

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-77809; File No. SR-ICEEU-2016-006)

May 11, 2016

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Accounts Categories for Positions of Clearing Member Affiliates

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 28 2016, ICE Clear Europe Limited (“ICE Clear Europe” or “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. ICE Clear Europe filed the proposal pursuant to Section 19(b)(3)(A) of the Act,<sup>3</sup> and Rule 19b-4(f)(i)<sup>4</sup> 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

The principal purpose of the proposed changes is to clarify the account categories to be used for positions of affiliates of Clearing Members.

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

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

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

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(4)(i).

In its filing with the Commission, ICE Clear Europe included statements concerning the purpose of and basis for 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

1. Purpose

ICE Clear Europe submits proposed amendments to its Clearing Procedures to clarify the account categories in which positions of affiliates of Clearing Members are to be maintained, in light of applicable US and EU regulatory requirements. ICE Clear Europe does not propose to amend its Rules in connection with these changes.

Under CFTC rules, the positions of an affiliate of an FCM are considered “proprietary” for purposes of segregation requirements and thus cannot be held in a customer account.<sup>5</sup> As a result, FCMs, including FCM/BD Clearing Members, have historically carried such positions in their proprietary accounts. However, under the European Market Infrastructure Regulation (“EMIR”),<sup>6</sup> when applicable to ICE Clear Europe, a clearing member will be required to treat an affiliate as a client<sup>7</sup> for various

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<sup>5</sup> See, e.g., 17 CFR 1.3(y), 17 CFR 1.20(e)(2).

<sup>6</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>7</sup> EMIR Article 2(15). EMIR defines “client” as “an undertaking with a contractual relationship with a clearing member of a CCP which enables that undertaking to clear its transactions with that CCP,” which suggests that an affiliate can be a client of a clearing member. This understanding of a client is supported in other EU legislation such as MiFID (see Directive 2004/39/EC of the European

purposes, and accordingly positions of the affiliate should be held in a separate account from the proprietary positions of the clearing member.<sup>8</sup> Accordingly, ICE Clear Europe proposes to establish new position-keeping accounts for use by FCM/BD Clearing Members for positions of their affiliates, which will be separate from the clearing member's own positions (and thus satisfy the EMIR requirement) but at the same time will not be customer accounts for purposes of applicable CFTC requirements. Although it is expected that these accounts will at present be principally relevant to F&O Contracts of affiliates of FCM/BD Clearing Members, the accounts would also be used for CDS Contracts of such persons, as and when ICE Clear Europe accepts such contracts cleared through FCM/BD Clearing Members.

Specifically, ICE Clear Europe proposes to amend paragraph 2.3(b) of the Clearing Procedures to establish new position-keeping accounts, labeled the "F" and "R" accounts, which will be required to be used for all positions of affiliates of FCM/BD Clearing Members. The "F" account will use a gross margin model (for positions in contracts margined on a gross basis under the Rules and Procedures); the "R" account will use a net margin model (for positions in contracts margined on a net basis under the Rules and Procedures). Both accounts will be treated as separate Proprietary Accounts for purposes of the Rules (and accordingly the accounts will not constitute Customer

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Parliament and of the Council on 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC), and in UK case law where affiliates have consistently been treated as clients to whom regulatory obligations were owed. See Re Lehman Brothers International (Europe) (in administration) [2012] UKSC 6.

<sup>8</sup> EMIR Article 39(4).

Accounts of the FCM/BD Clearing Member). New paragraph 2.3(f) has been added to provide a definition of “affiliate” for this purpose, based on the relevant definitions of proprietary accounts under CFTC rules.

Paragraph 2.3 has also been revised to clarify the treatment of positions of affiliates of Non-FCM/BD Clearing Members. New paragraph 2.3(f) also includes a definition of “affiliate” for this purpose, based on the EMIR definition of “group.” Conforming changes have been made to paragraph 2.3(b)(4) to use such definition. Additional clarifications have been made in paragraph 2.3(b)(5) as to the use by certain Non-FCM/BD Clearing Members of the “T” and “K” accounts (as separate Segregated Customer Omnibus Accounts for F&O or Segregated TTFCA Customer Omnibus Accounts for F&O) and of the “F” and “R” accounts as available for holding positions of their affiliates. Paragraph 2.3(c) has been revised to clarify that the Clearing House may establish additional position-keeping accounts for a Clearing Member to facilitate separate tracking of positions for each exchange non-clearing member for which the Clearing Member provides services. The revisions also clarify the treatment of such position-keeping accounts for exchange members as customer or proprietary, consistent with the requirements of the Rules and Clearing Procedures and applicable law.

Amendments to paragraph 3.1(a) of the Clearing Procedures provide for the margining of the “F” and “R” accounts of FCM/BD Clearing members as separate Proprietary Accounts. The summary table following paragraph 3.2 of the Clearing Procedures has been amended to conform to the other changes made in the Clearing Procedures.

