

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90746; File No. SR-ICEEU-2020-016)

December 21, 2020

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Publication of a Circular Regarding the Interpretation of References to EU Legislation in the Clearing Rules at the End of the Brexit Transition Period

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 December 11, 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. ICE Clear Europe filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(1) thereunder,⁴ such that the proposed rule change was immediately effective upon filing with the Commission. 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 publish a Circular, titled ICE Clear Europe: Interpretation of References to EU Legislation in the Clearing Rules Post-Brexit (the “Circular”), to provide guidance as to the interpretation of references to European Union

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(1).

(“EU”) directives and regulations in the ICE Clear Europe Clearing Rules and Procedures⁵ in the event that the United Kingdom (“UK”) ceases to be an EU member state, in circumstances where no withdrawal agreement stipulating that EU laws will continue to apply in the UK has been agreed between the UK and the EU-27. The interpretation contained in the Circular will only apply under such circumstances.

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

The purpose of the proposed Circular is to provide guidance with respect to the interpretation of certain provisions in the Rules and Procedures in the event that the UK exits the Transition Period, in circumstances where no trade agreement has been agreed between the UK and the EU-27 stipulating that EU laws will continue to apply in the UK. In such circumstances, directly applicable EU directives and regulations will be incorporated into UK law with modifications at the end of the Transition Period pursuant

⁵ Capitalized terms used but not defined herein have the meanings specified in the ICE Clear Europe Clearing Rules (the “Rules”).

to the European Union (Withdrawal) Act 2018 (the “EUWA”), which would result in there being two versions of a directly applicable EU legislative act which may be applicable to the Rules: (1) the version as enacted in the EU, directly applicable throughout the EU (and, in certain cases, the EEA); and (2) the version incorporated into UK law (referred to as “on-shored”).

There are various references to EU directives and regulations in the Rules and Procedures; others may arise by implication by virtue of definitions such as that of “Applicable Laws” or “Governmental Authority” (Rule 101). ICE Clear Europe is proposing to publish the Circular to provide guidance as to the proper interpretation of such references in the event of the end of the Transition Period without a trade agreement in place that provides for continued applicability of EU law in the UK. The guidance is intended to be consistent with the views of legal practitioners in the UK with respect to references to EU directives and regulations in English law contracts generally, but applied to the particular definitions and situations that arise under the Rules and Procedures.

The Circular sets out several principles that will be applied by ICE Clear Europe when interpreting references to an EU regulation or directive in its Rules:

1. Where the reference concerns an obligation on, or otherwise applies to, the Clearing House or a UK Clearing Member:
 - Where the reference is to an EU regulation, it should be interpreted as the regulation as it forms part of UK domestic law through section 3 of the EUWA, and as amended by UK law from time to time; and

- Where the reference is to an EU directive, it should be interpreted as the UK domestic law corresponding to the directive or provision thereof.
2. Where the reference concerns an obligation on, or otherwise applies to, an EU Clearing Member:
- Where the reference is to an EU regulation, it should be interpreted as the regulation as it applies in the EU, and as amended by EU law from time to time; and
 - Where the reference is to an EU directive, it should be interpreted as the EU directive, as amended by EU law from time to time and as implemented in the relevant member state of the EU Clearing Member.

The Circular also addresses situations where both sets of laws apply, for example for entities established in the UK with an EU branch (or vice versa) or which continue to be regulated in both systems under cross-border licenses, the UK temporary permissions regime or other grandfathering arrangements (via reverse solicitation or otherwise). By way of example, it explains how Rule requirements that Clearing Members maintain sufficient capital would require UK Clearing Members to comply with the on-shored version of the applicable regulatory requirements as well as applicable EU requirements for any EU branch or to the extent they are subject to EU consolidated supervision. EU Clearing Members with a UK branch or which are subject to UK consolidated supervision would be required to comply with UK capital rules equivalent to the EU rules, to the extent applicable (in addition to their applicable home country requirements).

Rule requirements that Clearing Members maintain segregated accounts would require UK Clearing Members to comply with the on-shored version of the applicable regulatory requirements, while EU Clearing Members would be required to comply with the existing EU regulations.

