

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95357; File No. SR-ICC-2022-012)

July 25, 2022

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change Relating to the Clearing Rules

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4thereunder,² notice is hereby given that on July 19, 2022, ICE Clear Credit LLC (“ICE Clear Credit” or “ICC”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by ICC. 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

The principal purpose of the proposed rule change is to implement certain amendments to ICC’s Clearing Rules (the “Rules”) to permit it to take advantage of certain additional settlement finality protections under applicable UK and EU law. The text of the proposed amendments is attached in Exhibit 5 [sic].

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

In its filing with the Commission, ICC included statements concerning the purpose of and basis for the proposed rule change, security-based swap submission, or advance notice and discussed any comments it received on the proposed rule change, security-based swap submission, or advance notice. The text of these statements may be

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

examined at the places specified in Item IV below. ICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

The purpose of the proposed changes is to modify certain provisions of the Rules to permit the clearing house to take advantage of certain protections for default rights and remedies under applicable United Kingdom (“UK”) and European Union (“EU”) Settlement Finality Laws and regulations. The amendments are expected to be principally relevant in the case of an insolvency of an ICC clearing participant (“Participant”) domiciled in the UK or an EU member state. The amendments would rely on certain protections in such Settlement Finality Laws and regulations that provide additional support (on top of existing protections in applicable law) for the enforceability of the clearing house’s default rights and remedies under the Rules without interference in such an insolvency.

By way of background, the EU Settlement Finality Directive³ introduced various insolvency-related protections in relation to “designated systems” used by EU participants to transfer financial instruments and payments, and participation in those systems. The Settlement Finality Directive aims to ensure that as a matter of EU member state laws, transfer orders which enter into such systems are finally settled, regardless of whether the sending participant has gone into an insolvency process. Transfer orders for

³ EU Directive 98/26/EC.

this purpose include instructions to make cash payments (including margin payments) and instructions to transfer securities (including as margin or in physical settlement of a cleared transaction, if applicable). Under the Settlement Finality Directive, transfer orders and related netting arrangements are enforceable, even in the event of insolvency proceedings against a participant, provided that the transfer order was entered into the system before the opening of the insolvency proceeding.⁴ Further, under the Settlement Finality Directive, the right of the operator of a designated system to realize and apply collateral security provided by a participant would not be affected by insolvency proceedings against the participant.⁵

“Designated systems” are defined as formal arrangements between three or more participants with common rules and standard arrangements for clearing or execution of transfer orders between participants which are governed by the law of an EU member state and have been designated as a system and notified to the European Securities and Markets Authority (“ESMA”).⁶ Although the Settlement Finality Directive itself does not establish an equivalent regime for systems operated under the laws of a non-EU member state (“third-country systems”), such as United States (“US”) clearing houses, Recital 7 of the Settlement Finality Directive provides that member states may choose to apply the provisions of the Settlement Finality Directive to their domestic institutions which participate directly in third country systems and to collateral security provided in

⁴ Settlement Finality Directive Article 3(1).

⁵ Settlement Finality Directive Article 9.

⁶ Settlement Finality Directive Article 2(a).

connection with participation in such systems. As a result, in some EU member states it is possible for a third country system such as ICE Clear Credit to receive national designation or be otherwise protected as a designated system for the purposes of that member state's national law.

The UK has implemented similar settlement finality regulations that continue to apply following the withdrawal of the UK from the EU, and which are also potentially applicable to UK institutions that participate in third country systems (such as a US clearing house).⁷

As discussed in further detail herein, ICE Clear Credit is proposing to adopt amendments to its Rules to introduce explicit provisions relating to the settlement finality of transfer orders, in order to take advantage of the protections of Settlement Finality Laws. Specifically, the amendments would address which "transfer orders" arise in its system, when they become irrevocable, who is bound by them and when they terminate. ICE Clear Credit believes that the amendments would facilitate obtaining the relevant protections of the Settlement Finality Directive and UK Settlement Finality Regulations, which will principally be relevant in the case of an insolvency of a Participant that is domiciled in an EU member state or in the UK. The amendments would not otherwise affect the clearing house's rights and obligations under the Rules, including default rights and remedies, and would not be expected to be relevant to an insolvency proceeding involving a Participant organized in the US or otherwise outside of the EU or the UK.

⁷ Financial Markets and Insolvency (Settlement Finality) Regulations 1999.

As used herein, the EU Settlement Finality Directive, national implementing legislation and the UK Settlement Finality Regulations are collectively referred to as "Settlement Finality Laws."

ICC proposes to move forward with implementation of these changes following Commission approval of the proposed rule change.

