SR-ICEEU-2019-003]

### Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change, Security-Based Swap Submission or Advance Notice Relating to amendments to the ICE Clear Europe Clearing Rules (the “Rules”)

May 13, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 29, 2019, ICE Clear Europe Limited (“ICE Clear Europe” or the “Clearing House”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule changes described in Items I, II and III below, which Items have been prepared by ICE Clear Europe. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Clearing Agency’s Statement of the Terms of Substance of the Proposed Rule Change, Security-Based Swap Submission, or Advance Notice

ICE Clear Europe proposes to modify certain provisions of its Rules relating to default management, Clearing House recovery and wind-down for CDS Contracts, and to adopt certain related default auction procedures.<sup>3</sup>

#### II. Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change, Security-Based Swap Submission or Advance Notice

In its filing with the Commission, ICE Clear Europe included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C)

below, of the most significant aspects of such statements.

#### (A) Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change, Security-Based Swap Submission or Advance Notice

##### (a) Purpose

ICE Clear Europe submits proposed amendments to the ICE Clear Europe Rules relating to Clearing House default management, recovery and wind-down to address the risk of uncovered losses from a Clearing Member default or series of defaults, among other risks. The amendments largely extend certain existing default management, recovery and wind-down rules currently available for the F&O Category to apply to the CDS Contract Category, with certain modifications appropriate to that type of contract.<sup>4</sup> ICE Clear Europe is also proposing to make certain other clarifications and improvements to these rules for all Contract Categories. ICE Clear Europe also proposes to adopt new default auction procedures for CDS Contracts.

##### I. Summary of Proposed Amendments

The amendments would extend certain existing F&O default management, recovery and wind-down tools to the CDS Contract Category. In particular, the amendments would, for CDS Contracts, enhance existing tools and establish new tools and procedures (and an order of priority for using such tools and procedures) to manage a Clearing Member or Sponsored Principal default or series of defaults and return to a matched book. Certain other improvements would be made to the default management procedures for F&O and FX Contracts.<sup>5</sup> The amendments would, among other matters:

(i) Establish default auction procedures for CDS contracts, including:

(A) Initial default auctions for CDS, to be conducted in accordance with a new defined set of CDS default auction procedures; and

(B) if such initial default auctions are not fully successful, conducting a secondary auction of all remaining CDS

<sup>4</sup> ICE Clear Europe adopted its rules relating to Clearing House recovery and wind-down for the F&O and FX Contract Categories in 2014 (the “F&O Recovery Rule Amendments”). See Exchange Act Release No. 34-71450 (Jan. 31, 2014), 79 FR 7250 (Feb. 6, 2014), for a discussion of the terms of those rule amendments and the basis for them.

<sup>5</sup> The default management, recovery and wind-down rules applicable to the F&O Contract Category also apply to the FX Contract Category. Since ICE Clear Europe does not currently clear any contracts in the FX Contract Category, the following discussion, for simplicity, generally does not refer to the FX Contract Category.

positions, to be conducted in accordance with a defined set of CDS secondary auction procedures; and

(ii) in relation to the CDS Contract Category, if a secondary auction is unsuccessful, or, in relation to the F&O Contract Category, if an auction is unsuccessful, permit partial tear-up of positions of non-defaulting Clearing Members and Sponsored Principals corresponding to the defaulter’s remaining portfolio; (Rule 915)

(iii) in connection with the new default management steps described in (i) and (ii) above, eliminate forced allocation for CDS Contracts as a default management tool; (Deletion of former Rule 905(c) and Rule 401(a)(x))

(iv) in connection with these default management steps, provide the ability to implement reduced gains distributions (a.k.a. variation margin haircutting) for CDS Contracts following exhaustion of other financial resources, for up to five business days; (Rule 914(o))

(v) extend to the CDS Contract Category the concept of a “Cooling-off Period” (based on that used for F&O Contracts), which would be triggered by certain Clearing Member or Sponsored Principal defaults with respect to CDS Contracts that result in Guaranty Fund depletion. During a Cooling-off Period, the aggregate liability of a CDS Clearing Member for replenishments of the Guaranty Fund and assessments would be capped at “3x” its required Guaranty Fund Contribution for all defaults during that period. Certain conforming amendments would be made to the Cooling-off Periods applicable under the current Rules for F&O Contracts; (Rule 917)

(vi) clarify the process under which a CDS Clearing Member or Sponsored Principal may withdraw from the Clearing House during a Cooling-off Period, related procedures for unwinding all positions of such a CDS Clearing Member or Sponsored Principal and capping its continuing liability to ICE Clear Europe and rights of ICE Clear Europe to call for margin from withdrawing CDS Clearing Members; (Rules 917–918)

(vii) clarify the procedures for full clearing service termination, particularly for CDS Contracts, where that is determined to be appropriate by ICE Clear Europe (Rule 916); and

(viii) in connection with the foregoing, eliminate the Continuing CDS Rule Provisions currently applicable to CDS Contracts and CDS Clearing Members as instead, the document called “Clearing Rules” will apply to

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Capitalized terms used but not defined herein have the meanings specified in the ICE Clear Europe Clearing Rules.

CDS Clearing Members in the same way as it applies to F&O Clearing Members.<sup>6</sup>

The proposed amendments are described in more detail in the following sections:

## II. Revisions to Default Management Tools and Steps

Part 9, which specifies ICE Clear Europe's remedies upon a Clearing Member or Sponsored Principal default, would be revised to implement the additional recovery tools for CDS Contracts discussed herein. The changes would replace forced allocation for CDS with default auctions, reduced gains distribution and partial tear up. Changes would also be made to harmonize default management tools across the F&O and CDS Contract Categories and improve overall clarity.

### Overall Structure of Revised Default Management Provisions

Rule 905 would establish the overall default management tools and procedures available to the Clearing House to terminate and close out contracts of a Defaulter. Rule 905(b) would be revised to contemplate initial CDS default auctions, as discussed below. Paragraph (c), which provided for forced allocation in the context of CDS Contracts, would be eliminated (along with a corresponding provision in Rule 401(a)(x) and related cross-references throughout the Rules). The amendments would add a new paragraph (d), addressing default management where the Clearing House does not resolve a default through the use of its standard default management remedies under Rules 905(a)–(c). Rule 905(d)(i) would address CDS Contracts, and set out circumstances for the use of reduced gains distribution, secondary CDS auctions, partial tear-up and certain other remedies not inconsistent with the other provisions of the Rules.

<sup>6</sup> The Continuing CDS Rule Provisions are certain provisions of the Rules as they were in effect prior to the adoption of the F&O Recovery Rule Amendments, and which continued in effect with respect to the CDS Contract Category, as provided in ICE Clear Europe Circular C14/012 of 31 January 2014 and in the definition thereof in the Rules. Specifically, the Continuing CDS Rule Provisions include prior Rules 105(c), 209 and 912 and certain aspects of Rules 910 and 1102 as they relate to the CDS Contract Category and/or CDS Clearing Members. Following adoption of the proposed Rule amendments relating to the CDS Contract Category, the Continuing CDS Rule Provisions will no longer be applicable, ICE Clear Europe will no longer maintain a document called "Continuing CDS Rule Provisions" on its website, and the published Rules (as amended) will fully apply to CDS Clearing Members as well as F&O Clearing Members. As a result, various references to the Continuing CDS Rule Provisions in the Rules would be removed. Note further that Exhibit 5A to this Form 19b-4 shows the deletion of the Continuing CDS Rule Provisions only.

Rule 905(d)(ii) would address F&O Contracts, and set out circumstances for the use of reduced gains distribution, partial tear-up and certain other remedies not inconsistent with the other provisions of the Rules. Certain other provisions of Rule 905 would be renumbered, and certain conforming and clarifying changes would be made.