The Circular further sets out certain exceptions to these general principles relating to the following:

- A reference to an EU law relating to emission allowance units issued under the EU Emissions Trading Scheme should be interpreted, as regards EU emission allowances, to continue to refer to the EU law;
- References to an EU law, as it relates to UK emission allowances, will refer to the new UK Emissions Trading Scheme (UK ETS). The Circular also notes that UK emissions allowances, unlike the EU emissions allowances, have not been designated as investments under the UK Financial Service and Markets Act and therefore will not be covered as deliveries of financial instruments under the Rules or covered by the Part 12 settlement finality rules in the Rules, unless and until that law is changed;
- References to EU member state laws transposing or implementing an EU directive will be read to include UK laws corresponding to that EU directive;
- Certain references relating to the European Market Infrastructure Regulation (Regulation (EU) No 648/2012) and related EU authorities will be read to continue to refer to relevant EU law and authorities, for example

in the context of ICE Clear Europe's status as a third country central counterparty thereunder;

- As the Clearing House has a designated or deemed national settlement finality directive status in certain EU member states, Part 12 of the Rules will be interpreted as constituting the settlement finality rules applicable to its designated system under the laws of those EU member states; and
- References relating to EU data protection legislation are excluded, since separate amendments will be proposed to the Clearing Rules to address Brexit-related data protection issues.

(b) Statutory Basis

ICE Clear Europe believes that the proposed rule change is consistent with the requirements of Section 17A of the Act⁶ and the regulations thereunder applicable to it, including the standards under Rule 17Ad-22.⁷ In particular, Section 17A(b)(3)(F) of the Act⁸ 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 proposed Circular would provide guidance with respect to the interpretation of the Rules

⁶ 15 U.S.C. 78q-1.

⁷ 17 C.F.R. 240.17Ad-22.

⁸ 15 U.S.C. 78q-1(b)(3)(F).

that would apply to EU and UK Clearing Members and ICE Clear Europe upon the termination of the Transition Period if there is no trade agreement that provides for EU law to continue to apply in the UK. The interpretation would thus facilitate continued clearing by EU and UK Clearing Members in compliance with applicable law in relevant jurisdictions and promote the prompt and accurate clearance and settlement of transactions by such persons. As such, the interpretation is consistent with the safeguarding of securities and funds in the custody or control of the Clearing House or for which it is responsible, the protection of investors and the public interest.

Moreover, the interpretation is consistent with Rule 17Ad-22(e)(1)⁹, which 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. As discussed herein, the interpretation is designed to ensure that references to EU legislation in the Rules and Procedures are properly interpreted should the Transition Period end with no trade agreement stipulating that EU laws will continue to apply in the UK. The guidance set out in the Circular would facilitate continued clearing in light of the requirements of UK and EU law in those circumstances and would minimize the potential for disputes and legal uncertainty. ICE Clear Europe does not expect that the interpretation will adversely impact its ability to comply with the Act or any standards under Rule 17Ad-22.¹⁰

⁹ 17 C.F.R. 240.17Ad-22(e)(1).

¹⁰ 17 C.F.R. 240.17Ad-22.

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

ICE Clear Europe does not believe the proposed guidance in the Circular would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purpose of the Act. The guidance is will not change the substantive requirements of any Rules or Procedures but will clarify the proper interpretation of references to EU legislation in order to facilitate that the Clearing House and EU and UK Clearing Members continue to adhere to applicable laws and regulations. ICE Clear Europe does not believe the interpretation will in itself materially affect the cost of, or access to, clearing. As a result, ICE Clear Europe does not believe the proposed the rule change imposes any burden on competition that is inappropriate 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 Circular have not been solicited or received. 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 for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and paragraph (f) of Rule 19b-4 thereunder. 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-2020-016 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-2020-016. 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, D.C. 20549, on official business days between the hours of 10:00 a.m.

and 3:00 pm. 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/notices/Notices.shtml?regulatoryFilings>. 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-2020-016 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

J. Matthew DeLesDernier
Assistant Secretary

¹¹ 17 CFR 200.30-3(a)(12).