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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-89186; File No. SR-ICEEU-2020-007]

Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Change, as Modified by Partial Amendment No. 1, Relating to the ICE Clear Europe Auction Terms for CDS Default Auctions and CDS Default Management Policy

June 29, 2020.

I. Introduction

On May 12, 2020, 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 (the “Act”),¹ and Rule 19b-4,² a proposed rule change to amend its Auction Terms for CDS Default Auctions (the “CDS Auction Terms”) and CDS Default Management Policy (the “Policy”). On May 20, 2020, ICE Clear Europe filed Partial Amendment No. 1 to the proposed rule change.³ The proposed rule change, as modified by Partial Amendment No. 1, was published for comment in the Federal Register on May 28, 2020.⁴ The Commission did not receive comments regarding the proposed rule change, as modified by Partial Amendment No. 1. For the reasons discussed below, the Commission is approving the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Partial Amendment Number 1 amended Exhibit 5A of the filing to correct the paragraph numbering in Part 2 of the CDS Auction Terms.

⁴ Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change, as Modified by Partial Amendment No. 1, Relating to the ICE Clear Europe Auction Terms for CDS Default Auctions and CDS Default Management Policy (formerly the CDS Default Management Framework), Exchange Act Release No. 88928 (May 21, 2020); 85 Fed. Reg. 32075 (May 28, 2020) (SR-ICEEU-2020-007) (“Notice”).

proposed rule change, as modified by Partial Amendment No. 1 (hereinafter the “proposed rule change”).

II. Description of the Proposed Rule Change

As discussed below, the proposed rule change would amend the CDS Auction Terms and the Policy.⁵ The CDS Auction Terms explain how ICE Clear Europe would auction one or more lots of a defaulting Clearing Member’s CDS Contracts, and the Policy describes the processes that ICE Clear Europe would use to close a defaulting Clearing Member’s CDS Contracts, including by auction.

A. Amendments to the CDS Auction Terms

Currently, the CDS Auction Terms contain provisions that apply to Primary CDS Auctions (meaning initial auctions of CDS contracts) and Secondary CDS Auctions (meaning auctions conducted under part two of the CDS Auction Terms and in accordance with ICE Clear Europe Rule 905(d)(i)(B)).⁶ The provisions of the CDS Auction Terms applicable to Primary CDS Auctions are substantially the same as those applicable to Secondary CDS Auctions, and the proposed rule change would make the changes described below to both sets of provisions.

⁵ Capitalized terms not otherwise defined herein have the meanings assigned to them in the CDS Auction Terms, the Policy, or the ICE Clear Europe Rulebook, as applicable. The description that follows is excerpted from the Notice, 85 Fed. Reg. at 32075.

⁶ A Secondary CDS Auction is an auction that ICE Clear Europe may conduct if ICE Clear Europe does not terminate, transfer, or close out all of the CDS Contracts of a Defaulter pursuant to a Primary CDS Auction and the other actions permitted under ICE Clear Europe Rule 905(a)-(c). Moreover, in the event of the failure of one or more Secondary CDS Auctions to eliminate or replace all remaining risk of the open contracts of a defaulting Clearing Member, ICE Clear Europe may employ its ability to engage in reduced gains distributions under Rule 914 and to partially terminate open contracts under Rule 915.

Thus, for the sake of brevity, the description below refers collectively to changes to the CDS Auction Terms and to an “Auction,” rather than a Primary CDS Auction and Secondary CDS Auction, unless needed to distinguish between the two terms.

As described below, the proposed rule change would make changes primarily related to (i) updating and revising defined terms of the CDS Auction Terms; (ii) interpretation and application of the CDS Auction Terms; (iii) the operation of an Auction; (iv) Minimum Bid Requirements; (v) use of the Default Management System; (vi) introducing All or Nothing Bids; and (vii) adding provisions to cover the EU Market Abuse Regulation.

i. Amendments to the Defined Terms

The proposed rule change would amend a number of the defined terms found in Section 1 of the CDS Auction Terms. First, the proposed rule change would update the names of certain defined terms to refer to an “Auction Lot” rather than a “Lot.” For example, the proposed rule change would re-title the term “Failed Lot” to “Failed Auction Lot.” ICE Clear Europe is making this change to be more specific and distinguish the term Auction Lot from the more general term Lot. Moreover, this change is consistent with ICE Clear Europe’s current authority under the CDS Auction Terms, which permit ICE Clear Europe to divide a Clearing Member’s portfolio into one or more Auction Lots and auction off each Auction Lot separately, as ICE Clear Europe considers appropriate.