### Initial CDS Auctions

As revised, Rule 905(b)(i) would provide for ICE Clear Europe to run one or more Initial CDS Auctions for the CDS Contract Category with respect to the remaining portfolio of the Defaulter.

Initial CDS Auctions would be conducted in accordance with Part 1 of a new defined set of Auction Terms for CDS Default Auctions (the "CDS Default Auction Procedures"). Under those procedures, ICE Clear Europe may break the portfolio into one or more lots, each of which would be auctioned separately. CDS Clearing Members would have an obligation to bid for each lot in a minimum amount determined by ICE Clear Europe. A CDS Clearing Member could transfer or outsource its minimum bid requirement to an affiliated CDS Clearing Member, and similarly a CDS Clearing Member could aggregate its own minimum bid requirement with that of its affiliated CDS Clearing Member. A minimum bid requirement would not apply where the bid would be in breach of applicable law or the Rules, such as if a self-referencing CDS Contract would arise from an accepted bid, or where ICE Clear Europe, after written notification that a minimum bid requirement is inappropriate in the current circumstances, reasonably determines that the requirement should not apply.

Customers would be able to bid indirectly through a CDS Clearing Member. In addition, a Customer, including a Sponsored Principal invited by ICE Clear Europe to participate in an Initial CDS Auction, would have the option to bid directly in the auction (a "Direct Participating Customer"), provided that (i) a Clearing Member has confirmed that it will clear any of its resulting transactions; (ii) it makes a minimum deposit of €7.5 million which may generally be applied by ICE Clear Europe in the same manner as CDS Clearing Members' Guaranty Fund Contributions (e.g., subject to "juniorization" as described below); and (iii) it has entered into an agreement with ICE Clear Europe pursuant to which it agrees to the auction terms and confidentiality requirement as they apply to Direct Participating Customers. If an auction for any lot or lots fails, as determined in accordance with the

default auction procedures, ICE Clear Europe would be able to determine to have a subsequent Initial CDS Auction or Auctions.

The auction for each lot would be conducted as a modified Dutch auction. Where there are multiple winning bidders, all would pay or receive the auction clearing price.

Under Rule 908, all available default resources (including pre-funded CDS Guaranty Fund Contributions of CDS Clearing Members, assessment contributions of CDS Clearing Members and ICE Clear Europe contributions to the CDS Guaranty Fund) could be used to pay the cost of an Initial CDS Auction. Guaranty fund and assessment contributions of non-defaulting CDS Clearing Members would be subject to "juniorization" under Rule 908(i) and would be applied using a defined default auction priority set out in the CDS Default Auction Procedures based on the competitiveness of their bids. A portion of each CDS Clearing Member's Guaranty Fund Contributions would be allocated to the auction cost of each lot. The CDS Guaranty Fund would be further divided into three tranches. The lowest (and first-used) tranche would consist of contributions of CDS Clearing Members that failed to bid in the required amount in the relevant auction. The second, or subordinate, tranche would include contributions of CDS Clearing Members whose bids were less competitive than a defined threshold based on the auction clearing price. The final, or senior, tranche includes contributions of CDS Clearing Members whose bids would be competitive as compared to a second threshold. (For CDS Clearing Members who bid in the band between the two thresholds, their contributions would be allocated between the senior and subordinate tranches based on a formula.) Thus, contributions of CDS Clearing Members who fail to bid would be used before those who bid, and contributions of those who bid uncompetitively would be used before those who bid competitively. A parallel juniorization approach would apply to the use of assessment contributions, and a similar juniorization approach also applies to contributions of Direct Participating Customers. With this design, ICE Clear Europe believes that the CDS Default Auction Procedures would give CDS Clearing Members a strong incentive to bid competitively, with the goal of reaching an efficient auction clearing price that would permit the Clearing House to close out the Defaulter's portfolio within the resources of the Clearing House.

### Additional Default Measures

New Rule 905(d) would address the default management tools of the Clearing House where initial Default Auctions are not successful in closing out the positions of the defaulter. Subclause (i) would apply to CDS Contracts, and provides that the Clearing House could engage in reduced gains distribution, Secondary CDS Auctions and partial tear-up, among other actions, as discussed below. Subclause (ii), which applies to F&O Contracts, would clarify that the Clearing House could engage in reduced gains distribution or partial tear-up, as discussed below.

### Secondary CDS Auction

If one or more Initial CDS Auctions are not fully successful in closing out the defaulting CDS Clearing Member's CDS portfolio, ICE Clear Europe would be able to proceed to conduct a Secondary CDS Auction with respect to the Defaulter's remaining portfolio under Rule 905(d)(i)(B) and the CDS Default Auction Procedures. (As discussed below, under Rule 905(d)(i)(A) ICE Clear Europe would be able to in certain circumstances invoke reduced gains distributions in connection with such an auction.)

The Secondary CDS Auction would be conducted pursuant to Part 2 of the CDS Default Auction Procedures. The Secondary CDS Auction would also use a modified Dutch auction format, with all winning bidders paying or receiving the auction clearing price. A Secondary CDS Auction for a lot would be deemed successful if it results in a price for the lot that is within ICE Clear Europe's remaining CDS default resources, which would be allocated to each lot for this purpose based on the initial margin requirements for the lot. The Secondary CDS Auction procedures contemplate that Customers could bid directly in the Secondary CDS Auction (without need for a minimum deposit, but provided that a CDS Clearing Member has confirmed that it will clear any resulting transactions of the Non-Clearing Member), or could bid through a CDS Clearing Member.

Under Rule 908(i), in the case of a Secondary CDS Auction, ICE Clear Europe would apply all remaining CDS default resources. Guaranty Fund and assessment contributions of non-defaulting CDS Clearing Members, to the extent remaining, would be subject to "juniorization" in a Secondary CDS Auction, similar to that described above for initial default auctions, in accordance with the secondary auction

priority set forth in the secondary auction procedures.

If a Secondary CDS Auction is unsuccessful for any lot, ICE Clear Europe would be able to run another Secondary CDS Auction for that lot. ICE Clear Europe could repeat this process as necessary. However, pursuant to Rule 914(o), if ICE Clear Europe invoked reduced gains distributions, the last attempt at a Secondary CDS Auction (if needed) would occur on the last day of the five-business-day reduced gains distribution period. On that last day, the Secondary CDS Auction for each lot would be successful if it results in a price that is within the default resources for such lot. ICE Clear Europe could also determine, for a Secondary CDS Auction on that last day, that an auction for a lot would be partially filled. With respect to any lot that is not successfully auctioned, in whole or in part, ICE Clear Europe could proceed to partial tear-up under Rule 915, as described below.

### F & O Default Auction

The proposed amendments would also clarify in Rule 908(b)–(d) that where a Default Auction is held in respect of the F&O Contract Category, any applicable juniorization approach (through modifications to Rule 908) could be set out by the Clearing House by Circular. Certain other drafting clarifications, corrections and conforming changes would be made to Rule 908 as well. Rule 908(f) is being amended to provide for notice of relevant default amount calculations to all affected Clearing Members, rather than publication by Circular, to allow ICE Clear Europe greater flexibility with respect to the manner of notice to affected Clearing Members.

### Partial Tear-Up

The amendments would add partial tear-up as an additional default remedy, for all Contract Categories. If, in relation to the CDS Contract Category, the Secondary CDS Auction, or, in relation to the F&O Contract Categories, the default auction does not result in the close out of all of the Defaulter's remaining portfolio within the Clearing House's remaining resources, then ICE Clear Europe would proceed to a partial tear-up with respect to remaining positions under Rule 915. Under Rule 915(a), ICE Clear Europe would be permitted to use partial tear-up, in relation to the CDS Contract Category, only after it has attempted one or more Initial CDS Auctions or Secondary CDS Auctions, and, in relation to the F&O Contract Categories, only after it has attempted a default auction.

