

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-79516; File No. SR-ICEEU-2016-014)

December 9, 2016

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Clearing Rules Regarding German CDS Clearing Members

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 November 25, 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 primarily prepared by ICE Clear Europe. ICE Clear Europe filed the proposed rule changes pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(4)(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 changes is to modify the ICE Clear Europe Clearing Rules (“Clearing Rules”) to clarify the application of economic sanctions compliance provisions to German CDS Clearing Members, as described herein.

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. The text of these

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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).

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

(a) Purpose

The purpose of the rule amendments is to modify the ICE Clear Europe Clearing Rules to revise the application of certain provisions related to economic sanctions compliance by CDS Clearing Members and Customers of CDS Clearing Members incorporated in Germany. The existing ICE Clear Europe Rules impose certain requirements on all Clearing Members with respect to compliance with economic sanctions regimes, specifically those imposed by the European Union, the United Kingdom, the United States and the United Nations Security Council. These requirements include representations by Clearing Members that they would not be prevented from entering into any cleared contract or from using the Clearing House under such sanctions regimes, and that they are in compliance with requirements under such regimes relating to due diligence in respect of their customers in any cleared transactions.

Clearing Members that are incorporated in Germany (“German Clearing Members”) have expressed concern to ICE Clear Europe that these requirements under the Rules may potentially be inconsistent with the anti-boycott provisions in Section 7 of the German Foreign Trade Ordinance (*Außenwirtschaftsverordnung*) (the “anti-boycott ordinance”), which generally prevents German persons from participating in so-called foreign boycotts. German Clearing Members have noted the view that contractual provisions that require them to comply with economic sanctions that are imposed by a

jurisdiction other than Germany, the EU or the UN Security Council may, at least as a theoretical matter, conflict with the anti-boycott ordinance. This potential conflict may apply to sanctions imposed by the United States or the United Kingdom that are not also imposed by the EU or UN Security Council.

To avoid this potential conflict, ICE Clear Europe is proposing to amend its Clearing Rules to provide exceptions to certain of the representations and undertakings for German Clearing Members, to the extent the representation or undertaking would be in conflict with the anti-boycott ordinance. Instead, such German Clearing Members would be required to provide notice to the Clearing House at least 30 days in advance of any transaction (including a customer transaction) that would otherwise violate such a representation or undertaking. In such case, ICE Clear Europe would as an operational and compliance matter continue to evaluate whether the transaction or activity would be subject to or restricted under any applicable sanctions regime or restriction (including those of the United States and United Kingdom). If so, ICE Clear Europe would be entitled, as it determined to be appropriate, to use one of its existing authorities under the Clearing Rules, including potentially under Rules 104, 404 and Parts 2 and 6 depending on the circumstances, to avoid or decline to clear the transaction or impose a position limit preventing the transaction from being effective even if submitted. The amendments only relate to German Clearing Members that are CDS Clearing Members in connection with their CDS clearing activity; they do not apply to Clearing Members organized in other jurisdictions or to other products cleared by German Clearing Members.<sup>5</sup>

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<sup>5</sup> Following prior consultations with Clearing Members, ICE Clear Europe is considering other potential changes to its Rules relating to sanctions. The proposed rule changes in this filing are intended to address only a specific issue identified by German Clearing Members.

The changes are thus intended to avoid placing German CDS Clearing Members in a situation where they face a potential conflict between the Clearing Rules as they relate to non-German sanctions regimes and the anti-boycott ordinance, while at the same time allowing ICE Clear Europe itself to maintain compliance with all applicable sanctions regimes, including those of the United States and the United Kingdom. The making of these changes is regarded as important by German market participants particularly in relation to CDS clearing, which is subject to a clearing mandate under the European Market Infrastructure Regulation (EMIR),<sup>6</sup> effective from February 2017. The so-called “frontloading window” for mandatory clearing of CDS has already commenced and based on communications with Clearing Members, ICE Clear Europe understands that market participants regard it as important that there be certainty that CDS transactions executed today by German users, which will later be required to be cleared, can be capable of being cleared in compliance with applicable laws.

The proposed amendments to the Rules are described in more detail as follows:

In Rule 101, a new definition of “Sanction” has been added, which largely tracks existing references in the Rules to economic sanctions regulations and restrictions imposed by the EU, United Kingdom, United States or UN Security Council.

In Rule 201(a), which contains a representation that the Clearing Member will not be prevented from entering into a contract or using the Clearing House as a result of prohibition or restriction under an economic sanction regime, paragraph (xxxiv) has been amended to provide the exception described above for German CDS Clearing Members, solely in respect of their CDS business, and solely to the extent that the representation

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<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.

would conflict with applicable laws purporting to nullify or restrict the effect of foreign sanctions or preventing boycotts (the “anti-boycott exception”). It has also been modified to use the new defined term Sanction.

In Rule 203(a), a new paragraph (xxi) has been added, which requires a German CDS Clearing Member (or any Clearing Member dealing with a customer incorporated in Germany) to provide at least 30 days’ notice before entering into a transaction that would breach applicable representations or undertakings in the Rules relating to Sanctions, but for the anti-boycott exception.