Similarly, the proposed rule change would rename and amend certain defined terms to clarify that they apply to Primary CDS Auctions rather than Secondary CDS Auctions. The CDS Auction Terms contain one set of defined terms that contain definitions that are applicable to both Primary CDS Auctions and Secondary CDS Auctions. To clarify the terms applicable only to Primary CDS Auctions and better distinguish them from Secondary CDS Auctions, the

proposed rule change would re-name the terms that currently only refer to a “CDS Auction” to specify that they apply to a Primary CDS Auction. For example, the proposed rule change would change the name of the terms “CDS Auction” and “CDS Auction Participant” to “Primary CDS Auction” and “Primary CDS Auction Participant.” With respect to Secondary CDS Auctions, no change is necessary because the CDS Auction Terms already contain terms specific to Secondary CDS Auctions. For example, the CDS Auction Terms already have a term called “Secondary CDS Auction Participant.”

The proposed rule change would also amend the defined term “Second CDS Auction.” A Second CDS Auction is a Primary CDS Auction that ICE Clear Europe may hold to sell an Auction Lot if it fails to sell all of the contracts in that Auction Lot via an initial Primary CDS Auction. A Second CDS Auction is an additional Primary CDS Auction, rather than a Secondary CDS Auction, as described above, and would therefore be subject to the rules for a Primary CDS Auction. To better clarify that point, the proposed rule change would rename the term “Second CDS Auction” to “Repeat CDS Auction.”

Moreover, the proposed rule change would revise the terms “Split Bidder” and “Subordinate Bidder” to note that they could apply to either a Primary CDS Auction Participant or a Secondary CDS Auction Participant, as applicable for the relevant auction. ICE Clear Europe represents that this amendment does not reflect a change in substance but would make the drafting consistent with the distinction between Primary and Secondary CDS Auctions discussed above.

Next, the proposed rule change would make changes to defined terms that affect the specifics of how ICE Clear Europe conducts an Auction. Specifically, the proposed rule change

would change the name of the term “Closing Time” to “Bidding Close Time” to be more precise. The proposed rule change would not alter the substance of this definition, however.

Similarly, the proposed rule change would slightly revise the definitions of “Primary CDS Auction Priority AC Sequence”, “Secondary CDS Auction Priority AC Sequence”, “Primary CDS Auction Priority GF Sequence,” and “Secondary CDS Auction Priority GF Sequence”. These defined terms specify the order in which ICE Clear Europe would use non-defaulting Clearing Members’ Guaranty Fund Contributions and Assessment Contributions if needed as additional financial resources to resolve the default of a Clearing Member under ICE Clear Europe Rule 908(i). Generally, under the current definitions, ICE Clear Europe would first apply the contributions of those Clearing Members whose bids in an Auction were the least competitive, starting with Non-Bidding CDS Clearing Members, and would then apply the contributions of those Clearing Members whose bids in an Auction were more competitive. The proposed rule change would not alter this order of priority. The proposed rule change would require, however, that ICE Clear Europe take each amount in the sequence pro rata for the relevant Auction Lot by applying the Auction Lot Guaranty Fund Weighting. The Auction Lot Guaranty Fund Weighting would be a percentage equal to the Initial Margin requirement associated with the contracts in the Auction Lot divided by the Initial Margin requirement associated with all of the contracts in all of the Auction Lots comprising the defaulting Clearing Member’s portfolio. Thus, under this change, ICE Clear Europe would determine the amounts in the sequence by Auction Lot, taking into account the Initial Margin requirement associated with each Auction Lot versus all Auction Lots. ICE Clear Europe represents that this change is consistent with, and does not represent an alteration to, its current practices because the CDS Auction Terms already permit ICE Clear Europe to divide a Clearing Member’s portfolio into

one or more Auction Lots and auction off each Auction Lot separately, as ICE Clear Europe considers appropriate.

Finally, consistent with the changes described below, the proposed rule change would add new defined terms. For example, the proposed rule change would add the terms “All or Nothing Bid”, “DMS”, and “Standard Bid.” The definitions of those new terms are discussed further below as part of the discussion of the specific changes related to those terms.

ii. Interpretation and Application of CDS Auction Terms

The proposed rule change would add several paragraphs regarding interpretation and application of the CDS Auction Terms. For example, the proposed rule change would add paragraphs to define the governing law for the CDS Auction Terms, to identify which courts shall have jurisdiction over disputes, and to provide for submission of matters to arbitration. ICE Clear Europe represents that these provisions are substantially similar to existing provisions in the Rulebook and the other Procedures, and ICE Clear Europe is proposing to add them to the CDS Auction Terms for consistency across its documentation.