Pursuant to Rule 915(b), in a partial tear-up, ICE Clear Europe would terminate positions of non-defaulting Clearing Members and Sponsored Principals that exactly offset those in the Defaulter's remaining portfolio (*i.e.*, positions in the identical contracts and in the same aggregate notional amount) ("Tear-Up Positions"). ICE Clear Europe would terminate Tear-Up Positions across both the house and customer origin accounts of all non-defaulting Clearing Members and Sponsored Principals that have such positions, on a pro rata basis. Within the customer origin account of a non-defaulting Clearing Member, Tear-Up Positions of customers would be terminated on a pro rata basis. Where ICE Clear Europe has entered into hedging transactions relating to the defaulter's positions that would not themselves be subject to tear-up, ICE Clear Europe could offer to assign or transfer those transactions to Clearing Members with related Tear-Up Positions.

ICE Clear Europe would determine a termination price for all Tear-Up Positions, in accordance with Rule 915(f), for a CDS Contract based on the last established end-of-day mark-to-market settlement price, and for an F&O Contract based on the last established exchange end-of-day settlement price, subject to a specified fallback price procedure. Under Rule 915(c), the date and time as of which Partial Tear-Up would occur would be set out in a Partial Tear-Up Circular published by the Clearing House. For the CDS Contract Category, tear-up would occur contemporaneously with the determination of the termination price at end of day. Because the termination price would equal the current mark-to-market or other applicable settlement value as determined pursuant to the applicable exchange or ICE Clear Europe end-of-day settlement price process (and would be satisfied by application of mark-to-market margin posted (or that would have been posted but for reduced gains distribution) under Rule 915(e)), no additional amount would be owed by ICE Clear Europe in connection with the tear-up.

### Reduced Gains Distributions

As an additional secondary default management action, ICE Clear Europe would extend a modified version of its variation margin haircutting rules in Rule 914 to the CDS Contract Category. ICE Clear Europe would rename the prior provisions for margin haircutting, which only applied to the F&O Contract Categories, as "reduced gains distribution." Certain clarifications would be made to the provisions as they

apply to F&O Contracts. For example, Rule 914(b) would be revised to clarify that in the case of any Contract Category, ICE Clear Europe would determine at the close of business on each business day in the Loss Distribution Period whether the conditions for reduced gains distributions would be continuing. Clarifications have also been made for all Contract Categories to state explicitly that reduced gains distribution would only apply to variation or mark-to-market margin, and not initial or original margin. Additional changes in Rule 914(i) would clarify the obligations of the Clearing House upon termination of reduced gains distribution.

The potential use of reduced gains distribution for CDS Contracts under the revised Rules would be narrower in certain respects than for the other Contract Categories, consistent with the use of reduced gains distribution for other swap clearing organizations.<sup>7</sup> For CDS Contracts, reduced gains distribution could be invoked under Rule 914 only where ICE Clear Europe has exhausted its remaining available default resources (including assessment contributions received). In addition, for the CDS Contract Category, pursuant to Rule 914(n), ICE Clear Europe could invoke reduced gains distribution only for up to five consecutive business days. Reduced gains distribution would allow ICE Clear Europe to reduce payment of variation, or mark-to-market, gains that would otherwise be owed to Clearing Members, during which time, in relation to the CDS Contract Category, it would attempt a Secondary CDS Auction or conduct a partial tear-up. Rule 914(a) and 914(n) would specify certain conditions to the commencement of reduced gains distribution for CDS Contracts, including that ICE Clear Europe has exhausted all other available default resources and has determined that reduced gains distribution is appropriate in connection with a Secondary CDS Auction or partial tear-up.

Pursuant to proposed Rule 914(o), for the CDS Contract Category, if ICE Clear Europe conducts a successful Secondary CDS Auction, that day, or if ICE Clear Europe so determines, the preceding business day, would be the last day for reduced gains distribution. If ICE Clear Europe is unable to conduct a successful Secondary CDS Auction by the end of the five business day reduced gains distribution period, ICE Clear Europe would proceed to conduct a partial tear-up under Rule 915 as of the close of business on such fifth business day.

Pursuant to proposed Rule 914(p), if reduced gains distribution applies to CDS Contracts on any day, the net amount owed on such day to each Margin Account of each Contributor that is deemed to be a “cash gainer” in respect of its house or customer origin account (*i.e.*, a Contributor that would otherwise be entitled to receive mark-to-market margin or other payments in respect of such account) would be subject to a percentage haircut, based on the incoming mark-to-market margin from other Clearing Members. Because reduced gains distribution would only be used following exhaustion of other resources, the Clearing House would only use incoming mark-to-market margin payments to pay mark-to-market margin gains. Haircuts are determined independently on each day of reduced gains distribution for CDS Contracts, and are applied separately for each margin account for each Contributor. For each day of reduced gains distribution, ICE Clear Europe would notify Clearing Members and the market more generally of the amount of the haircut and such other matters as ICE Clear Europe considers relevant, through a Circular.

A proposed amendment in Rule 906(a) would also clarify that the calculation of a net sum on default will treat the payment or return of variation margin or mark-to-market margin as having been successfully and fully made even if reduced gains distributions have been applied, and therefore the defaulter will not pay or receive such variation margin or mark-to-market margin in the net sum on default.

#### Removal of Forced Allocation as a Default Management Tool

Existing Rule 905(c), which allowed ICE Clear Europe to make a forced allocation of positions in the defaulter’s portfolio, would be removed in light of the new default management tools described above.

#### Recoveries From Defaulting Clearing Members

The amendments to Rule 907 would add a new subsection (c), which addresses the Clearing House’s authority to seek recoveries from a defaulting Clearing Member on its own behalf and on behalf of Clearing Members, including through setoff or legal process. The rule would also be revised to state ICE Clear Europe’s obligations with respect to seeking recoveries from a defaulting Clearing Member where the Guaranty Fund Contributions of non-defaulting Clearing Member have been applied, and provide that in such case ICE Clear Europe will exercise the same

degree of care in enforcement and collection of any claims against the defaulter as it exercises with respect to its own assets that are not subject to allocation to Clearing Members and others. Certain contrary provisions of the Rules to the effect that the Clearing House has no obligation to pursue recoveries from defaulters, such as existing Rule 914(m), would be removed.

#### Delay of Outbound Variation Margin

The proposed amendments would extend the provisions of Rule 110(f) to the CDS Contract Category. Rule 110(f) would permit the Clearing House to delay making a variation margin or mark-to-market margin payment, solely on an intra-day basis, where a Clearing Member or Sponsored Principal has failed to make a corresponding payment to the Clearing House (including without limitation for technical or operational reasons), and the amount of the failure exceeds the initial or original margin posted by that Clearing Member or Sponsored Principal.

#### III. Clarifications of Guaranty Fund Requirements and Uses

Various clarifications and conforming changes would be made to the provisions of Rule 908, which address contributions to and uses of the Guaranty Fund. Provisions in Rule 909 would also be moved and reorganized, and Rules 910–911 would be removed and reserved. These changes include the following:

- Changes to ICE Clear Europe’s ability to modify the order of application of Guaranty Fund Contributions under the Auction Procedures to provide for juniorization based on bidding (Rule 908(i), and conforming cross-references throughout).
- Changes to produce in Rule 909 a single Powers of Assessment rule for all Contract Categories, eliminating inconsistencies across the default rules for different products. Various deletions and insertions would be made to remove duplication between the three Contract Categories. In addition, a certification requirement in connection with the application of claims under any default insurance policies for F&O Contracts would be removed as unnecessary (Rules 909–911).
- Rule 909(a) would permit assessments for CDS Contracts to be called in anticipation of any charge against the CDS Guaranty Fund following a default, rather than only after such a charge. This change would be consistent with the current treatment of assessments for F&O Contracts.

