

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-89060; File No. SR-ICEEU-2020-005]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change Relating to Amendments to the ICE Clear Europe Clearing Rules

June 12, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 2, 2020, 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 primarily 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

ICE Clear Europe is proposing to make certain changes to its Clearing Rules (the “Rules”)³ to address the receipt of proceeds from default insurance.

II. Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

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

(a) Purpose

ICE Clear Europe proposes amendments to Parts 9 and 11 of the Rules relating to default insurance that is intended to cover losses resulting from a Clearing Member default. Among other changes, the proposed amendments address the potential receipt of proceeds from default

insurance. Although ICE Clear Europe is not, and would not be, required to obtain or maintain default insurance, the proceeds of any such insurance would, under the Rules as proposed to be revised, be applied as part of the resources available to ICE Clear Europe in the event of a Clearing Member default. Such default insurance would provide additional default resources to cover losses from Clearing Member defaults, prior to the need to use guaranty fund resources from non-defaulting Clearing Members. This would provide a potential extra layer of protection for the non-defaulting Clearing Members’ guaranty fund contributions and assessments. ICE Clear Europe is also proposing certain additional conforming amendments to the Rules. The proposed revisions are described in detail below.

ICE Clear Europe proposes to amend the default waterfalls in Rules 908(b) (for F&O-only Clearing Members or Sponsored Principals), (c) (for CDS-only Clearing Members or Sponsored Principals), (d) (for FX-only Clearing Members or Sponsored Principals) and (g) (for Clearing Members or Sponsored Principals in multiple membership categories) such that default insurance proceeds would be placed third in the waterfall of assets used to meet the obligations and liabilities of a Defaulter and any shortfall, loss or liability to the Clearing House upon an Event of Default. (In the case of a defaulter with multiple membership categories, the proceeds of default insurance would be applied to each Default Amount on a pro rata basis, as provided in Rule 908(g)(iii) as proposed to be revised.) Default insurance proceeds would thus be applied following the Clearing House initial contribution and before the Clearing Member guaranty fund contributions and assessment contributions. Conforming amendments would be made to the Rule 101 definitions of “Clearing House CDS GF Contribution”, “Clearing House F&O GF Contribution” and “Clearing House FX GF Contribution” as well as to Rule 909(a), reflecting the placement of default insurance proceeds in the applicable waterfalls under Rule 908.

Rule 1103(e) (which states certain limitations with respect to the benefits of default insurance) would be amended to provide that the Clearing House is not obliged to obtain or maintain any default insurance policy or make or receive the proceeds under any claim prior to processing to the next levels of assets in the applicable waterfall in Rule 908, and subject to the payment order specified in Rule 1102(k). The amendments would further reflect that

there could be a delay in receiving insurance proceeds such that other assets applicable under Rule 908 may be called prior to insurance proceeds being received and proceeds of any claim may need to be applied to meet losses across more than one Event of Default if there are multiple defaulters. The amendments would further set out the order in which proceeds of default insurance claims would be paid out if there are multiple defaulters within a certain period, such that insurance proceeds would not be applied to a default in respect of which there were no further losses after applying default resources up to and including the Clearing House contribution, and would be applied to remaining losses based on which default occurred first in time, and to losses from defaults occurring simultaneously (including defaults occurring on the same day) on a pro rata basis.

Rule 1102(k) (which addresses allocation of amounts recovered from a Defaulter) would be amended to address application of recoveries to pay amounts owed to default insurers in respect of default insurance, as well as reimbursements to Clearing Members and the Clearing House in respect of their contributions that have been used, in the reverse order in which assets were applied under Rule 908 (*i.e.*, to non-defaulting Clearing Members in respect of their Guaranty Fund Contributions that had been applied, then to the default insurance provider in respect of amounts owed to it, and then to the Clearing House in respect of its default contribution). Rule 1102(k) would also be revised to clarify that application of such amounts would be subject to (i) retaining or repaying amounts applied by the Clearing House (which would no longer include claims under insurance policies) or other third parties applied to meet shortfalls; (ii) if applicable, reimbursing payments to Persons that made Assessment Contributions in the reverse order specified in Rule 908; and (iii) if applicable, meeting certain repayment obligations under Rules 909(j), 914(j) or 916(n).