Similarly, the proposed rule change would clarify that nothing in the CDS Auction Terms would prevent ICE Clear Europe from administering a sale or entering into offsetting transactions without holding an Auction and that the CDS Auction Terms are subject to ICE Clear Europe’s Rulebook. These changes reflect ICE Clear Europe’s existing authority under its Rulebook, and ICE Clear Europe is adding these clarifications to avoid any potential confusion as to the scope of the CDS Auction Terms.

The proposed rule change would also clarify that references to CDS Contracts, for purposes of the CDS Auction Terms, include (i) CDS Contracts terminated via automatic early termination or notional amounts representing such terminated CDS Contracts and (ii) CDS

Contracts that have arisen from hedging transactions executed by ICE Clear Europe. ICE Clear Europe is making these changes to clarify that it may auction such CDS Contracts to establish replacement contracts with non-defaulting Clearing Members and to determine a price for calculating ICE Clear Europe's loss from closing the defaulting Clearing Member's positions.

iii. Operation of an Auction

The proposed rule change would also make certain changes regarding the operation of an Auction, specifically relating to the Bidding Close Time for an Auction, the treatment of Bids, and participation of customers of Clearing Members in an Auction.

Currently, the CDS Auction Terms provide that Clearing Members may only submit Bids for an Auction prior to the Bidding Close Time for that Auction. The proposed rule change would not alter this provision, but it would further specify that ICE Clear Europe could postpone the Bidding Close Time for up to one hour by giving notice of such postponement to all participants and following consultation to the extent practicable with the CDS Default Committee. Similarly, the CDS Auction Terms permit ICE Clear Europe to withdraw an Auction Lot prior to the Bidding Close Time. The proposed rule change would expand this authority to permit ICE Clear Europe to withdraw an Auction Lot after the Bidding Close Time. ICE Clear Europe believes these changes would provide it additional flexibility to deal with any potential operational issues that could arise during an Auction.

The proposed rule change would update provisions related to the treatment of Bids in an Auction. First, the proposed rule change would revise the wording of a number of provisions to specify that in certain circumstances ICE Clear Europe would treat Clearing Members as having not made a Bid in Auction rather than not participating in an auction, as currently stated. This is not a substantive change because in either case, whether not participating in the Auction or not

making a Bid in the Auction, the CDS Auction Terms as amended would treat the Clearing Member as a Non-Bidding CDS Clearing Member. This designation is important because under the CDS Auction Terms and ICE Clear Europe Rule 908(i), in the event that ICE Clear Europe needs to use non-defaulting Clearing Members' Guaranty Fund Contributions or Assessment Contributions to resolve the default of a Clearing Member, ICE Clear Europe would use Non-Bidding CDS Clearing Members' Contributions first. Thus, under the proposed rule change, the CDS Auction Terms would treat a Clearing Member that submits a referential Bid (meaning a Bid that is one Euro higher or lower than the highest or lowest bidder), an invalid Bid, a void Bid, a Bid after the Bidding Close Time, a Bid in breach of the CDS Auction Terms, position limits, or other risk policies of ICE Clear Europe, or that submits a Bid while a Defaulter, as having not made a Bid in an Auction and as a Non-Bidding Clearing Member. Although effectively this treatment is the same as under the current CDS Auction Terms (designation as a Non-Bidding CDS Clearing Member), ICE Clear Europe is making this change because it believes that it is more accurate to describe the Clearing Member as having not made a Bid rather than not participating.

Relatedly, the CDS Auction Terms currently permit ICE Clear Europe to exclude certain Bids for purposes of calculating the CDS Auction Clearing Price (as defined below). Specifically, the CDS Auction Terms permit ICE Clear Europe to exclude a Bid that is invalid because ICE Clear Europe reasonably believes that if it accepted such Bid, the Clearing Member would not clear the resulting CDS Contract. The proposed rule change would expand this provision to include Bids that are invalid for other reasons under the CDS Auction Terms, like Bids submitted below the minimum bid size, if any, Bids submitted after the Bidding Close Time, and Bids that do not comply with the requirements of the CDS Auction Terms.

In addition, under the current CDS Auction Terms, each Bid constitutes an offer from a CDS Clearing Member to ICE Clear Europe to enter into CDS Contracts. The proposed rule change would not change this provision. The proposed rule change would clarify, however, that the offer would be an offer to enter into CDS Contracts pursuant to a Transfer governed by ICE Clear Europe Rule 904(b) and Part 4 of the ICE Clear Europe Rulebook. This change would not alter the substance of this provision. Rather, ICE Clear Europe is making this change to provide additional specificity by referencing the existing process for entering into CDS Contracts under the ICE Clear Europe Rulebook.

