

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79999; File No. SR-ICEEU-2017-002)

February 9, 2017

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change to Revise the ICE Clear Europe Clearing Rules Relating to the Application of Default Provisions in the Event of a Resolution Proceeding

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 January 25, 2017, ICE Clear Europe Limited (“ICE Clear Europe” or “Clearing House”) 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 primarily prepared by ICE Clear Europe. 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 modify the ICE Clear Europe Clearing Rules (“Clearing Rules”) to clarify the application of certain default provisions in the event of a resolution proceeding with respect to the Clearing House or a Clearing Member.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

1. Purpose

The purpose of the rule amendments is to modify the ICE Clear Europe Clearing Rules to clarify the application of certain default-related provisions in the context of resolution proceedings with respect to the Clearing House or a Clearing Member. Such proceedings can arise under so-called special resolution regimes that may apply under applicable law to the Clearing House or a Clearing Member in the event of either's failure or insolvency, as an alternative to traditional bankruptcy or insolvency proceedings in the relevant jurisdiction. Such regimes include the UK Banking Act 2009 and the EU Bank Recovery and Resolution Directive (the "BRRD").³

In Rule 101, ICE Clear Europe proposes amendments to the definition of "Insolvency" and addition of new defined terms "Resolution Step" and "Unprotected Resolution Step." These amendments are designed to distinguish between insolvency and resolution proceedings, and reflect and incorporate certain limitations on the termination of Contracts and exercise of default remedies that apply under the terms of an applicable special resolution regime. (Under the current Rules, an Insolvency in turn

³ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

constitutes an Event of Default that permits the exercise of the default rights and remedies specified in the Rules.)

The definition of Insolvency has been amended to exclude certain resolution proceedings. Specifically, the amendment removes the existing provision that a Governmental Authority exercising one or more of its stabilization powers under the UK Banking Act 2009 will constitute an Insolvency. In addition, the appointment of an Insolvency Practitioner, which normally is an Insolvency, will not constitute an Insolvency if it is made in connection with a Resolution Step that is not an Unprotected Resolution Step, as defined below. A Resolution Step involving a Governmental Authority making an order to transfer a person's securities, property, rights or liabilities (which may be a feature of a resolution proceeding) will also not constitute an Insolvency.

A new definition of "Resolution Step" has been added, which can apply to persons other than the Clearing House. A Resolution Step means a Government Authority exercising stabilization powers under the UK Banking Act 2009 or certain resolution authorities under national legislation implementing the BRRD. A resolution proceeding of this type involving the Clearing House itself will not constitute a Resolution Step. The amendments do not address other types of resolution proceedings (including resolution proceedings under laws other than the UK Banking Act 2009 or national laws implementing the BRRD).

A new definition of "Unprotected Resolution Step" has been added, which means a Resolution Step with respect to a person (other than the Clearing House) in which either (i) the substantive obligations of the person to the Clearing House under the Rules are not

being performed or (ii) the Clearing House is not prohibited or otherwise prevented from declaring an event of default or exercising termination and close out rights under the Rules with respect to that person.

In Section 901(a)(vii), the definition of Event of Default has been modified to include an Unprotected Resolution Step with respect to a Clearing Member or any of its Group Companies.

As a result of these changes, a resolution proceeding under the UK Banking Act or national laws implementing the BRRD, with respect to either the Clearing House itself or a Clearing Member, will not constitute an Insolvency. Such a resolution proceeding that involves a Clearing Member will constitute a Resolution Step, but a Resolution Step will not itself constitute an Event of Default under the Rules, unless it is an Unprotected Resolution Step. In light of the definition of Unprotected Resolution Step, this approach thus takes into account limitations imposed by the relevant resolution regime on the declaration of a default and exercise of default remedies in the context of a resolution proceeding.

A variety of conforming and other clarifying changes have been made throughout the Rules. In the definition of “Insolvency Practitioner” in Rule 101, a reference to a temporary administrator has been added. The definition of “Applicable Law” has been revised to use the defined term “Insolvency.” Rule 201(a)(xxi) has been revised to provide that in order to become or remain a Clearing Member, a person must not be subject to an Unprotected Resolution Step (in addition to the existing provision that a person must not be subject to an Insolvency). In Rule 202(b), reference to various types of insolvency laws have been replaced using the term Insolvency and Applicable Laws.