<sup>7</sup> See, *e.g.*, ICE Clear Credit LLC Rule 808.

• Certain changes would be made throughout Part 11 to align the process for return of Guaranty Fund Contributions following termination of Clearing Membership across all Contract Categories, align Guaranty Fund Contribution calculation methodology across Contract Categories and to clarify that separate Guaranty Fund Contribution amounts calculated in respect of Proprietary and Customer positions could be applied across any type of account. A change to Rule 1101(e) would be made to better reflect current practice for the calculation of Guaranty Fund Contributions. In addition, Rule 1102(n) would be deleted because its content would be combined into Rule 1102(m).

#### IV. Cooling-Off Period

ICE Clear Europe would modify the Cooling-off Period concept in Rule 917 in order to apply it to CDS Contracts, to adjust the calculation of the relevant cap on contributions for all Contract Categories, and to reduce the length of the period. Cooling-off Periods could be designated, and would operate, separately in respect of different Contract Categories. A Cooling-off Period is triggered by certain calls for assessments for the relevant Contract Category or by sequential Guaranty Fund depletion in the relevant Contract Category within a specified period. The base length of the Cooling-off Period would be reduced from 30 Business Days to 30 calendar days, consistent with the approach of other clearing organizations,<sup>8</sup> and in order to balance the goals of limited liability and certainty for Clearing Members with the need for the Clearing House to restore normal operations following recovery as quickly as possible. As under the current Rules, a Cooling-off Period could be extended as a result of subsequent defaults during the period.

Rule 917(b) would also be revised to provide that the “3x” cap on relevant contributions during a Cooling-off Period applies to both Assessment Contribution and replenishments of the Relevant Guaranty Fund, in the aggregate, regardless of the number of defaults during the period. The foregoing cap is based on a Clearing Member’s individual Guaranty Fund Contribution immediately prior to the default that triggered the Cooling-off Period. (As set out in Rule 917(b)(iii), the existing single-default cap on Assessment Contributions under Rule 909 would also continue to apply in a Cooling-off Period.) The proposed

amendments would also allow ICE Clear Europe to rebalance, reset and recalculate the Relevant Guaranty Fund during the Cooling-off Period, but such changes would not affect the aggregate 3x contribution limit. Under proposed Rule 917(e), Clearing Members that have made the maximum contribution during a Cooling-off Period could be required to provide additional proprietary initial margin during the period, which would facilitate ICE Clear Europe’s ability to continue to satisfy its regulatory minimum financial resources requirements.

#### V. Clearing Member Withdrawal

Existing Rules 209 and 918, which address withdrawals by Clearing Members (other than CDS Clearing Members), are proposed to be revised to apply to the CDS Contract Category, such that the Rules would apply to all ICE Clear Europe Clearing Members and Sponsored Principals. Under revised Rule 917(c), CDS Clearing Members (like other Clearing Members) and Sponsored Principals could withdraw from ICE Clear Europe during a Cooling-off Period by providing an irrevocable notice of withdrawal in the first 10 business days of the period (subject to extension in certain cases if the Cooling-off Period is extended). CDS Clearing Members could withdraw from ICE Clear Europe at other times by notice to ICE Clear Europe under Rule 209. Rule 209 would also permit ICE Clear Europe to terminate a CDS Clearing Member’s membership on 30 business days’ notice, consistent with its authority with respect to Clearing Members in other Contract Categories. In case of withdrawal or termination, all outstanding positions would need to be closed out by a specified deadline, generally within 20 to 30 business days following notice of withdrawal under Rule 918(a) and 209(c). Withdrawal would not be effective, pursuant to Rule 918, until the Clearing Member or Sponsored Principal closed out all outstanding positions and satisfied any related obligations, and a withdrawing Clearing Member or Sponsored Principal would remain liable under Rule 918 with respect to charges and assessments resulting from defaults that occurred before such time. Under the proposed rule change, a CDS Clearing Member that seeks to withdraw other than during the first 10 business days of a Cooling-off Period could, at the direction of ICE Clear Europe under Rule 209(d), be required to make a deposit of up to three times its required Guaranty Fund Contribution (this provision already applies to F&O Clearing Members). Such a deposit

would not impose new liabilities on the Clearing Member, but provide assurance that the withdrawing Clearing Member would continue to meet its obligations in respect of defaults and potential defaults before its withdrawal would be effective. It thus reduces the potentially destabilizing effect that Clearing Member withdrawal (or a series of Clearing Member withdrawals) could have on the Clearing House during a stressed situation. Rule 918(a)(viii)(B) would also specify the timing for the return of Guaranty Fund Contributions to a withdrawing Clearing Member or Sponsored Principal. Rule 918(a)(vii) would be removed and reserved to reflect the amendments to Rule 917 discussed above permitting the Clearing House to rebalance the Relevant Guaranty Fund during a Cooling-off Period. A cross-reference to the relevant Settlement Finality Regulations would be added in Rule 918(a)(viii).

#### VI. Clearing Service Termination

The amendments would extend the existing provisions of Rules 105(c), 912 and 916, which provide for full clearing service termination for one or more Contract Categories, to the CDS Contract Category.

Rule 105(c) would apply where the Clearing House determines to cease acting as a Clearing House, whether generally or in relation to a particular class of Contracts. It would provide for the application of the procedures and terms in specified sections of Rule 918 to effect termination of the relevant contracts, including the timing of termination and the determination of the termination price.

Rule 916 would permit the Clearing House to terminate an entire Contract Category in certain circumstances following an Event of Default, including where there has been an Under-priced Auction or the Clearing House otherwise does not believe it will have sufficient assets to perform its obligations in respect of that Contract Category. Rule 916 would set out procedures for such termination, including notice of termination and calculation of the termination timing and price. Under the amendments, ICE Clear Europe would be permitted to use the procedures of Rule 916 in connection with the CDS Contract Category, in addition to the F&O Contract Categories currently covered by the Rule.

In addition, Rule 912, which provides for contract termination upon Clearing House insolvency and failure to pay events, would be extended to apply to CDS Contracts as well as F&O Contracts.

<sup>8</sup> See, e.g., ICE Clear Credit Rule 102 (definition of “Cooling-off Period”).

Certain other conforming changes would be made in Rule 912.

#### VII. Additional Changes

ICE Clear Europe has proposed certain additional changes to the Rules that are generally in the nature of drafting improvements and updates, clarifications and conforming changes. In particular, Rule 101 would be revised to add new defined terms that are used in the rule changes discussed above, such as those relating to Assessment Amounts, CDS Default Auction Procedures, Default Auctions, Default Auction Procedures, Initial CDS Auction, Relevant Contract Categories, Secondary CDS Auction and Under-priced Auction. Certain such defined terms would be moved from Rule 913 to Rule 101. ICE Clear Europe would also revise Rule 101 to include, for clarity, additional cross-references to various terms that are defined in other parts of the Rules. Updates to the definitions relating to recovery provisions in Rule 913 would also be made, consistent with the changes discussed herein. Other updates to definitions and cross-references would be made throughout the Rules, including in Parts 4 and 11.

Certain other conforming changes would be made throughout the Rules to reflect the new default management tools and provisions discussed above and related defined terms, including in Part 15 of the Rules. Rule 903(d) would be amended to align treatment of automatic default termination provisions for all Contract Categories. In Rule 906, "OA" would be revised to clarify that certain amounts payable to Clearing Members in respect of Guaranty Fund Contributions, assessments, reduced gains distribution, partial tear-up and collateral offset obligations are to be taken into account in that component of the net sum calculation. In addition, certain clarifications and conforming updates would be made in Part 12 of the Rules. Rule 1901(k) would be amended to provide that Sponsored Principals could be required to participate in Default Auctions. Certain other typographical and cross-reference corrections would be made throughout the Rules.