Similar provisions have been added in new paragraphs (xiv) and (xv) of Rule 204(a), which requires Clearing Members to provide certain notices to the Clearing House. Paragraph (xiv) requires that a German CDS Clearing Member provide notice if any UK or US Sanctions would, if they were applicable, prevent the German CDS Clearing Member from entering into a cleared contract or using the Clearing House in circumstances in which neither EU Sanctions nor UN Security Council Sanctions would impose such restriction. Similarly, paragraph (xv) requires that a German CDS Clearing Member (or any Clearing Member for a customer incorporated in Germany) provide notice if U.K. or U.S. Sanctions would, if they were applicable, restrict or prevent any derivatives or spot trading activities involving the customer in circumstances in which neither EU Sanctions nor UN Security Council Sanctions would impose such restriction. Such notices must be given 30 days before entering into any such cleared contract.

Rule 405(a), which establishes certain representations deemed made by Clearing Members upon entering into a cleared contract, has been revised in paragraph (xi) to use the defined term Sanctions and include the anti-boycott exception discussed above.

In Rule 1901(d), which establishes requirements for being a Sponsored Principal, clause (xiii) has been revised (in a manner similar to the changes in Rule 201(a) above) to use the defined term Sanction and include the anti-boycott exception discussed above.

In addition, in the form of Standard Terms Annex for CDS transactions, paragraph 3(o), which includes representations by the customer about compliance with economic sanctions, has been revised to use the defined term Sanctions and include an anti-boycott exception applicable where the Clearing Member or Customer is located in Germany. The other Standard Terms Annexes for F&O and FX include only a conforming amendment to use the new defined term Sanction.

(b) Statutory Basis

ICE Clear Europe believes that the changes described herein are consistent with the requirements of Section 17A of the Act<sup>7</sup> and the regulations thereunder applicable to it, and are consistent with the prompt and accurate clearance of 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 ICE Clear Europe or for which it is responsible and the protection of investors and the public interest, within the meaning of Section 17A(b)(3)(F) of the Act.<sup>8</sup> The amendments are intended to resolve a potential inconsistency for German Clearing Members between the provisions of the Rules relating to sanctions compliance and the German anti-boycott ordinance. Although certain responsibilities of German Clearing Members in this regard are being modified in light of the German anti-boycott ordinance, the amendments impose new notice requirements on such Clearing Members to facilitate the identification

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<sup>7</sup> 15 U.S.C. 78q-1.

<sup>8</sup> 15 U.S.C. 78q-1(b)(3)(F).

and review by the Clearing House of potential sanctions violations, which would entitle the Clearing House may [sic] take any appropriate action under the Rules, as discussed above. The amendments will thus facilitate continued compliance by ICE Clear Europe with sanctions regimes in all relevant jurisdictions. As such, ICE Clear Europe believes that the amendments will further the public interest in enforcement of such sanctions. By seeking to avoid a potential conflict with German law while maintaining overall compliance, the amendments will also further the development of a well-founded legal framework applicable to German Clearing Members (and their customers) in all relevant jurisdictions, within the meaning of Rule 17Ad-22(d)(1).<sup>9</sup> As a result, in ICE Clear Europe's view, the amendments are consistent with the requirements of Section 17A of the Act.<sup>10</sup>

(B) Self-Regulatory Organization's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed changes to the rules would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purpose of the Act. ICE Clear Europe is adopting amendments to the Clearing Rules intended to address certain potential compliance issues for German Clearing Members relating to different economic sanctions regimes. The amendments do not affect other Clearing Members, and are tailored to address a particular concern under the German anti-boycott ordinance that may affect the ability of German Clearing Members to comply with certain requirements under the Rules. ICE Clear Europe does

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<sup>9</sup> 17 C.F.R. 240.17Ad-22(d)(1). In this regard, ICE Clear Europe notes that as a clearing organization that provides services outside the United States, it is required to identify and address any material conflict of law issues, and be able to demonstrate that its rules and procedures are enforceable in all relevant jurisdictions. See 17 C.F.R. 39.27(c); see also recently adopted Commission Rule 17Ad-22(e)(1) and related guidance in Exchange Act Release No. 34-78961 (Sept. 28, 2016).

<sup>10</sup> 15 U.S.C. 78q-1.

not believe that these changes will impose any significant additional costs on Clearing Members or other market participants. ICE Clear Europe also does not believe the amendments will adversely affect access to clearing by Clearing Members or their customers or otherwise adversely affect Clearing Members or market participants.

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

ICE Clear Europe has previously conducted a public consultation with respect to a series of amendments relating to economic sanctions matters.<sup>11</sup> That consultation included a prior version of the provisions addressing the German anti-boycott ordinance issue that are the subject of this proposed rule change. Although a number of comments were received in that consultation generally (which ICE Clear Europe continues to consider), no material comments were received on the provisions relating to the German anti-boycott ordinance. ICE Clear Europe has commenced a further public consultation relating to the proposed changes to the Rules discussed here. 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>12</sup> of the Act and Rule 19b-4(f)(4)(i)<sup>13</sup> thereunder because it effects 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

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<sup>11</sup> See ICE Clear Europe Circular C16/099.

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(4) [sic].

meaning of Rule 19b-4(f)(4)(i). 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](mailto:rule-comments@sec.gov). Please include File Number SR-ICEEU-2016-014 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-2016-014. 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 Section, 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#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-2016-014 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>14</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).