ICE Clear Credit would adopt a new Part 10 of the Rules addressing Settlement Finality Laws. Rule 1000 would add a number of related definitions, including definitions for relevant legislation and regulations, such as “EMIR,” “Financial Collateral Directive,” “Financial Collateral Regulations,” “FSMA,” “Settlement Finality Directive,” “Settlement Finality Regulations” and “UK EMIR.” The rule would also adopt key definitions relating to the settlement finality provisions, including “ICE Systems” (referencing ICE Clear Credit’s trade registration, clearing processing and finance systems), “SFD System” (referencing the third country system operated by ICE Clear Credit for purposes of the Settlement Finality Laws), “Payment Transfer Order,” “Securities Transfer Order” and “Transfer Order” (representing the types of transfer orders used in the ICE system and covered by the Settlement Finality Laws), “SFD Participant” (referencing ICE Clear Credit itself, its Participants organized in the European Economic Area (“EEA”) or in the UK, among certain other relevant persons), “SFD Custodian” (referencing a custodian located in the EEA or the UK used by ICE Clear Credit or a Participant for the holding or transfer of Non-Cash Collateral), “SFD Financial Institution” (referencing a financial institution located in the EEA or UK used by ICE Clear Credit or a Participant for purpose of the deposit or transfer of cash), “SFD Security” (referencing a security as defined in the Settlement Finality Laws), “Indirect Participant” (referencing Non-Participant Parties that fall within the definition of indirect participant under the Settlement Finality Laws), and “Non-Cash Collateral” (referencing Margin or Collateral in the form of a security).

New Rule 1001 would set out general principles relevant to implementation of the EU and UK settlement finality arrangements. Subsection (a) would provide that ICC is the operator of a third country system for purposes of relevant Settlement Finality Laws, and that Chapter 10 of the Rules would apply to ICE Clear Credit and SFD Participants to the extent that the Settlement Finality Laws are applicable to such persons. Subsection (b) would require SFD Participants to comply with actions taken by ICC pursuant to Chapter 10 and the relevant Settlement Finality Laws, and to acknowledge that the Settlement Finality Laws modify certain otherwise applicable provisions of insolvency laws. Subsection (c) would provide that each SFD Participant is on notice of the provisions of Chapter 10, and by virtue of participating in the SFD System, is deemed to agree to the application of Chapter 10 (including in the event of any conflict with any other agreement or obligation). Subsection (d) would provide an additional acknowledgment that Margin and Collateral transferred to ICC under the Rules fall within certain protections for collateral arrangements under the Settlement Finality Laws.

New Rule 1002 would address the timing and circumstances in which various types of Transfer Orders would arise for purposes of the ICC SFD System, specifically Payment Transfer Orders and Securities Transfer Orders in various circumstances, including for transfer of positions (“Position Transfer Orders”), transfer of non-cash collateral (“Collateral Transfer Orders”), submission of new trades for clearing (“New Transaction Clearing Orders”), backloading trades for clearing (“Backloaded Transaction Clearing Orders, and together with New Transaction Clearing Orders, “Transaction Clearing Orders”), and physical settlement under cleared CDS contracts (“CDS Physical Settlement Orders”). The rule would also specify the subject matter of each type of

Transfer Order (e.g., a payment in respect of a Payment Transfer Order) and the parties in respect of which each type of Transfer Order would apply and have effect (e.g., in the case of a Payment Transfer Order, the affected Participant (if it is an SFD Participant), ICE Clear Credit, and any affected SFD Financial Institution). Rule 1002 would also address the possibility of multiple Transfer Orders existing in respect of the same obligation (which may exist, but would not result in the duplication of any obligation), and the fact that netting or close out of Contracts would not affect the status of Transfer Orders. The rule also states, consistent with the general approach of the Rules, that where a Transfer Order applies to an Indirect Participant, it would not affect the liability of any SFD Participant pursuant to the same Transfer Order.

Rule 1003 would specify the time at which each type of Transfer Order (specifically, Payment Transfer Orders, Position Transfer Orders, Collateral Transfer Orders, Transaction Clearing Orders and CDS Physical Settlement Orders) becomes irrevocable for purposes of the relevant Settlement Finality Laws. Payment Transfer Orders would become irrevocable at the earlier of the time payment is received or at the time the relevant financial institution used by ICC for this purpose sends a SWIFT or other confirmation that payment has been made. Collateral Transfer Orders similarly would become irrevocable at the earlier of the time the transfer is received or a related securities transfer order in a relevant securities transfer system becomes irrevocable. Position Transfer Orders would become irrevocable at the time the position transfer is recorded in the ICC systems, and Transaction Clearing Orders would become irrevocable at the applicable Novation Time under the Rules. CDS Physical Settlement Orders would become irrevocable at the earliest of (1) the time the Matched Delivery Buyer has

irrevocably instructed its custodian to transfer the relevant securities to the Matched Delivery Seller, (2) the time the relevant instrument is delivered or assigned, or (3) the time notice is otherwise given under the Rules that the Matched Delivery Pair have settled the relevant Matched Delivery Contracts. Under the Rule, as from the time when the Transfer Order becomes irrevocable, it cannot be revoked or purported to be revoked by any SFD Participant or ICE Clear Credit and will be binding on all SFD Participants.