Finally, the CDS Auction Terms currently permit customers of Clearing Members to participate in Auctions by becoming Direct Participating Customers. To become a Direct Participating Customer, a customer must meet certain requirements, including making a deposit and entering into an agreement with ICE Clear Europe regarding its participation. The proposed rule change would further require that each Direct Participating Customer enter into a CDS Auction Participation Agreement with its CDS Clearing Member. ICE Clear Europe is making this change to establish a clearer and stronger basis for enforcement of the CDS Auction Terms against the Direct Participating Customer.

iv. Minimum Bid Requirements

Currently, the CDS Auction Terms require each CDS Clearing Member to bid in every CDS Auction and for every lot in a CDS Auction unless its membership privileges permit it not to participate and it elects not to participate, with this obligation referred to as a CDS Clearing Member's Minimum Bid Requirement. The CDS Auction Terms provide further, however, that a Minimum Bid Requirement would not apply to the extent: (i) it would breach applicable law or the ICE Clear Europe Rulebook; (ii) it would result in a self-referencing CDS; or (iii) where ICE

Clear Europe, after being notified in writing by the Clearing Member that it would be inappropriate, reasonably determines that the Minimum Bid Requirement does not apply. In that case, the Clearing Member must notify ICE Clear Europe promptly and in any event at least 12 hours prior to the opening of the relevant Auction.

The proposed rule change would make a number of amendments to these provisions. First, to acknowledge the fact there may be circumstances where a minimum Bid is not required, the proposed rule change would amend the requirement that each CDS Clearing Member bid in every CDS Auction for every lot in a CDS Auction to make it subject to a zero Minimum Bid Requirement being established under the conditions described further below.

Next, the proposed rule change would delete the qualification that the Minimum Bid Requirement does not apply to a CDS Clearing Member whose membership privileges permit it not to participate. ICE Clear Europe is deleting that particular provision because there are no Clearing Members whose membership privileges permit them not to participate in CDS Auctions. Relatedly, the proposed rule change would also delete the term “Elective CDS Auction Participant,” which refers to a CDS Clearing Member whose membership privileges permit it not to participate.

Moreover, with respect to the circumstances in which a Minimum Bid Requirement does not apply, the proposed rule change would amend the portion of the CDS Auction Terms regarding a Clearing Member’s notification to ICE Clear Europe that the Minimum Bid Requirement should not apply. Under the proposed rule change, a Clearing Member would still be required to notify ICE Clear Europe, and ICE Clear Europe still would have to reasonably determine that the Minimum Bid Requirement would be inappropriate. The Clearing Member would be required to provide the notice, however, within one hour of ICE Clear Europe

publishing details of the CDS Contracts comprising the relevant Auction Lot, and ICE Clear Europe would need to confirm that it agrees with the Clearing Member's assessment. ICE Clear Europe is making this particular change because ICE Clear Europe does not believe the current 12-hour period is feasible given that it may need to conduct an Auction with less than 12 hours' notice.

Finally, the CDS Auction Terms currently provide that a Clearing Member can satisfy its Minimum Bid Requirement by submitting multiple Bids with differing Bid prices and Bid sizes provided that, in the aggregate, its submitted Bids equal or exceed the Minimum Bid Requirement and any individual Bid is larger than any applicable minimum Bid size imposed for that particular Auction, consistent with the CDS Auction Terms. The proposed rule change would clarify this provision by providing that any individual Bid must be equal to or larger than any applicable minimum Bid size.

Additionally, the CDS Auction Terms currently allow affiliated Clearing Members to transfer, outsource, or aggregate their Minimum Bid Requirements to apply to a single one of them, subject to notifying ICE Clear Europe prior to a CDS Auction. The CDS Auction Terms further provide that a Clearing Member that transfers or outsources its Minimum Bid Requirement to an Affiliate remains liable for any breach by its Affiliate in respect of such Clearing Member's Minimum Bid Requirement (in addition to the liability on the part of its Affiliate for such breach) and is subject to the CDS Auction Priority as if such Bid were its own. Under the proposed rule change, the CDS Auction Terms would continue to allow a Clearing Member to transfer its Minimum Bid Requirement to an Affiliate but would further require that the Affiliate also be a Clearing Member and that both Clearing Members execute an agreement provided by ICE Clear Europe for this purpose. The proposed rule change also would allow