Rule 201(a)(xxxv) has been revised to refer to applicable laws involving Resolution Steps as well as Insolvency. Similarly, Rule 204(a)(viii) requires a Clearing Member to notify the Clearing House of any Resolution Step involving it or its Group Companies. In Rule 405(a)(ii) and (f), references to various types of insolvency proceedings have been replaced with the defined term Insolvency.

Rule 903(d)(i), which addresses certain automatic termination events, has been revised to include a reference to an Unprotected Resolution Step, in addition to the current reference to Insolvency. In Rule 904(m), which requires the Clearing House to commit to trigger the procedures for transfer of customer positions following a Clearing Member default, a requirement has been added that the relevant customer is not subject to an Unprotected Resolution Step (in parallel to the existing requirement that the customer not be subject to an Insolvency). Similar changes are made in Rule 904(p) with respect to Sponsored Principals and Rule 904(u) with respect to Customers using Individually Segregated Margin-flow Co-mingled Accounts.

In Rule 1901(b)(x), a requirement that Sponsored Principals not be subject to an Unprotected Resolution Step has been added (similar to the requirement discussed above for Clearing Members in revised Rule 201(a)). Rule 1901(b)(xiv) has also been revised to refer to the defined term Insolvency. In addition, in each of the forms of Standard Terms Annex, paragraph 10 has been revised to use the defined term Insolvency in place of certain references to various types of insolvency proceedings.

2. Statutory Basis

ICE Clear Europe believes that the changes described herein are consistent with the requirements of Section 17A of the Act⁴ 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.⁵ The changes to the Rules are intended to clarify the applicability of certain default rights and remedies in the context of a resolution proceeding with respect to the Clearing House or a Clearing Member, in light of limitations that may exist under the UK Banking Act 2009 and BRRD (and relevant national implementing legislation) on the exercise of such rights and remedies. As such, ICE Clear Europe believes that the changes will promote the prompt and accurate clearance and settlement of securities and derivatives transactions, and further the public interest in the safe and effective clearing of such transactions. ICE Clear Europe also does not believe the amendments will adversely affect the safeguarding of securities and funds in its custody or control or for which it is responsible. In addition, the amendments are not intended to increase risk to ICE Clear Europe, and will not impact ICE Clear Europe's ability to take risk management measures under its Rules with respect to non-defaulting Clearing Members (including Clearing Members that may be

⁴ 15 U.S.C. 78q-1.

⁵ 15 U.S.C. 78q-1(b)(3)(F).

subject to a Resolution Step that is not an Unprotected Resolution Step). The changes are thus consistent with the requirements of Section 17A of the Act.⁶

B. Clearing Agency'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 conform the Rules to the requirements of certain special resolution regimes. ICE Clear Europe does not believe that these changes will impose any significant additional costs on Clearing Members or other market participants, and further believes that any incremental costs that result reflect the limitations imposed on the exercise of remedies as a matter of law under certain special resolution regimes. ICE Clear Europe 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. In this regard, the changes will apply to all Clearing Members that may be subject to the covered types of resolution proceedings, and accordingly are not expected to affect competition among Clearing Members or in the market for clearing services generally.

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

ICE Clear Europe published a prior version of the proposed amendments for consultation with its Clearing Members. In response to that consultation, two Clearing Members inquired about the regulatory process surrounding the proposed changes. In addition, one Clearing Member suggested that certain additional clarifications be made to

⁶ 15 U.S.C. 78q-1.

limit the application of other aspects of the Insolvency definition. In the context of the current version of the proposed amendments, which has been revised from the original consultation, ICE Clear Europe does not believe that such additional clarifications are necessary or appropriate, and has determined not to make any such clarifications. ICE Clear Europe will notify the Commission of any written comments with respect to the proposed rule change received by ICE Clear Europe.

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 the 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-ICEEU-2017-002 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-2017-002. 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 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>.

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-2017-002 and should be submitted on or before [insert date 15 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷

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Assistant Secretary

⁷ 17 CFR 200.30-3(a)(12).