ICE Clear Europe would also make an amendment to its Clearing Procedures to reflect the renaming of its risk model.

#### VIII. Governance

Under the CDS Default Auction Procedures, ICE Clear Europe would be required to consult with its CDS Default Committee as to certain matters of auction design. These include the division of the relevant portfolio into lots, as well as decisions as to whether

to hold additional auctions and/or accept a partial fill of any lot in any such auction. The CDS Default Committee is made up of personnel seconded from Clearing Members, who are required to act in the best interests of ICE Clear Europe in that capacity. The CDS Default Committee would be expected to work together with, and under the supervision of, the ICE Clear Europe risk department, and would be supported by ICE Clear Europe legal, compliance and other personnel.

Based on its existing Board charter and practice, ICE Clear Europe expects that key decisions involving whether to hold a Secondary CDS Auction, invoke reduced gains distribution, implement a partial tear-up and/or terminate a clearing service would be made in consultation with the ICE Clear Europe Board. In this regard, it bears noting that the Board is independent of ICE Clear Europe management.

In particular, upon an Event of Default with respect to a Clearing Member, the President of ICE Clear Europe has been delegated by the Board authority to take the relevant steps set out under the Rules, or to ensure that such steps are taken. Under the terms of delegation, the President is required to ensure that the Board is informed of the relevant circumstances, steps or actions taken or determinations made or approvals given, as soon as practicable subsequent to such Event of Default. The Board may, in its discretion, where possible and practical, rescind any steps or actions taken or determinations made or approvals given, or amend such actions, steps, determinations or approvals, as it determines appropriate. ICE Clear Europe believes that these arrangements, which are used for its existing F&O default management, recovery and wind-down tools, are also appropriate for the extension of those tools to the CDS Contract Category.

#### (b) Statutory Basis

ICE Clear Europe believes that the proposed rule changes are consistent with the requirements of Section 17A of the Act<sup>9</sup> and the regulations thereunder applicable to it, including the standards under Rule 17Ad-22.<sup>10</sup> In particular, Section 17A(b)(3)(F) of the Act requires that the rule change be consistent with the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts and transactions cleared by ICE Clear Europe, the safeguarding of securities and funds in the custody or control of ICE Clear Europe or for which it is

responsible, and the protection of investors and the public interest.<sup>11</sup> As discussed herein, the proposed rule changes are principally designed to address the risks posed to ICE Clear Europe by a significant default by one or more Clearing Members or Sponsored Principals. Although ICE Clear Europe has established the level of its required financial resources in order to cover defaults in extreme but plausible market conditions, consistent with regulatory requirements, and has existing default management tools and procedures to address default losses, ICE Clear Europe nonetheless faces the risk of a loss scenario (however implausible) that exceeds such conditions (as a result of which its financial resources and tools may not be sufficient to enable it to cover the loss in full).

ICE Clear Europe has previously adopted rules and procedures pursuant to the F&O Recovery Rule Amendments addressing such extreme loss scenarios (often referred to as "recovery" and "wind-down" scenarios) with respect to the F&O Contract Category. The proposed rule changes would extend these tools and procedures to the CDS Contract Category, with certain modifications that reflect the particular characteristics of the CDS product and the market participants who trade and clear it. ICE Clear Europe does not propose to change its existing risk methodology or margin framework for CDS Contracts, which are its initial lines of defense against losses from Clearing Member or Sponsored Principal default. However, as discussed herein, the amendments would provide additional default tools and procedures for addressing a default by a CDS Clearing Member, including initial and secondary CDS auction procedures and partial tear-up, that are designed to permit ICE Clear Europe to restore a matched book and limit its exposure to potential losses from a CDS Clearing Member or Sponsored Principal default in extreme scenarios that may not be able to be addressed by standard risk management and default procedures. The amendments would also make available the tool of reduced gains distribution for the CDS Contract Category in limited circumstances, where the Clearing House has exhausted its other funded financial resources. This tool could permit the Clearing House to continue operations for a limited number of days in order to facilitate a final auction or partial tear-up. The enhanced procedures for full CDS clearing service termination would also serve as a means of addressing

<sup>9</sup> 15 U.S.C. 78q-1.

<sup>10</sup> 17 CFR 240.17Ad-22.

<sup>11</sup> 15 U.S.C. 78q-1(b)(3)(F).

general business risk, operational risk and other risks that may otherwise threaten the viability of the Clearing House. Moreover, the amendments would clarify the ability of CDS Clearing Members and Sponsored Principals to withdraw from the Clearing House (and specify the responsibilities and liabilities of the Clearing House, the Clearing Member and the Sponsored Principal in such situations), thereby providing greater certainty for both the Clearing House and its Clearing Members and Sponsored Principals. Certain other clarifications and improvements would be made to the default management procedures for F&O Contracts, including the adoption of a partial tear-up tool for returning to a matched book.

In the proposed rule changes, ICE Clear Europe has sought to develop default management tools that permit and incentivize involvement of CDS Clearing Members, Sponsored Principals and customers of CDS Clearing Members in a default management scenario. For example, the new CDS default auction procedures are designed to incentivize competitive bidding through the possibility of juniorization of Guaranty Fund and assessment contributions. The auction procedures further contemplate that customers may participate directly in default auctions at their election (subject to making the required clearing deposit), or alternatively may participate through a Clearing Member (without the need for such a deposit). ICE Clear Europe believes that such participation will lead to more effective and efficient auctions, and give customers of CDS Clearing Members the opportunity to protect against the possibility of partial tear-up (to the extent the consequences thereof are adverse to them) and reduced gains distribution through bidding competitively in the auction.

The amendments also more clearly allocate certain losses as among ICE Clear Europe, CDS Clearing Members, Sponsored Principals and their customers. The amendments are designed to plan for a remote and unprecedented, but potentially extreme, type of loss event—a loss from one or more CDS Clearing Member or Sponsored Principal defaults that exhausts funded resources and requires additional recovery or wind-down steps. Such losses would necessarily and adversely affect some or all CDS Clearing Members, Sponsored Principals, customers or other stakeholders. In ICE Clear Europe's view, its current Rules applicable to CDS Contracts and CDS Clearing

Members (including the Continuing CDS Rule Provisions), with the possibility of forced allocation, could force certain risks of loss only on CDS Clearing Members, in a way that is unpredictable and difficult to quantify in advance, and that CDS Clearing Members have strongly stated is undesirable from their perspective. ICE Clear Europe believes that the amendments take a more balanced approach that distributes potential losses more broadly, to Clearing Members, Sponsored Principals and customers that would otherwise have potential gains. Specifically, in the event of a partial tear-up, all market participants (Clearing Members, Sponsored Principals and customers) holding the relevant positions would be affected on a pro rata basis. Similarly, losses arising from reduced gains distribution would be shared on a pro rata basis by Clearing Members, Sponsored Principals and customers with gain positions. In the event of a full termination, any shortfall in resources would similarly be shared on a pro rata basis across all Sponsored Principals and Clearing Members and their customers. ICE Clear Europe also believes that the amendments would provide greater certainty as to the consequences of default and the resources that would be available to support clearing operations, to allow stakeholders to evaluate more fully the risks and benefits of clearing.