Clearing Members to outsource the operational processing of any of their obligations under the CDS Auction Terms pursuant to ICE Clear Europe Rule 102(w), which permits Clearing Members to outsource the performance of their obligations under the ICE Clear Europe Rulebook. Thus, this change would expand a Clearing Member's ability to outsource the operational processing of any of its obligations under the CDS Auction Terms (not just the Minimum Bid Requirement) and would reference the applicable ICE Clear Europe Rule. Moreover, the proposed rule change, as under the current CDS Auction Terms, would provide that a Clearing Member that transfers its Minimum Bid Requirement to an Affiliate remains liable with respect to that Minimum Bid Requirement. The proposed rule change also would expand this liability to make a Clearing Member liable for any breach of the CDS Auction Terms by the person to whom the Clearing Member has outsourced its operational obligations, consistent with the expansion discussed above. Finally, the proposed rule change would further specify that a Clearing Member that transfers or outsources its Minimum Bid Requirement to an Affiliate would assume the same position as the Affiliate for the purposes of determining the order of application of non-defaulting Clearing Members' Guaranty Fund Contributions and Assessment Contributions under ICE Clear Europe Rule 908(i) and for designation as a Non-Bidding CDS Clearing Member. ICE Clear Europe is making this particular change to better specify the consequences of transfer of a CDS Clearing Member's obligations to an Affiliate.

Finally, to clarify the extent of the Minimum Bid Requirements, the proposed rule change would add a provision to state that only those Bids that count toward the Minimum Bid Requirement would be taken into account in determining the order of application of Guaranty Fund Contributions and Assessment Contributions under the Primary and Secondary CDS Auction Priority AC Sequence, Primary and Secondary CDS Auction Priority GF Sequence, and

ICE Clear Europe Rule 908(i) (as discussed above). Thus, for example, a Clearing Member that submits a Bid despite having a Minimum Bid Requirement of zero (for one of the reasons discussed above), would not see that Bid considered in determining where the Clearing Member stands in the CDS Auction Priority GF Sequence.

v. Use of the Default Management System

As mentioned above, the proposed rule change would add a new defined term, “DMS.” The proposed rule change would define DMS as the Default Management System operated by ICE Clear Europe. The Default Management System would be the system used by ICE Clear Europe to communicate information to, and receive information from, CDS Clearing Members regarding Auctions. The proposed rule change would make changes to various aspects of the CDS Auction Terms to reflect use of this new defined term. With respect to the defined terms, the proposed rule change would make amendments to reflect the use of the DMS rather than the currently specified forms of communication, which usually require some form of manual delivery. For example, the proposed rule change would rename the term “Bid Form” to “Bid Submission” and revise the definition to reflect that it would refer to a Bid submitted via the DMS rather than a Bid submitted on a form prescribed by ICE Clear Europe. Similarly, the proposed rule change would amend the definitions for Primary and Secondary CDS Auction Announcement to reflect that ICE Clear Europe would send the announcement via the DMS rather than a circular.

Similarly, the proposed rule change would amend other parts of the CDS Auction Terms to reflect ICE Clear Europe’s use of the DMS. Specifically, the proposed rule change would require that Minimum Bid Requirements be communicated via the DMS (or via such other means and in such format as is specified by ICE Clear Europe), rather than by the template

notification currently set out in Annex B. Accordingly, the proposed rule change would delete Annex B from the CDS Auction Terms. The proposed rule change would also require that ICE Clear Europe send the particular specifications for an Auction Lot, like its minimum reserve price (the lowest price ICE Clear Europe would accept), via the DMS rather than by the template notification currently set out in Annex A. Accordingly, the proposed rule change would delete Annex A from the CDS Auction Terms. Finally, the proposed rule change would require that ICE Clear Europe notify the winning bidders for particular Auction Lots via the DMS.

In addition, the proposed rule change would amend the CDS Auction Terms to reflect Clearing Members' use of the DMS. The proposed rule change would require Clearing Members to submit bids via the DMS. The proposed rule change would also specify that a Clearing Member could amend its Bid by resubmitting the entire bid through DMS.

To reflect the particular operations of the DMS, the proposed rule change would delete a provision from the CDS Auction Terms that currently states that Clearing Members may make an unlimited number of separate Bids. Operationally, the DMS does not accept an unlimited number of separate Bids from Clearing Members. Rather, the DMS would allow a Clearing Member to make separate Bids in respect of either its Customers for whom it acts as Clearing Member or its Sponsored Principals for whom it acts as Sponsor (in addition to any Bids for its Proprietary Accounts), in the same way as it may make a Bid for one of its Proprietary Accounts and subject to the same provisions of the CDS Auction Terms. Similarly, the proposed rule change would delete a statement that a Clearing Member who has made a mistaken or erroneous bid may withdraw the Bid and correct the mistake. The DMS would not permit Clearing Members to withdraw Bids. Instead, the Clearing Member would need to request that ICE Clear Europe invalidate the Bid, which, as under the current CDS Auction Terms, ICE Clear Europe

could do at its own discretion if the Clearing Member has made a genuine mistake in the submission of a Bid.

