

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-70283; File No. SR-ICEEU-2013-08)

August 29, 2013

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Account for Sections 1471 through 1474 of the U.S. Internal Revenue Code and U.S. Treasury Regulations and Other Guidance Thereunder (Commonly Known as the Foreign Account Tax Compliance Act or “FATCA”)

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 August 20, 2013, ICE Clear Europe Limited (“ICE Clear Europe”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule changes described in Items I and II below, which Items have been prepared primarily by ICE Clear Europe. ICE Clear Europe filed the proposal pursuant to Section 19(b)(3)(A)(ii)³ of the Act and Rule 19b-4(f)(2)⁴ thereunder so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

ICE Clear Europe submits proposed amendments to its CDS Procedures, as described below, in connection with the implementation of sections 1471 through 1474 of the Internal Revenue Code of 1986, as amended, which sections were enacted as part of the Foreign Account Tax Compliance Act, and the Treasury Regulations or other official interpretations thereunder (collectively “FATCA”).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

II. Self-Regulatory Organization’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. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

ICE Clear Europe submits proposed amendments to its CDS Procedures in order to clarify the scope of the obligation of CDS Clearing Members to pay additional amounts to (or otherwise indemnify) ICE Clear Europe for any tax imposed or collected pursuant to FATCA in connection with CDS clearing.

FATCA was enacted on March 18, 2010, as part of the Hiring Incentives to Restore Employment Act, and became effective, subject to transition rules, on January 1, 2013. The U.S. Treasury Department finalized and issued various implementing regulations (“FATCA Regulations”)⁵ on January 17, 2013. FATCA’s intent is to curb tax evasion by U.S. citizens and residents through their use of offshore bank accounts. FATCA generally requires foreign financial institutions (“FFIs”)⁶ to become “participating FIs” by entering into agreements with the Internal Revenue Service (“IRS”). Under these agreements, FFIs are required to report to the IRS information on U.S. persons and entities that have (directly or indirectly) accounts with

⁵ Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities, 78 Fed. Reg. 5874 (Apr. 15, 2013).

⁶ Non-U.S. financial institutions are referred to as “foreign financial institutions” or “FFIs” in the FATCA Regulations.

these FFIs. If an FFI does not enter into such an agreement with the IRS, FATCA will generally impose a 30% withholding tax on U.S.-source interest, dividends and other periodic amounts paid to such “nonparticipating FFI” (“Income Withholding”), as well as on the payment of gross proceeds arising from the sale, maturity or redemption of securities or any instrument yielding U.S.-source interest and dividends (“Gross Proceeds Withholding,” and, together with Income Withholding, “FATCA Withholding”). The 30% FATCA Withholding taxes will apply to payments made to a nonparticipating FFI acting in any capacity, including payments made to a nonparticipating FFI that is not the beneficial owner of the amount paid and acting only as a custodian or other intermediary with respect to such payment. To the extent that U.S.-source interest, dividend, and other periodic amount or gross proceeds payments are due to a nonparticipating FFI in any capacity, a U.S. payor transmitting such payments to the nonparticipating FFI will be liable to the IRS for any amounts of FATCA Withholding that the U.S. payor should, but does not, withhold and remit to the IRS.

In addition, under FATCA, a U.S. payor could be required to deduct Income Withholding with regard to a participating FFI if either: (x) the participating FFI makes a statutory election to shift its withholding responsibility under FATCA to the U.S. payor; or (y) the U.S. payor is required to ignore the actual recipient and treat the payment as if made instead to certain owners, principals, customers, account holders or financial counterparties of the participating FFI.

As an alternative to FFIs entering into individual agreements with the IRS, the U.S. Treasury Department provided another means of complying with FATCA for FFIs which are resident in Non-U.S. jurisdictions that enter into intergovernmental agreements (“IGAs”) with

the United States.⁷ Generally, such a jurisdiction (“FATCA Partner”) would pass laws to eliminate the conflicts of law issues that would otherwise make it difficult for FFIs in its jurisdiction to collect the information required under FATCA and transfer this information, directly or indirectly, to the United States. An FFI resident in a FATCA Partner jurisdiction would either transmit FATCA reporting to its local competent tax authority, which in turn would transmit the information to the IRS, or the FFI would be authorized/required by FATCA Partner law to enter into an FFI agreement and transmit FATCA reporting directly to the IRS. Under both IGA models, payments to such FFIs would not be subject to FATCA Withholding so long as the FFI complies with the FATCA Partner’s laws mandated in the IGA.