In light of discussions with CDS Clearing Members, customers and other market participants, and the views expressed by industry groups and others, ICE Clear Europe believes that the amendments would provide an appropriate and equitable method to allocate the loss from an extreme CDS default scenario to CDS Clearing Members and their customers, and Sponsored Principals, on the basis of their respective positions. ICE Clear Europe further believes that the approach taken would facilitate the ability of the Clearing House to fully allocate the loss so that it can continue clearing operations and withstand and/or recover from extreme loss events. The amendments therefore would further the prompt and accurate clearance and settlement of cleared transactions. The amendments would also support the stability of the clearing system, as part of the broader financial system, and would promote the protection of market participants from the risk of default by another market participant and the public interest more generally. In light of the importance of Clearing Houses to the financial markets they serve, the

policies in favor of clearing of financial transactions as set out in the European Market Infrastructure Regulation (EMIR)<sup>12</sup> and Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>13</sup> and the potential adverse consequences of a Clearing House failure for the financial markets, the amendments would support the public interest and the protection of investors. Through increasing the ability of ICE Clear Europe to withstand and recover from extreme loss events, the amendments may also enhance the safeguarding of securities and funds in the custody or control of the Clearing House or for which it is responsible, and avoid disruption of access to such assets.

The amendments would also satisfy the specific relevant requirements of Rule 17Ad-22,<sup>14</sup> as set forth in the following discussion:

*Financial Resources.* Rule 17Ad-22(b)(2)-(3)<sup>15</sup> requires, in relevant part, a clearing agency for security-based swaps to “use margin requirements to limit its credit exposures to participants under normal market conditions and use risk-based models and parameters to set margin requirements” and maintain financial resources “sufficient to withstand, at a minimum, a default by the two participant families to which it has the largest exposure in extreme but plausible market conditions.” Rule 17Ad-22(e)(4)(ii)<sup>16</sup> similarly requires a covered clearing agency involved in activities with a more complex risk profile (such as CDS) to maintain “financial resources at the minimum to enable it to cover a wide range of foreseeable stress scenarios that include, but are not limited to, the default of the two participant families that would potentially cause the largest aggregate credit exposure for the covered clearing agency in extreme but plausible market conditions.” ICE Clear Europe's funded margin and Guaranty Fund resources are currently designed to be sufficient to meet ICE Clear Europe's financial obligations in respect of CDS Contracts to CDS Clearing Members notwithstanding a default by the two CDS Clearing Member families creating the largest combined loss, in extreme but plausible market conditions, consistent with these regulatory requirements. ICE Clear Europe does not

<sup>12</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, as well as various implementing regulations and technical standards.

<sup>13</sup> P.L. 111-203 (July 21, 2010).

<sup>14</sup> 17 CFR 240.17Ad-22.

<sup>15</sup> 17 CFR 240.17Ad-22(b)(2)-(3).

<sup>16</sup> 17 CFR 240.17Ad-22(e)(4)(ii).

propose to reduce such funded resources. The amendments are intended to enhance and provide greater certainty as to the additional resources, beyond the funded margin and Guaranty Fund resources, that would be available to support CDS clearing operations in more extreme CDS Clearing Member and Sponsored Principal default scenarios.

As set forth above, the amendments would maintain the existing limitation on assessment contributions per default, and impose a new limitation on CDS Guaranty Fund replenishments and assessments during a Cooling-off Period. The amendments would require that Clearing Members continue to replenish the Relevant Guaranty Fund and meet assessment obligations during the Cooling-off Period, subject to an aggregate 3x limit. In addition, in the event the 3x limit is reached, the amended rules would allow ICE Clear Europe to call on Clearing Members for additional initial margin in order to ensure that it maintains sufficient resources to comply with applicable minimum regulatory financial resources requirements. In ICE Clear Europe's view, these changes would provide an appropriate balance between several competing interests of the Clearing House and Clearing Members. Although the amendments could in theory limit the maximum resources available to the Clearing House (as compared to the absence of a cap), the changes would provide greater certainty for Clearing Members as to their maximum liability with respect to the relevant Guaranty Fund in the event of defaults (and thus their maximum amount of mutualized risk), in order to facilitate their own risk management, regulatory and capital considerations. This greater certainty is in turn intended to help stabilize the Clearing House during a period of significant stress, including where there are multiple defaults. In particular, a Cooling-off Period and limit on assessments may reduce the risk of cascading defaults, where the financial demands placed on non-defaulting Clearing Members for repeated assessments or replenishments could cause such Clearing Members to themselves experience financial stress or even default, which could make the default management process more difficult. The Cooling-off Period thus would reduce the potential procyclical effect of requiring additional mutualized Guaranty Fund contributions in times of stress. The period is designed to give the Clearing House time to work out the default without exacerbating these stresses, while also allowing the

Clearing House and Clearing Members time to assess whether the defaults would be able to be resolved and normal clearing would be able to resume.

In addition, the amendments would ensure that ICE Clear Europe maintains sufficient resources to continue operations in compliance with minimum regulatory financial resources requirements, either through replenishment of the Relevant Guaranty Fund in the normal course, or in an extreme situation where the 3x cap is reached, by providing ICE Clear Europe the ability to call for additional initial margin. ICE Clear Europe recognizes that the ability to call for such additional initial margin, particularly in times of stress, could have a potential procyclical impact and potential liquidity impact on Clearing Members and their customers that is greater than guaranty fund replenishment, because initial margin is not subject to mutualization. As a result, the amount of additional initial margin required could exceed the amount of guaranty fund replenishment that would be required in the absence of the 3x cap. At the same time, ICE Clear Europe believes that these risks would be limited to a particular remote loss scenario, and would be mitigated by certain factors. ICE Clear Europe expects to limit the additional margin to the amount necessary to maintain minimum regulatory financial resources compliance, which may be less than the amount ICE Clear Europe would otherwise require under its Guaranty Fund methodology. ICE Clear Europe also expects that over the course of a Cooling-off Period, aggregate potential stress losses, and thus the need for additional financial resources, would generally decrease. In particular, Sponsored Principals and Clearing Members (and their customers) have the opportunity during the Cooling-off Period to reduce or rebalance the risk in their own portfolios, and thus mitigate potential stress loss and exposure to initial margin increases. Sponsored Principals and Clearing Members and their customers could also participate in default management (through participation in auctions), which would help them reduce their own risk profile. Greater involvement in default management could enhance competitive bidding, which in turn could reduce the likelihood that the 3x cap will be reached. In addition, and most importantly, additional initial margin posted by Sponsored Principals and Clearing Members would not be subject to mutualization and could not be used to cover defaults of other Sponsored

Principals and Clearing Members. As a result, while Sponsored Principals and Clearing Members could be required to post more funds as additional initial margin than in a replenishment of a mutualized Guaranty Fund, the risk of loss to Sponsored Principals and Clearing Members of those additional margin funds is substantially less than for Guaranty Fund replenishment.

The Clearing House would reduce the length of the Cooling-off Period to a duration of 30 calendar days (which is proposed to apply to all Contract Categories). The change reflects evolution in views among market participants and others as to the appropriate length of the period since the time of adoption of the F&O Recovery Rule Amendments. The period is intended to be long enough to provide the Clearing House and Sponsored Principals with a measure of stability and predictability as to the use of guaranty fund resources and avoid incentivizing Clearing Members and Sponsored Principals to withdraw from the Clearing House following a default. In the case of CDS Contracts, this period would also be consistent with the timeframe for the normal, periodic recalculation of ICE Clear Europe's guaranty fund under Part 11 of the Rules and the Finance Procedures (which is done on a monthly basis), a period that ICE Clear Europe has found appropriately balances stable Guaranty Fund requirements with the ability to make changes as necessary. ICE Clear Europe also believes, based on its analysis of the relevant derivatives markets and historical default scenarios involving a large market participant, that 30 days has historically been an adequate period for the market to stabilize following a significant default event. (This was, for example, observed in the interest rate swap market following the Lehman insolvency.) ICE Clear Europe similarly believes that in the context of a Cooling-off Period, 30 calendar days is an appropriate time horizon to seek to stabilize the Clearing House, in light of the products cleared by ICE Clear Europe, and reduce stress on non-defaulting Sponsored Principals and Clearing Members (and their customers) as the Clearing House conducts its default management.