Rule 1004 would address variations or cancellations of Transfers Orders prior to the time they become irrevocable, in specified circumstances. These circumstances include, for any Transfer Order, cases where the order is affected by manifest or proven error or an error agreed by all affected SFD Participants. Additional grounds for variation or cancellation apply for particular types of Transfer Order, including, in the case of a Payment Transfer Order or Collateral Transfer Order, where the underlying Contract is void or avoided under the Rules or applicable law, or amended as a result of ICC exercising its discretion under the Rules. Transaction Clearing Orders may be subject to variation or cancellation where the underlying trade is not eligible for clearing or otherwise not accepted for clearing, and Backloaded Transaction Clearing Orders may be subject to variation or cancellation if an error or omission is noted to ICC prior to the Novation Time. Similarly, variation or cancellation of a CDS Physical Settlement Order may be made if a NOPS Amendment Notice is validly delivered under the Rules or ICE Clear Credit Procedures. Under Rule 1004, in these circumstances, ICC would be permitted to make appropriate modifications to the relevant Transfer Order, or in the alternative to cancel the relevant Transfer Order. Rule 1004 also would not preclude ICC from taking steps to give rise to a new Transfer Order with opposite effect to an existing

Transfer Order or part thereof. Rule 1004 also would provide for notice of any modification or cancellation of a Transfer Order to affected SFD Participants.

Rule 1005 would specify the circumstances under which Transfer Orders are deemed satisfied. Specifically, Payment Transfer Orders are satisfied upon all required payments being received in immediately available funds or full satisfaction of the underlying obligation is otherwise made and recorded in ICC's systems, free of any encumbrances. Position Transfer Orders would be deemed satisfied upon becoming irrevocable (at which time the relevant positions have been transferred under the Rules). Collateral Transfer Orders would be deemed satisfied upon ICC or the Participant, as applicable, receiving the Non-Cash Collateral in its account or upon the definitive record of the assets transferred by the Participant being updated to reflect the successful transfer of the relevant collateral. Transaction Clearing Orders would be deemed satisfied at the time the relevant cleared contracts arise under the Rules. A CDS Physical Settlement Order would be deemed satisfied at the time ICC updates its records to reflect that physical delivery of the relevant security has been completed or the delivery obligations of the parties are otherwise discharged or settled.

Rule 1006 would set out certain acknowledgements of ICC, Participants and Non-Participant Parties with respect to matters relating to Margin or Collateral to the extent they fall to be determined under the laws of an EEA member state or the UK. The amendments would clarify that such arrangements are subject to the EU Financial Collateral Directive or UK Financial Collateral Regulations, as applicable, and would provide that Participants and Non-Participant Parties would not dispute that characterization. The amendments would further provide that arrangements for the

provision of cash Margin and Collateral constitute “title transfer financial collateral arrangements” and arrangements for the provision of Pledged Items constitute “security financial collateral arrangements”, in each case for purposes of the EU Financial Collateral Directive or UK Financial Collateral Arrangements, that all such Margin and Collateral constitute “financial collateral” for purposes of such laws, and that ICC has possession or control of such Margin and Collateral for purposes of such laws. The amendments would also state that for purposes of UK law, the security arrangements under the Rules constitute a “market charge” for purposes of the Companies Act 1989, which provides certain protections for the enforceability of such arrangements in the event of the insolvency of a clearing participant.

ICC also proposes to make certain amendments to Rule 611, which currently addresses the treatment of certain Rules under various insolvency laws and other protections for the enforceability of default remedies in the event of the insolvency of a clearing participant. The amendments would add a new subsection (f), which would provide that specified Rules providing for default rights and remedies would constitute default rules, procedures and similar arrangements as defined for purposes of relevant EU and UK law, including EMIR, UK EMIR, and the Settlement Finality Laws.

(b) Statutory Basis

ICE Clear Credit believes that the proposed amendments are consistent with the requirements of Section 17A of the Act⁸ and the regulations thereunder applicable to it,

⁸ 15 U.S.C. 78q-1.

including the standards under Rule 17Ad-22.⁹ Section 17A(b)(3)(F) of the Act¹⁰ requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of investors and the public interest.