In preparation for FATCA’s implementation, FFIs are being asked to identify their expected FATCA status as a condition of continuing to do business. Customary legal agreements in the financial services industry already contain provisions allocating the risk of any FATCA Withholding tax that will need to be collected, and requiring that, upon FATCA’s effectiveness, foreign counterparties must certify (and periodically recertify) their FATCA status using the relevant tax forms that the IRS has announced it will provide. Advance disclosure by an FFI client or counterparty would permit a withholding agent to readily determine whether it must, under FATCA, withhold on payments it makes to the FFI. If an FFI fails to provide appropriate compliance documentation to a withholding agent, such FFI would be presumed to be a nonparticipating FFI and the withholding agent will be obligated to withhold on certain payments.

⁷ As of the date of this proposed rule change filing, the United Kingdom, Mexico, Ireland, Switzerland, Spain, Norway, Denmark, Italy, and Germany have signed or initialed an IGA with the United States. The U.S. Treasury Department has announced that it is engaged in negotiations with more than 50 countries and jurisdictions regarding entering into an IGA.

FATCA will require ICE Clear Europe to deduct FATCA Withholding on payments to certain clearing members arising from certain transactions processed by ICE Clear Europe on behalf of such clearing members. Because FATCA treats any entity holding financial assets for the account of others as a “financial institution,” ICE Clear Europe believes that almost all of its clearing members which are treated as non-U.S. entities for federal income tax purposes will likely be FFIs under FATCA (collectively, “FFI Members”). As such, ICE Clear Europe will be liable to the IRS for any failures to withhold correctly under FATCA on payments made to its FFI Members.

Accordingly, the proposed amendments are intended to clarify the scope of the obligation of CDS Clearing Members to pay additional amounts to (or otherwise indemnify) ICE Clear Europe for any tax imposed or collected as a result of FATCA. This also includes any tax that results from current or future regulations or interpretations of FATCA, as well as any fiscal or regulatory legislation, rules or practices adopted pursuant to any IGA entered into in connection with the implementation of FATCA.

ICE Clear Europe believes that the proposed rule changes are consistent with the requirements of Section 17A of the Act⁸ and the regulations thereunder applicable to it. Specifically, the proposed rule changes promote the prompt and accurate clearing and settlement of CDS transactions by eliminating any uncertainty in payment settlement that would arise if ICE Clear Europe were subject to FATCA Withholding Obligations. The proposed rule changes are also consistent with Section 17A of the Act because they provide for the equitable allocation of reasonable due, fees and other charges among ICE Clear Europe’s CDS Clearing Members.

⁸ 15 U.S.C. 78q-1.

Finally, the proposed rule changes allow ICE Clear Europe to be in compliance with FATCA Regulations.

B. Self-Regulatory Organization's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed rule changes would have any impact, or impose any burden, on competition. The proposed rule changes would apply to all CDS Clearing Members of ICE Clear Europe that may be subject to FATCA. The proposed rule changes are for the purpose of ensuring that ICE Clear Europe, as well as its CDS Clearing Members, are in compliance with FATCA Regulations and thereby permit the operation of ICE Clear Europe's clearing services consistent with the FATCA Regulations. As a result, ICE Clear Europe believes that the obligations imposed under the proposed rule changes are appropriate in furtherance of the purposes of the Act, and should not have any effect on the competitive position of CDS Clearing Members.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

ICE Clear Europe has solicited written comments relating to the proposed rule change, but has not received any written comments to date. ICE Clear Europe will notify the Commission of any written comments received by ICE Clear Europe.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)⁹ of the Act and Rule 19b-4(f)(2)¹⁰ thereunder because it primarily establishes a fee or other charge imposed by ICE Clear Europe on its CDS Clearing Members. Specifically, the proposed rule changes will require CDS Clearing Members to pay additional amounts to ICE

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(2).

Clear Europe for tax imposed or collected pursuant to FATCA in connection with CDS clearing. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-ICEEU-2013-08 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-ICEEU-2013-08. 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 a.m. and 3:00 p.m. Copies of such filings also will 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/notices/Notices.shtml?regulatoryFilings>.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ICEEU-2013-08 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.¹¹

Kevin M. O'Neill
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).