In ICE Clear Europe's view, the 30-day Cooling-off Period and assessment and replenishment limits balance the interests of the Clearing House, Sponsored Principals and Clearing Members and in the aggregate enhance the likelihood that the Clearing House can withstand a default. In ICE Clear Europe's view, the proposed amendments are thus consistent with

the financial resources requirements of Rule 17Ad–22(b)(2)–(3) and (e)(4)(ii).<sup>17</sup>

*Settlement Process and Reduced Gains Distribution.* Rules 17Ad–22(e)(8)<sup>18</sup> requires that a covered clearing agency “define the point at which settlement is final to be no later than the end of the day on which the payment or obligation is due and, where necessary or appropriate, intraday or in real time.” The amendments contemplate that as a secondary default management step, in extreme cases, ICE Clear Europe could implement reduced gains distributions for CDS Contracts for up to five business days where it has exhausted all other financial resources (including assessment contributions). In such case, ICE Clear Europe would continue to collect mark-to-market margin owed to it from all non-defaulting Clearing Members, but would reduce outbound payments of mark-to-market margin owed to Sponsored Principals and Clearing Members to reflect available resources. ICE Clear Europe would calculate the haircut amount for CDS Contracts on a daily basis for each day of reduced gains distribution, without consideration of reductions on prior days. As a result, settlement on any day of reduced gains distributions for CDS Contracts would be final, as ICE Clear Europe would not have any ability to reverse or unwind the settlement. As a result, in ICE Clear Europe’s view, the amendments are consistent with the settlement finality requirements noted above.

*Default Procedures.* Rule 17Ad–22(e)(13)<sup>19</sup> requires the covered clearing agency to ensure that it “has the authority and operational capacity to take timely action to contain losses and liquidity demands” in the case of default. The proposed amendments would clarify and augment the Rules and procedures relating to default management, with the goal of enhancing the ability of the Clearing House to withstand extreme default events, particularly for CDS Contracts (which were not covered by the F&O Recovery Rule Amendments). For CDS Contracts, the amendments more clearly distinguish between standard default management events, largely covered by its existing default rules and procedures, and more extreme default management scenarios, for which recovery tools may be appropriate. The amendments include a new set of procedures for Initial CDS Auctions, designed to facilitate liquidation of the defaulter’s portfolio through a multi-lot

modified Dutch auction. The auction procedures require participation of all CDS Clearing Members (unless outsourced to another Clearing Member in accordance with the Rules), and permit direct participation in the auction by customers as well as Clearing Members and Sponsored Principals. The procedures also provide incentives for competitive bidding through juniorization of Guaranty Fund and assessment contributions, as discussed above. The amendments further include a set of procedures for Secondary CDS Auctions, intended to provide for an effective final auction of the entire remaining portfolio, prior to the exercise of other recovery tools such as partial tear-up.

Following consultation with Clearing Members, ICE Clear Europe is proposing to remove the existing CDS default management tool of forced allocation, in light of concerns that the tool could result in unpredictable and unquantifiable liability for CDS Clearing Members. Instead, ICE Clear Europe would have the option to invoke a partial tear-up of CDS positions to restore a matched book in the event that it would be unable to auction the defaulter’s remaining portfolio. The amendments would also permit the use of partial tear-up for other Contract Categories. Partial tear-up, if used, would occur at the most recent mark-to-market or settlement price determined by ICE Clear Europe, contemporaneously with such determination. As a result, partial tear-up would not result in additional loss to Clearing Members or Sponsored Principals as compared to the most recent mark to market settlement (and if reduced gains distribution is invoked, partial tear-up will not entail additional loss beyond that resulting from such reduced gains distribution). ICE Clear Europe believes that this revised set of tools would maximize the Clearing House’s ability to efficiently, fairly and safely manage extreme default events. The amendments further provide for the allocation of losses that exceed funded resources, through assessments and replenishments to the Guaranty Fund, as described herein, and the use of reduced gains distributions when necessary, following the exhaustion of all other resources. The amendments thus are designed to permit ICE Clear Europe to fully allocate losses arising from default by one or more Clearing Members or Sponsored Principals, with the goal of permitting the Clearing House to resume normal operations. Furthermore, ICE Clear Europe contemplates testing of the use of the

new tools and procedures as part of its regular default management exercises, in order to identify and manage any related operational risks. The results of such testing would be shared with appropriate ICE Clear Europe risk and governance committees and regulators, consistent with the treatment of the results of other default management testing.

As a result, in ICE Clear Europe’s view, the amendments would allow it to take timely action to contain losses and liquidity pressures, within the meaning of Rule 17Ad–22(e).

*Risk and Operational Resources.* Rule 17Ad–22(e)(3)<sup>20</sup> requires that a covered clearing agency “maintain a sound risk management framework for comprehensively managing” risks, including credit and operational risks, that arise in or are borne by the covered clearing agency. This includes adopting plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, among other losses. As set forth herein, ICE Clear Europe believes the amendments would facilitate its ability to effect recovery or wind-down, if necessary, in connection with extreme loss events, and in particular extend its existing recovery and wind-down tools and procedures to the CDS Contract Category. ICE Clear Europe further anticipates that it would revise its existing recovery and wind-down plans, as filed with the Commission, to reflect the rule amendments set forth herein upon their approval and implementation.

ICE Clear Europe further believes that its operational systems and capabilities are sufficient to support the proposed rule changes and new default management tools that would be implemented under those amendments. For the most part the changes extend to the CDS Contract Category Rules, procedures and tools that already apply to the F&O Contract Category. Accordingly, ICE Clear Europe has developed various systems relating to the default management process, and has done significant work to incorporate its F&O recovery tools and procedures in those systems. Once the rule amendments become effective, ICE Clear Europe would complete the incorporation of those tools into its systems for CDS Contracts, and test such systems as part of its regular system testing process.

*Well-Founded Legal Framework.* Rule 17Ad–22(e)(1)<sup>21</sup> requires that a covered clearing agency have rules and policies

<sup>17</sup> 17 CFR 240.17Ad–22(b)(2)–(3) and (e)(4)(ii).

<sup>18</sup> 17 CFR 240.17Ad–22(e)(8).

<sup>19</sup> 17 CFR 240.17Ad–22(e)(13).

<sup>20</sup> 17 CFR 240.17Ad–22(e)(3).

<sup>21</sup> 17 CFR 240.17Ad–22(e)(1).

reasonably designed to “provide for a well-founded, clear, transparent and enforceable legal basis for each aspect of its activities in all relevant jurisdictions.” ICE Clear Europe believes that the amendments would provide a clearer and more transparent set of default management procedures for addressing extreme loss events in the CDS Contract Category, in a manner that is largely consistent with the approach already used for the F&O Contract Category. These changes (including the elimination of the Continuing CDS Rule Provisions), and the greater harmonization among product categories, would provide greater certainty to the Clearing House, Clearing Members, Sponsored Principals and other market participants as to the various tools available to the Clearing House and the potential liabilities of Clearing Members, Sponsored Principals and others in such events. ICE Clear Europe further believes that the amendments would facilitate the Clearing House’s ability to conduct an orderly recovery or, if necessary, wind-down process, in accordance with the requirements of applicable regulations. ICE Clear Europe has in addition considered legal advice of internal and external counsel with respect to the implementation of the amendments. As a result, ICE Clear Europe believes the amendments are consistent with the requirements of Rule 17Ad-22(e)(1).

