

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-83055; File Nos. SR-ICEEU-2017-016 and SR-ICEEU-2017-017)

April 17, 2018

Self-Regulatory Organizations; ICE Clear Europe Limited; Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes Related to ICEEU's Recovery and Wind-Down Plans

I. Introduction

On December 29, 2017, ICE Clear Europe Limited (“ICE Clear Europe”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change (ICEEU-2017-016) concerning the ICE Clear Europe Recovery Plan (“Recovery Plan”). The proposed rule change was published for comment in the Federal Register on January 19, 2018.<sup>3</sup> On December 29, 2017, ICE Clear Europe filed with the Commission a proposed rule change (ICEEU-2017-017) concerning the ICE Clear Europe Wind-Down Plan (“Wind-Down Plan”). The proposed rule change was published for comment in the Federal Register on January 19, 2018.<sup>4</sup> On February 27, 2018, the Commission designated a longer period for Commission action on both proposed rule changes.<sup>5</sup> To date, the Commission has not received any comments on the proposed rule changes. The Commission is publishing this order to institute proceedings

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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> Exchange Act Release No. 82496 (Jan. 12, 2018), 83 FR 2855 (Jan. 19, 2018) (SR-ICEEU-2017-016) (“Recovery Plan Notice”).

<sup>4</sup> Exchange Act Release No. 82497 (Jan. 12, 2018), 83 FR 2847 (Jan. 19, 2018) (SR-ICEEU-2017-017) (“Wind-Down Plan Notice”).

<sup>5</sup> Exchange Act Release No. 82786 (Feb. 27, 2018), 83 FR 9345 (Mar. 5, 2018); Exchange Act Release No. 82782 (Feb. 27, 2018), 83 FR 9351 (Mar. 5, 2018).

pursuant to Section 19(b)(2)(B)<sup>6</sup> of the Exchange Act to determine whether to approve or disapprove the proposed rule changes.

Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to the proposed rule changes, nor does it mean that the Commission will ultimately disapprove the proposed rule changes. Rather, as discussed below, the Commission seeks additional input on the proposed rule changes and issues presented by the proposed rule changes.

## II. Description of the Proposed Rule Changes

As a “covered clearing agency,”<sup>7</sup> ICE Clear Europe is required to, among other things, “establish, implement, maintain and enforce written policies and procedures reasonably designed to . . . maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which . . . includes plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.”<sup>8</sup> The Commission has previously clarified that it believes that such recovery and wind-down plans are “rules” within the meaning of Section 19(b) of the Exchange Act and Rule 19b-4 thereunder because such plans would constitute changes to a stated policy, practice, or interpretation of a covered clearing

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<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> The term “covered clearing agency” is defined in Rule 17Ad-22(a)(5) under the Exchange Act. 17 CFR 240.17Ad-22(a)(5).

<sup>8</sup> 17 CFR 240.17Ad-22(e)(3)(ii).

agency.<sup>9</sup> Accordingly, a covered clearing agency, such as ICE Clear Europe, must file its recovery and wind-down plans with the Commission.

A. The Recovery Plan (ICEEU-2017-016)

According to ICE Clear Europe, the Recovery Plan is based on, and intended to be consistent with, ICE Clear Europe's Rules and Procedures, as well as its existing risk management frameworks, policies, and procedures.<sup>10</sup> The Recovery Plan, as further described in the Recovery Plan Notice, (1) identifies the critical services that ICE Clear Europe provides and the business functions that support those services;<sup>11</sup> (2) outlines a number of stress scenarios that may result in significant losses, a liquidity shortfall, suspension or failure of its critical services and related functions and systems, and damage to other market infrastructures, including both default and non-default loss scenarios and evaluating different impact categories and severity levels of these stress scenarios;<sup>12</sup> and (3) describes the recovery tools, mechanisms, and options that ICE Clear Europe may use to address a stress scenario and continue to provide its critical services, as well as the actions that would be necessary to implement those recovery tools, mechanisms, and options, including appropriate escalation and early warning procedures and communications with regulators and other relevant stakeholders.<sup>13</sup> It also considers the

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<sup>9</sup> Standards for Covered Clearing Agencies, Exchange Act Release No. 78961 (Sep. 28, 2016), 81 FR 70786, 70809 (Oct. 13, 2016).

<sup>10</sup> Recovery Plan Notice, 83 FR at 2855.

<sup>11</sup> Id. at 2855-56.

<sup>12</sup> Id. at 2856.

<sup>13</sup> Id. at 2856-57.

implications of certain situations that may be beyond its control, such as interdependencies with other institutions.<sup>14</sup>

The Recovery Plan also addresses the roles and responsibility of ICE Clear Europe Board of Directors, management, and other personnel, including with respect to development, review and approval, testing and maintenance, and liaison with relevant regulatory authorities.<sup>15</sup> The Recovery Plan includes a description of ICE Clear Europe, its organizational structure, its applicable regulatory regime, and the standards and guidelines that have informed the Recovery Plan.<sup>16</sup>

**B. The Wind-Down Plan (ICEEU-2017-017)**

ICE Clear Europe stated that a wind-down may result from situations where neither the Recovery Plan nor application of its loss allocation rules have succeeded in stopping default losses or non-default losses incurred and, as a result, ICE Clear Europe cannot remain viable as a going concern.<sup>17</sup> As described further in the Wind-Down Plan Notice, the Wind-Down Plan addresses three particular categories of scenarios in which wind-down may occur: (1) a non-insolvency scenario where the ICE Clear Europe Board of Directors voluntarily decides to wind down the clearing business, (2) an insolvency scenario not linked to clearing member default, and (3) an insolvency scenario linked to a member default.<sup>18</sup> The Wind-Down Plan sets out a

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<sup>14</sup> Id. at 2857.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Wind-Down Plan Notice, 83 FR at 2847.