Finally, the CDS Auction Terms currently allow ICE Clear Europe to set a minimum bid size for an Auction and provide that any bid below the minimum bid size will be null and void. The proposed rule change would leverage the DMS to automate these existing requirements by specifying that the DMS would be designed to automatically prevent Clearing Members from submitting bids below the minimum bid size and to render null and void any bid below the minimum bid size that the DMS accepted in error.

vi. All or Nothing Bids

As mentioned above, the proposed rule change would add a new defined term, “All or Nothing Bid.” An All or Nothing Bid would be a Bid that stipulates that if the Bid is the winning Bid, the bidder would receive all of the contracts being auctioned in the lot, without any of the contracts being split among other Bids. To make an All or Nothing Bid, the bidder would need to mark the Bid as such in its submission. The proposed rule change would introduce a new defined term for Bids that are not All or Nothing Bids, calling them Standard Bids.

Clearing Members would not be required to make All or Nothing Bids pursuant to the proposed rule change. If a Clearing Member submits an All or Nothing Bid, however, then in the absence of other bids, the All or Nothing Bid would satisfy the Clearing Member’s Minimum Bid Requirement (if any) at the same price but adjusted on a pro rata basis for the notional amount of contracts in the Auction Lot. If a Clearing Member makes an All or Nothing Bid, the Clearing Member still would be able to submit one or more Standard Bids for the same Auction Lot, whether for its account or the account of its customers, provided that all of the Bids are submitted in the same submission.

Under the CDS Auction Terms, ICE Clear Europe currently determines the price of an Auction by ordering Bids sequentially, starting with the highest price and ending with the lowest price. The price of the Bid at which, along with any equal or higher Bids, the sum of the notional amount of contracts being purchased equals or is greater than the notional amount of contracts that ICE Clear Europe is auctioning is the clearing price of the Auction (the “CDS Auction Clearing Price”). In other words, ICE Clear Europe proceeds down the list of Bids by price, starting with the highest priced Bid, and sets the CDS Auction Clearing Price at the Bid that, along with the other higher priced Bids before it, allows ICE Clear Europe to allocate 100% of the open CDS contracts in the Auction Lot.

The CDS Auction Terms currently require that, in the event there are multiple Bids at the CDS Auction Clearing Price and there is a shortfall of open CDS contracts, ICE Clear Europe must allocate the contracts *pro rata* according to the notional amount of contracts that each winning bidder requested in its Bid. As revised under the proposed rule change, the CDS Auction Terms would require that, where there is an All or Nothing Bid in the sequence of Bids before the CDS Auction Clearing Price, the price of the All or Nothing Bid would set the CDS Auction Clearing Price (because that would be the highest priced bid that would allow ICE Clear Europe to allocate 100% of the open contracts). In that case, ICE Clear Europe would allocate to the bidder that submitted the All or Nothing Bid 100% of the contracts even if there are Standard Bids at a higher or equal price. If there were more than one All or Nothing Bid at the CDS Auction Clearing Price, then the CDS Auction Procedures, as revised under the proposed rule change, would require that ICE Clear Europe allocate the portfolio equally among the All or Nothing Bids.

The proposed rule change would update two other provisions of the CDS Auction Terms to clarify how those provisions would apply in light of the presence of All or Nothing Bids. First, the CDS Auction Terms currently provide that ICE Clear Europe may, after a Primary Auction, in its discretion and after consultation with the CDS Default Committee, determine the CDS Auction Clearing Price to be less than 100% of the notional amount of the contracts and declare a Repeat Auction to auction off the remaining contracts. ICE Clear Europe may do so if, in its reasonable determination, awarding 100% of the notional amount of the contracts would have a material impact on the amounts payable or receivable by ICE Clear Europe. The proposed rule change would not alter this provision but would specify that, in such a situation, ICE Europe could disregard any All or Nothing Bids.

Second, the proposed rule change would revise the CDS Auction Terms to clarify how an All or Nothing Bid affects the calculation of a Clearing Member's Bid price for purposes of determining the competitiveness of a Clearing Member's Bid and satisfaction of a Clearing Member's Minimum Bid Requirement. The competitiveness of a Clearing Member's Bid and satisfaction of a Clearing Member's Minimum Bid Requirement are important because under the CDS Auction Terms and ICE Clear Europe Rule 908(i), in the event that ICE Clear Europe needs to use non-defaulting Clearing Members' Guaranty Fund Contributions or Assessment Contributions to resolve the default of a Clearing Member, ICE Clear Europe uses first the contributions attributable to Clearing Members that did not satisfy their Minimum Bid Requirement (Non-Bidding CDS Clearing Members), followed by those that submitted less competitive Bids. Currently, ICE Clear Europe uses the weighted average price of all valid Standard Bids made by the Clearing Member in the Auction (weighted by the portfolio size of

each such Bid, and converted into Euro, if applicable) to determine Bid price and thus to determine the competitiveness of a Clearing Member's Bids in an Auction.