*Governance.* Rule 17Ad-22(e)(2)<sup>22</sup> requires that a covered clearing agency provide for governance arrangements that, among other matters, are “clear and transparent,” “clearly prioritize the safety and efficiency of the covered clearing agency,” “specify clear and direct lines of responsibility” and “consider the interests of relevant stakeholders of the covered clearing agency.” ICE Clear Europe believes that its governance around the use of the recovery and wind-down tools and procedures set out in the Rule amendments, and in particular the extension of existing tools and procedures to CDS Contracts, is consistent with these requirements. Under the proposed CDS Default Auction Procedures, ICE Clear Europe would consult with its CDS Default Committee with respect to the terms for Initial CDS Auctions and Secondary CDS Auctions, including as to the definitions of relevant lots in the auction and decisions as to whether to hold additional auctions and/or accept a partial fill of a lot in any auction. Consistent with its existing Board charter and practice, ICE Clear Europe

expects that key decisions relating to recovery and wind-down considerations, such as invoking reduced gains distributions, holding a Secondary CDS Auction, implementing a partial tear-up and/or terminating a relevant clearing service, would be made in consultation with ICE Clear Europe’s Board. Those procedures provide, among other matters, for notice to the Board of relevant actions, and contemplate the Board’s ability to rescind or modify actions taken by management. In this regard, the ICE Clear Europe Board is independent of ICE Clear Europe management. In ICE Clear Europe’s view, the proposed arrangements would involve appropriate consultation with Clearing Members through the CDS Default Committee, and with the Board, which is the governing body best placed to take into account the interests of the Clearing House and all relevant stakeholders. ICE Clear Europe further believes that these arrangements, which are used for its existing F&O default management, recovery and wind-down tools, are also appropriate for the extension of those tools to the CDS Contract Category.

For the foregoing reasons, ICE Clear Europe believes that the proposed rule changes would be consistent with the requirements of Section 17A of the Act<sup>23</sup> and the regulations thereunder applicable to it, including the applicable standards under Rule 17Ad-22.<sup>24</sup>

#### *(B) Clearing Agency’s Statement on Burden on Competition*

ICE Clear Europe does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purpose of the Act. The amendments will apply uniformly to all CDS Clearing Members (and customers of Clearing Members), and generally serve to harmonize the treatment of CDS Clearing Members with other Clearing Members in the case of extreme loss events. ICE Clear Europe does not anticipate that the amendments would affect the day-to-day operation of the Clearing House under normal circumstances, or even in typical default management scenarios. ICE Clear Europe is not proposing to alter the standards or requirements for becoming or remaining a Clearing Member, or otherwise using the clearing services it provides. ICE Clear Europe also does not propose to change its methodology for calculation of margin or guaranty fund contributions. The amendments are

intended to address instead the risk of extreme loss events, and provide the Clearing House additional tools and resources to withstand and/or recover from extreme loss events, particularly for the CDS Contract Category, so that it can restore a matched book, fully allocate any losses, and resume normal clearing operations. The amendments are consistent with requirements for clearing organizations to implement such procedures under applicable law and regulation, and relevant international standards. As a result, ICE Clear Europe does not believe the amendments would adversely affect the ability of Clearing Members or other market Clearing Members to continue to clear contracts, including CDS Contracts. ICE Clear Europe also does not believe the enhancements would limit the availability of clearing in CDS or other products for Clearing Members or their customers or otherwise limit market Clearing Members’ choices for selecting clearing services in CDS and other products.

In the case of an extreme default scenario, as discussed herein, the proposed rules and default management procedures could impose certain costs and losses on Clearing Members or their customers, as well as ICE Clear Europe. ICE Clear Europe has sought to appropriately balance the allocation of such costs and losses, with appropriate techniques (such as competitive auctions) through which Clearing Members and customers can mitigate the risks of such losses. The amendments would also remove the tool of forced allocation, which potentially forced CDS Clearing Members to face uncertain and unquantifiable liability in certain default scenarios. The amendments would extend to CDS Contracts features such as Cooling-off Periods, that provide appropriate and transparent limits on the potential liability faced by Clearing Members. As a result, in ICE Clear Europe’s view, while the proposed amendments could impose certain costs and losses on market participants, that allocation is appropriate in light of the default management goals of the Clearing House, the goals of promoting orderly Clearing House recovery, and the broader public interest in the strengthening of the clearing system to withstand significant default events. As a result, ICE Clear Europe does not believe that the proposed rule changes impose any burden on competition that is not appropriate in furtherance of the purpose of the Act.

<sup>23</sup> 15 U.S.C. 78q-1.

<sup>24</sup> 17 CFR 240.17Ad-22.

<sup>22</sup> 17 CFR 240.17Ad-22(e)(2).

*(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The proposed rule changes have been discussed with Clearing Members (individually and as a group). The changes have been developed over the course of several years, and throughout that time ICE Clear Europe has consulted with Clearing Members on both the overall design and the detailed drafting of the amendments. Several aspects of the amendments reflect requests and concerns identified by Clearing Members, as discussed above (both through direct discussions and from public statements by Clearing Members and other market participants concerning recovery and wind-down issues for clearing generally), including the removal of forced allocation, introduction of a Cooling-off Period for CDS Contracts and establishment of aggregate limitations on assessments and replenishments. The introduction of partial tear-up and reduced gains distributions as recovery tools have also been discussed with Clearing Members, and have been drafted to take into account suggestions raised by Clearing Members, including to define the circumstances in which those tools may be used and to limit the adverse impact of such tools on netting, regulatory capital and other matters. Certain CDS Clearing Members have expressed concern in particular with the potential use of reduced gains distribution as a recovery tool. While ICE Clear Europe believes reduced gains distribution is an important tool for ensuring its ability to fully allocate losses, ICE Clear Europe has, in light of such concerns, limited the use of reduced gains distribution for CDS Contracts to scenarios in which all other funded financial resources of the Clearing House have been exhausted. ICE Clear Europe has also consulted with CDS Clearing Members on the details of the Initial CDS Auctions and Secondary CDS Auction procedures, and has taken into account comments and suggestions concerning such matters as minimum bid requirements, use of a Dutch versus other auction methodologies, degree and triggers for juniorization and participation by customers. ICE Clear Europe has shared drafts of the amendments with Clearing Members, and informally sought (and received) comment from Clearing Members and Clearing Members' internal and external counsel on such drafts, which ICE Clear Europe has taken into consideration in the drafting of the amendments.

ICE Clear Europe has also conducted a public consultation with respect to the proposed rule amendments.<sup>25</sup> ICE Clear Europe received one written comment on the proposed rule changes as set out in the consultation, which questioned whether reduced gains distribution for CDS Contracts is appropriate prior to the exhaustion of assessment contributions. ICE Clear Europe believes the approach it has taken is appropriate, as Rule 914(n) requires both that (1) all available resources other than assessment contributions have been exhausted, and (2) assessments have been called and have become due and payable, before ICE Clear Europe can implement reduced gain distribution for CDS Contracts. The approach reflects the risk that unfunded assessments may not be paid when due, and further provides that any reduced gains distributions made will be reimbursed through assessments when received.

ICE Clear Europe will notify the Commission of any written comments on the proposed rule changes received by ICE Clear Europe.

**III. Date of Effectiveness of the Proposed Rule Change, Security-Based Swap Submission and Advance Notice and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove the proposed rule change or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, security-based swap submission or advance notice is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>) or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ICEEU-2019-003 on the subject line.

<sup>25</sup> Circular C17/107 (22 September 2017), available on the ICE Clear Europe website at [https://www.theice.com/publicdocs/clear\\_europe/circulars/C17107.pdf](https://www.theice.com/publicdocs/clear_europe/circulars/C17107.pdf).

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-ICEEU-2019-003. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change, security-based swap submission or advance notice that are filed with the Commission, and all written communications relating to the proposed rule change, security-based swap submission or advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at <https://www.theice.com/clear-europe/regulation>.

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ICEEU-2019-003 and should be submitted on or before June 7, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

**Eduardo A. Aleman,**  
*Deputy Secretary.*

[FR Doc. 2019-10227 Filed 5-16-19; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>26</sup> 17 CFR 200.30-3(a)(12).