The amendments are intended to permit the clearing house explicitly to take advantage of certain additional protections for the enforceability of default rights and remedies that may be available under EU and UK law, principally in the context of the insolvency of a Participant domiciled in the EU or the UK. The amendments would not themselves change any of the existing default rights or remedies of ICC. Rather, the amendments adopt explicit provisions relating to settlement finality of transfer orders relating to various clearing activities, most importantly the payment and transfer of Margin and Collateral, and the enforcement of ICC's rights with respect thereto, in order to facilitate potential reliance by the clearing house on settlement finality protections existing under relevant Settlement Finality Laws. The amendments would thus provide additional legal certainty as to the ability of the clearing house to enforce its default rights and remedies (including its rights to use Margin and Collateral provided by Participants under the Rules) in the event of the insolvency of a Participant domiciled in the EU or the UK (on top of existing protections for the enforceability of such rights and remedies on

⁹ 17 C.F.R. 240.17Ad-22.

¹⁰ 15 U.S.C. 78q-1(b)(3)(F).

which the clearing house may currently rely). As such, the amendments are, in ICC’s view, consistent with the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of the investors and the public interest, within the meaning of Section 17A(b)(3)(F).¹¹

Moreover, the amendments are consistent with relevant provisions of Rule 17Ad-22.¹² In particular, Rule 17Ad-22(e)(1) requires that each covered clearing agency “establish, implement, maintain and enforce written policies and procedures reasonably designed to . . . provide for a well-founded, clear, transparent and enforceable legal basis for each aspect of its activities in all relevant jurisdictions.”¹³ As discussed above, the amendments would provide an additional legal basis to support the enforceability of the clearing house’s default rules in the context of an insolvency of a Participant that is domiciled in an EU member state or in the UK. The amendments would in particular facilitate the clearing house’s taking advantage of protections for the enforceability of transfer orders, including in default scenarios, based on the EU Settlement Finality Directive and UK Settlement Finality Regulations. The amendments thus enhance the legal certainty of the framework supporting ICC’s activities in those jurisdictions. As a

¹¹ 15 U.S.C. 78q-1(b)(3)(F).

¹² 17 C.F.R. 240.17Ad-22.

¹³ 17 C.F.R. 240.17Ad-22(e)(1).

result, ICC believes the amendments are consistent with the requirements of Rule 17Ad-22(e)(1).¹⁴

Rule 17Ad-22(e)(13) requires that each covered clearing agency “establish, implement, maintain and enforce written policies and procedures reasonably designed to . . . ensure the covered clearing agency has the authority and operational capacity to take timely action to contain losses and liquidity demands and continue to meet its obligations . . .”¹⁵ As discussed herein, ICC is not proposing to change the substance of its existing default remedies and procedures under the Rules and the ICE Clear Credit Procedures. The amendments to the Rules are intended to enhance the legal certainty of those existing default remedies and procedures in the context of an insolvency of a clearing participant domiciled in the EU or the UK by facilitating the clearing house’s ability to take advantage of protections for transfer orders under applicable Settlement Finality Laws. As such, in ICC view, the amendments will further compliance with the requirements of Rule 17Ad-22(e)(13).¹⁶

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

ICE Clear Credit does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The amendments will not change the substantive default rights and remedies under the Rules, and so will not affect the rights or obligations of ICC itself or those of Participants. The changes are intended to enhance the legal

¹⁴ 17 C.F.R. 240.17Ad-22(e)(1).

¹⁵ 17 C.F.R. 240.17Ad-22(e)(13).

¹⁶ 17 C.F.R. 240.17Ad-22(e)(13).

certainty of existing clearing house default rights and remedies in the context of the insolvency of a Participant domiciled in the UK or EU, and thereby enhance the overall clearing framework. As a result, ICE Clear Credit does not believe the amendments will impact competition among clearing members or other market participants, adversely affect the ability of market participants to access clearing generally, or adversely affect the cost of clearing. ICE Clear Credit thus does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act.

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

Written comments relating to the proposed amendments have not been solicited or received by ICE Clear Credit. ICE Clear Credit will notify the Commission of any comments received with respect to the proposed rule change.

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 such 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:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-ICC-2022-012 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-ICC-2022-012. This file number should be included on the subject line if e-mail 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 am and

3:00 pm. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's website at <https://www.theice.com/clear-credit/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-ICC-2022-012 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

J. Matthew DeLesDernier
Deputy Secretary

¹⁷ 17 C.F.R. 200.30-3(a)(12).