Under the CDS Auction Terms as revised by the proposed rule change, where a Clearing Member has submitted both an All or Nothing Bid and one or more Standard Bids, the Clearing Member's Bid price would be the (i) the weighted average price of all valid Standard Bids made by the Clearing Member in the Auction (weighted by the portfolio size of each such bid, and converted into Euro, if applicable) and (ii) the price of any valid All or Nothing Bid made by the Clearing Member in the Auction, in either case proportionately scaled to a portfolio size representing 100% of the relevant Auction Lot. Moreover, under the proposed rule change, if a Clearing Member's Standard Bids do not satisfy its Minimum Bid Requirement, the Clearing Member's Bid price would be the price of its All or Nothing Bid. Where a Clearing Member has submitted one or more Standard Bids (and has not submitted an All or Nothing Bid), and that Clearing Member's Standard Bids do not satisfy its Minimum Bid Requirement, the CDS Auction Terms would treat the Clearing Member as a Non-Bidding CDS Clearing Member, which, as noted above, has consequences under ICE Clear Europe Rule 908(i).

vii. Market Abuse Regulation

The proposed rule change would also amend the CDS Auction Terms to clarify and state explicitly certain obligations for auction participants in respect of information they may receive in connection with an Auction, including the contents of the portfolio and the outcome or timing of an Auction. Specifically, a participant in an Auction would be required to acknowledge that such information may constitute inside information for the purposes of the EU Market Abuse Regulation (Regulation (EU) No 596/2014) or any similar under applicable law in respect of any Contracts cleared by the ICE Clear Europe or in respect of securities of a defaulting Clearing

Member. Under the proposed rule change, each participant in an Auction would be required to assess whether such information is inside information for purposes of the Market Abuse Regulation and, if so, to agree to: (i) comply with applicable Market Abuse Laws; (ii) generally not disclose such information to persons outside of its organization; (iii) prevent persons engaged in client trading at such organization from possessing such information; (iv) prevent those in possession of such information from trading on such information until it ceases to be inside information; and (v) where such information constitutes inside information under Regulation (EU) No. 596/2014, maintain an insider list of persons with access to this information.

B. Amendments to the Policy

The proposed rule change would make a number of changes to the Policy in relation to the amendments to the CDS Auction Terms. First, as mentioned above, the proposed rule change would change the name from the CDS Default Management Framework to the CDS Default Management Policy. The proposed rule change would make amendments to that effect throughout the document.

Next, the proposed rule change would revise certain characterizations of the timeframe within which certain actions would occur under the Policy. The Policy currently provides that after the approval for the declaration of a default, ICE Clear Europe will immediately institute its default management process as outlined in the Policy. The proposed rule change would remove “immediately” from this provision. In addition, the proposed rule change would remove “immediately” from the provision that ICE Clear Europe cease clearing trades for the defaulting Clearing Member when that Clearing Member is declared in default. Although ICE Clear Europe expects that it would implement such actions in a timely manner under the circumstances, ICE

Clear Europe does not believe it is necessary or feasible to specify that it would do take such actions immediately.

Similarly, with respect to assembling the Clearing Risk Team after a default, the Policy currently requires that the Head of Clearing Risk assemble the Clearing Risk Team as soon as a Clearing Member is deemed to have defaulted. The proposed rule change would amend this to require assembly once a Clearing Member is deemed to have defaulted. Again, ICE Clear Europe does not believe it is necessary or feasible to specify that assembly occur as soon as a Clearing Member is deemed to have defaulted. Finally, the Policy currently provides that when liquidating collateral assets of a default Clearing Member, ICE Clear Europe ensures that it can sell the collateral, subject to settlements terms, within a single working day, but the Head of Clearing Risk has discretion to postpone the collateral sale. The proposed rule change would delete this statement. ICE Clear Europe believes the statement is not needed to ensure timely sale of collateral and that it is unnecessary given that ICE Clear Europe relies on its existing and detailed collateral and liquidity policies to ensure it has sufficient access to liquidity in case of default.