Rule 909(j) (which addresses reimbursement of Assessment Contributions) would also be amended to reflect the application of default insurance. The amendments would expand the existing provision to provide that if, after any Assessment Contribution has been paid in relation to an Event of Default, the Clearing House collects on the defaulted obligation, loss or shortfall in whole or in part from an insurer, the Clearing House would refund the collected

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Capitalized terms used but not defined herein have the meanings specified in the Rules.

amount, less expenses, to non-defaulting Clearing Members in respect of their paid Assessment Contributions. The amendment would also add a drafting clarification that such reimbursements are subject to the Clearing House retaining or repaying amounts applied to meet any shortfall and certain repayment obligations, if applicable, under Rules 914(j) (addressing payment of recoveries to persons that were subject to reduced gains distributions under Rule 914) and 916(n) (addressing payments of recoveries to persons that received reduced amounts in the case of product termination under Rule 916), which is consistent with the existing language of Rule 914(j) and 916(n).

The term “Available Non-Defaulter Resources” in Rule 913 would be amended to include claims under default insurance policies available to be applied pursuant to Rule 908, provided that they were received in cleared funds at the time the Clearing House performs a calculation of Available Non-Defaulter Resources.

Rule 914(j) (which addresses application of recoveries in the context of reduced gains distribution) would be extended such that it would also apply where the Clearing House receives insurance proceeds. Existing Rule 914(j) provides that if the Clearing House receives an amount that would, had it been paid on time, have increased the Clearing House’s available resources on a day on which a Margin Account Adjustment was made in connection with Reduced Gains Distributions, the Clearing House would distribute the amounts received first to non-defaulting Contributors who were liable to pay an adjustment on a pro rata basis and second in accordance with Rule 1102(k) (as described above). The amendment would include default insurance proceeds in the type of received amounts subject to the rule.

Similarly, Rule 916(n) (which addresses application of recoveries in the context of product termination) would be amended such that it also applies to insurance proceeds. Existing Rule 916 in general permits the Clearing House to terminate the open contracts in a relevant contract category (e.g., F&O or CDS) under specified circumstances, including in certain cases following an Under-priced Auction or where the Clearing House determines there are not sufficient Clearing Members to support continued clearing of the relevant contract category. In the case of such a termination of a contract category, under existing Rule 916(n), where ICE Clear Europe receives an amount that would, had it been paid on time, have

increased the amount owed to (or decreased the amount owed by) Clearing Members or Sponsored Principals upon termination of a contract category, ICE Clear Europe would distribute the amount received first to non-defaulting Clearing Members or Sponsored Principals who received less in respect of product termination than they were otherwise owed, then in accordance with Rule 914(j) (as discussed above), and then in accordance with Rule 1102(k) (as discussed above). The amendment would include default insurance proceeds in the type of received amounts subject to distribution under Rule 916(n).

(b) Statutory Basis

ICE Clear Europe believes that the proposed rule changes are consistent with the requirements of Section 17A of the Act⁴ and the regulations thereunder applicable to it, including the applicable standards under Rule 17Ad–22.⁵ 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.⁶ The proposed changes amend the default waterfalls in Rule 908 to apply the proceeds of default insurance, if any, as an additional default resource after the application of ICE Clear Europe’s own initial contributions and prior to the application of guaranty fund contributions or assessment contributions of non-defaulting Clearing Members. Placing the proceeds from any default insurance that ICE Clear Europe may receive before the guaranty fund resources of non-defaulting Clearing Members in the default waterfall is generally favorable to non-defaulting Clearing Members and enhances ICE Clear Europe’s procedures that are designed to protect and ensure the safety of Clearing Member funds and assets. Although ICE Clear Europe is not relying on the additional default resources from default insurance to meet regulatory minimum financial requirements, in ICE Clear Europe’s view, the proposed changes to the Rules nonetheless enhance ICE Clear Europe’s ability to manage the risk of defaults by providing resources to cover losses from Clearing Member defaults, prior to the

need to use guaranty fund resources from non-defaulting Clearing Members, thereby promoting the prompt and accurate clearance and settlement of securities transactions, derivatives agreements, contracts, and transactions and the safeguarding of securities and funds which are in the custody or control of ICE Clear Europe or for which it is responsible within the meaning of Section 17A(b)(3)(F) of the Act.⁷

The amendments will also satisfy relevant requirements of Rule 17Ad–22,⁸ as set forth in the following discussion.