<sup>18</sup> Id.

variety of options for wind-down, depending on the scenario involved.<sup>19</sup> In the case of an insolvency as a result of non-default losses, the Wind-Down Plan contemplates that all open contracts would be terminated and net sums calculated to be payable to or from each clearing member for each account category, in accordance with the applicable rules.<sup>20</sup> For a voluntary wind-down or a wind-down following a clearing member default, the Wind-Down Plan contemplates that for each product category, ICE Clear Europe would either transfer clearing to another clearing house or terminate clearing.<sup>21</sup>

As stated by ICE Clear Europe, any decision to wind down is expected to be considered over a period of months, involve consultation with members, potential alternative clearing houses, exchange, and regulators, and would need approval by the ICE Clear Europe Board of Directors.<sup>22</sup> The Wind-Down Plan contemplates that a specific execution plan will be developed for any wind-down, based on the relevant situation.<sup>23</sup> The Wind-Down Plan also addresses procedural issues related to a wind-down, such as providing appropriate notice to terminate all service agreements and employee contracts, and liquidity considerations during a wind-down.<sup>24</sup> It also contemplates the establishment of a Wind-Down Planning Committee, which would be tasked with exploring with clearing members, exchanges, alternative clearing houses, and

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<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id. at 2847-48.

<sup>22</sup> Id. at 2848.

<sup>23</sup> Id.

<sup>24</sup> Id.

regulators the relevant approaches to wind-down with a goal of minimizing adverse impact on clearing members, and the committee would report to the ICE Clear Europe Board of Directors.<sup>25</sup>

III. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Changes and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act to determine whether the proposed rule changes should be approved or disapproved.<sup>26</sup> Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule changes. As noted above, institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to comment on the proposed rule changes and provide arguments to support the Commission's analysis as to whether to approve or disapprove the proposals.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,<sup>27</sup> the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from, commenters with respect to the proposed rule changes' consistency with the Exchange Act<sup>28</sup> and the rules thereunder, including the following provisions:

- Section 17A(b)(3)(F) of the Exchange Act, which requires that the rules of a clearing agency be designed to, among other things, promote the prompt and

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<sup>25</sup> Id. at 2849.

<sup>26</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>27</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>28</sup> 15 U.S.C. 78q-1.

accurate clearance and settlement of securities transactions, assure the safeguarding of securities and funds which are in the custody or control of the clearing agency for which it is responsible, and, in general, to protect investors and the public interest;<sup>29</sup>

- Rule 17Ad-22(e)(2) under the Exchange Act, which requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent and support the public interest requirements in Section 17A of the Exchange Act applicable to clearing agencies, and the objectives of owners and participants;<sup>30</sup>
- Rule 17Ad-22(e)(3)(ii) under the Exchange Act, which requires that covered clearing agencies, among other things, “establish, implement, maintain and enforce written policies and procedures reasonably designed to . . . maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which . . . includes plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses;” and

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<sup>29</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>30</sup> 17 CFR 240.17Ad-22(e)(2).

- Rules 17Ad-22(e)(15)(i)-(ii) under the Exchange Act,<sup>31</sup> which require a covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to determine the amount of liquid net assets funded by equity based upon its general business risk profile and the length of time required to achieve a recovery or orderly wind-down, as appropriate, of its critical operations and services if such action is taken and to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for holding liquid net assets funded by equity equal to the greater of either six months of its current operating expenses or the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of the covered clearing agency, as contemplated by the plans established under Rule 17Ad-22(e)(3)(ii).<sup>32</sup>

#### IV. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues raised by the proposed rule changes. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule changes are inconsistent with Section 17A(b)(3)(F) of the Exchange Act<sup>33</sup> and Rules 17Ad-22(e)(2),<sup>34</sup> 17Ad-22(e)(3)(ii),<sup>35</sup> and 17Ad-22(e)(15)(i)-(ii)<sup>36</sup> under the Exchange Act, or any other provision of the Exchange Act or rules and regulations thereunder.

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<sup>31</sup> 17 CFR 240.17Ad-22(e)(15)(i)-(ii).

<sup>32</sup> 17 CFR 240.17Ad-22(e)(3)(ii).

<sup>33</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>34</sup> 17 CFR 240.17Ad-22(e)(2).

Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>37</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule changes should be approved or disapproved on or before [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal on or before [insert date 35 days from publication in the Federal Register]. 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-2017-016 and SR-ICEEU-2017-017 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549.

All submissions should refer to SR-ICEEU-2017-016 and SR-ICEEU-2017-017. These

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<sup>35</sup> 17 CFR 240.17Ad-22(e)(3)(ii).

<sup>36</sup> 17 CFR 240.17Ad-22(e)(15)(i)-(ii).

<sup>37</sup> Section 19(b)(2) of the Exchange Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29, 89 Stat. 97 (1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

file numbers 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 submissions, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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, N.E., Washington, D.C. 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the 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/clear-europe>.

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-2017-016 and SR-ICEEU-2017-017 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. If comments are received, any rebuttal comments should be submitted on or before [insert date 35 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>38</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>38</sup> 17 CFR 200.30-3(a)(12).