## 2. Statutory Basis

ICE Clear Europe believes that the proposed amendments to the Clearing Procedures are consistent with the requirements of Section 17A of the Act<sup>9</sup> and the regulations thereunder applicable to it.<sup>10</sup> Section 17A(b)(3)(F) of the Act<sup>11</sup> 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, to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible and to protect investors and the public interest.

The amendments are designed to clarify the treatment of positions of affiliates of Clearing Members in light of applicable legal and regulatory requirements. Specifically, for FCM/BD Clearing Members, the amendments establish separate accounts in which such positions must be held, in a manner that is consistent with both CFTC and EMIR requirements. Such accounts will allow positions of affiliates to be held separately from the Clearing Member's positions, consistent with the EMIR requirements, but will be treated as Proprietary Accounts under the Rules and Procedures, consistent with CFTC rules. The amendments also clarify the treatment of positions of affiliates of Non-FCM/BD Clearing Members, consistent with EMIR requirements. Overall, in ICE Clear Europe's view, the amendments will enhance its ability (and that of its Clearing

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<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).

Members) to track positions of Clearing Member affiliates and comply with relevant regulatory obligations. As a result, in ICE Clear Europe's view, the amendments will promote the prompt and accurate clearance and settlement of derivative transactions, are consistent with the safeguarding of funds and securities in the custody or control of ICE Clear Europe, and generally further the public interest. The amendments are therefore consistent with the requirements of Section 17A(b)(3)(F) of the Act<sup>12</sup> and the regulations thereunder.<sup>13</sup>

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

ICE Clear Europe does not believe the proposed changes to the Rules discussed herein would have any adverse impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendments are intended to clarify the treatment of positions of affiliates of Clearing Member, consistent with applicable legal requirements. ICE Clear Europe does not believe the proposed amendments would adversely affect access to clearing by Clearing Members or their affiliates (or customers), adversely affect competition among Clearing Members or adversely affect the market for clearing services or limit market participants' choices for clearing transactions. Although the proposed amendments may impose additional compliance costs on Clearing Members, including because of the requirements to hold affiliate positions in separate accounts that are separately margined, ICE Clear Europe believes that such costs reflect, and are appropriate in light of, the legal requirements applicable to such positions. Although the amendments treat affiliate positions of FCM/BD Clearing Members and Non-FCM/BD Clearing Members

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<sup>12</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>13</sup> 17 CFR 240.17Ad-22

differently in certain respects, in ICE Clear Europe's view such differences also result from the different legal frameworks applicable to such Clearing Members. As a result, ICE Clear Europe does not believe that the proposed amendments to the Clearing Procedures will impose any burden on competition not appropriate in furtherance of the purposes of the Act.

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

ICE Clear Europe has not solicited or received any written comments with respect to the proposed changes. 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)<sup>14</sup> of the Act and Rule 19b-4(f)(4)(i)<sup>15</sup> thereunder. The amendments effect a change in an existing service of a registered clearing agency that does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible, and does not significantly affect the respective rights or obligations of the clearing agency or persons using its clearing service, within the meaning of Rule 19b-4(f)(4)(i).<sup>16</sup> As noted above, the amendments provide for a separate proprietary account to be used for positions of affiliates of FCM/BD Clearing Members (as opposed to combining such positions in the same account as the Clearing

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<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4(f)(4)(i).

<sup>16</sup> 17 CFR 240.19b-4(f)(4)(i).

Member's own positions), in order to be consistent with both CFTC and EMIR requirements. The amendments also provide that such accounts will be margined separately. Certain other clarifications are made with respect to the accounts used for positions of affiliates of Non-FCM/BD Clearing Members. In ICE Clear Europe's view, these changes will not adversely affect the safeguarding of funds or securities in the custody or control of ICE Clear Europe, from the perspective of Clearing Members or their affiliates or customers. Although the amendments impose certain additional requirements on Clearing Members that carry positions on behalf of their affiliates in terms of the use of a separate account, ICE Clear Europe also believes that the amendments will not significantly affect the rights or obligations of ICE Clear Europe or Clearing Members using its clearing services. As a result, ICE Clear Europe views these amendments as falling within Rule 19b-4(f)(4)(i).<sup>17</sup>

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:

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<sup>17</sup> 17 CFR 240.19b-4(f)(4)(i).



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](mailto:rule-comments@sec.gov). Please include File Number SR-ICEEU-2016-006 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-2016-006. 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 Europe and on ICE Clear Europe's website at <https://www.theice.com/clear-europe/regulation#rule-filings>.

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-2016-006 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.<sup>18</sup>

Robert W. Errett  
Deputy Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).