Rule 17Ad–22(e)(4)⁹ requires ICE Clear Europe to maintain financial resources at a minimum sufficient 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 in extreme but plausible market conditions. ICE Clear Europe is not relying on default insurance to meet its regulatory financial resource requirements, including for purposes of Rule 17Ad–22(e)(4), and is not reducing the amount of its other relevant financial resources. ICE Clear Europe believes that the proposed revisions will nonetheless enhance its default waterfall and default management procedures. As described above, the proposed amendments contemplate the possibility of ICE Clear Europe receiving proceeds from default insurance, which would provide additional default resources to cover losses from Clearing Member defaults, prior to the need to use guaranty fund resources from non-defaulting Clearing Members. Conforming changes proposed to Rule 1103(e) would permit the use of Guaranty Fund Contributions to occur prior to receipt of any default insurance proceeds and the application of default insurance proceeds to meet losses across multiple Events of Default. As such, default insurance would, in ICE Clear Europe’s view, represent a tool that strengthens ICE Clear Europe’s ability to manage its financial resources and withstand the pressures of defaults, consistent with the requirements of Rule 17Ad–22(b)(3).¹⁰

Rule 17Ad–22(e)(13)¹¹ requires ICE Clear Europe to establish, implement, maintain and enforce written policies and procedures reasonably designed to ensure it has the authority and operational capacity to take timely

⁴ 15 U.S.C. 78q–1(b)(3)(F).

⁵ 17 CFR 240.17Ad–22.

⁶ 17 CFR 240.17Ad–22(e)(r).

⁷ 17 CFR 240.17Ad–22(e)(4).

⁸ 17 CFR 240.17Ad–22(e)(13).

¹⁰ 15 U.S.C. 78q–1(b)(3)(F).

¹¹ 17 CFR 240.17Ad–22(e)(13).

action to contain losses and liquidity demands and continue to meet its obligations in the case of participant default. The proposed changes to the Rules integrate default insurance into the default waterfall, providing additional potential default resources to cover losses from Clearing Member defaults, prior to the need to use guaranty fund resources from non-defaulting Clearing Members. Amended Rule 1103(e) provides that ICE Clear Europe may use the contributions of non-defaulting Clearing Members to the guaranty fund prior to the receipt of proceeds owed under the default insurance provided that those Clearing Members are reimbursed from the insurance proceeds when received. Given that there may be delays in making and processing an insurance claim, this provision ensures that the existence and use of default insurance does not interfere with ICE Clear Europe's default management and allows ICE Clear Europe to continue its default management process without having to wait for the payment of insurance proceeds. The proposed amendments thus ensure that ICE Clear Europe can take timely action to contain losses and liquidity pressures and to continue meeting its obligations in the event of a participant default, consistent with the requirements of Rule 17Ad–22(e)(13).¹²

(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 consistently across all Clearing Members or across all Clearing Members in a particular product category, their customers and other market participants. Furthermore, as the amendments would place the application of proceeds from default insurance above Clearing Member guaranty fund contributions and contemplates certain repayments to Clearing Members upon collection from default insurers, the amendments are generally consistent with the interests of Clearing Members. As a result, ICE Clear Europe does not expect that the proposed changes will adversely affect access to clearing or the ability of Clearing Members, their customers or other market participants to continue to clear contracts. ICE Clear Europe also does not believe the amendments would materially affect the cost of clearing or

otherwise limit market participants' choices for selecting clearing services. Accordingly, ICE Clear Europe does not believe the amendments would impose any burden on competition not necessary or appropriate in furtherance of the purpose of the Act.

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

ICE Clear Europe has conducted a public consultation the proposed amendments¹³ and received one written response. The commenter inquired into whether the total default insurance coverage covers both F&O and CDS clearing together and, if both, how the insurance policy will be applied if the defaulting clearing member was active in both clearing segments. ICE Clear Europe noted that these points were addressed in the consultation Circular, which states that the coverage includes both F&O and CDS Contract Categories, and proposed Rule 908(g)(iii), which states that proceeds of any insurance policy claim shall be applied to each segment on a basis pro rata to the shortfall, loss or liability of each Default Amount (as defined in Rule 908(g)) less Clearing House Contributions applied to such amount. No changes were made as a result of the comments.

III. Date of Effectiveness of the Proposed Rule Change 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 is consistent with the Act. Comments may be submitted by any of the following methods:

¹³ ICE Clear Europe Circular C20/037 (March 24, 2020), available at https://www.theice.com/publicdocs/clear_europe/circulars/C20037.pdf (the "Circular").

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*. Please include File Number SR-ICEEU-2020-005 on the subject line.

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-2020-005. 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 that are filed with the Commission, and all written communications relating to the proposed rule change 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-2020-005 and should be submitted on or before July 9, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

J. Matthew DeLesDernier,
Assistant Secretary.

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¹⁴ 17 CFR 200.30-3(a)(12).