The proposed rule change would also make a change with respect to the personnel authorized to take action regarding default management. The proposed rule change would remove a statement that in the event that the President / Chief Operating Officer is absent, the Head of Clearing Risk has the ability to overrule any other head of department (including Head of Treasury and Head of Operations) where necessary, on matters relating to default management. Thus, if the President / Chief Operating Officer is absent, the Head of Clearing Risk no longer has the ability to overrule any head of department. ICE Clear Europe is making this amendment to reflect a change in the Board's delegation of authority. Under the current

delegation of authority, where the President / Chief Operating Officer is absent, the Executive Risk Committee has authority to make decisions, and thus override any head of department.

The proposed rule change would also amend the Policy regarding ICE Clear Europe's authority to convert a default Clearing Member's non-cash margin to cash. The Policy currently provides that to manage the risks related to a Clearing Member's default, ICE Clear Europe will internally isolate the Defaulting Clearing Member's positions and, if deemed appropriate, convert any non-cash portion of the Defaulting Member's margin and collateral securing their portion of the Guaranty Fund into cash. The proposed rule change would alter this slightly to provide that ICE Clear Europe "may" convert any non-cash portion of the Defaulting Member's margin and collateral securing their portion of the Guaranty Fund into cash. ICE Clear Europe is making this change to clarify the drafting of this provision, but it does not believe this change would substantively alter ICE Clear Europe's authority under this provision.

The proposed rule change would also amend the portion of the Policy related to the mechanics of bidding in an Auction to address the introduction of All or Nothing Bids, as discussed above. The proposed amendments would provide explanation regarding the meaning of an All or Nothing Bid and an example of how an All or Nothing Bid would work. The proposed amendments would also provide that ICE Clear Europe would publish further information on the bidding types utilized in any given Auction as part of the specifications for that Auction.

Finally, the proposed rule change would amend the Policy's provisions regarding review, breach management, and exception handling. With respect to reviewing and revising the Policy, the Policy currently provides that ICE Clear Europe will conduct a quarterly review of the Policy, to include an assessment of responsibilities, trading facilities, and equipment. The

proposed rule change would delete this provision because ICE Clear Europe would review and revise the Policy as part of ICE Clear Europe's separate annual documentation review process rather than on a quarterly basis and, as discussed below, the document owner would be responsible for ensuring the Policy remains up-to-date. In its place, the proposed rule change would add a provision explaining that ICE Clear Europe, in coordination with its Clearing Members, would conduct an annual mock Clearing Member default test with the Clearing Risk Department, appropriate Clearing House management, and CDS Default Committee Members for each Clearing Member. The proposed rule change would also make the Policy's provisions for breach management and exception handling consistent with other ICE Clear Europe policies and governance processes.⁷ Pursuant to the amendments, the document owner, as specified in ICE Clear Europe policies, would be responsible for making sure the Policy is up-to-date and for reporting report material breaches or unapproved deviations from the Policy to the Head of Department, the Chief Risk Officer and the Head of Compliance (or their delegates) who together would determine if further escalation should be made to relevant senior executives, the Board and/or competent authorities. Exceptions to the Policy would be approved in accordance with ICE Clear Europe's governance process for the approval of changes to the Policy.

⁷ See Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Partial Amendment No. 2 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Partial Amendment No. 1 and Partial Amendment No. 2, To Revise the ICE Clear Europe Treasury and Banking Services Policy, Liquidity Management Procedures, Investment Management Procedures and Unsecured Credit Limits Procedures, Exchange Act Release No. 86891 (Sept. 6, 2019); 84 Fed. Reg. 48191 (Sep. 12, 2019) (SR-ICEEU-2019-012) (approving similar provisions in the ICE Clear Europe Treasury and Banking Services Policy, Liquidity Management Procedures, Investment Management Procedures and Unsecured Credit Limits Procedures).

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.⁸ For the reasons given below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act⁹ and Rules 17Ad-22(e)(2)(v) and (e)(13).¹⁰

A. Consistency with Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of ICE Clear Europe be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds which are in the custody or control of ICE Clear Europe or for which it is responsible.¹¹ As discussed in more detail below, the Commission generally believes that the proposed rule change should improve the CDS Auction Terms and the Policy and, therefore, ICE Clear Europe's conduct of an Auction in response to a Clearing Member's default, and, as a result, believes that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act.¹²

⁸ 15 U.S.C. 78s(b)(2)(C).

⁹ 15 U.S.C. 78q-1(b)(3)(F).

¹⁰ 17 CFR 240.17Ad-22(e)(2)(v), (e)(13).

¹¹ 15 U.S.C. 78q-1(b)(3)(F).

¹² 15 U.S.C. 78q-1(b)(3)(F).

Specifically, the Commission believes that the proposed rule change, in amending certain defined terms and adding defined terms needed for the other changes as discussed in Part II.A.i above, should reduce the possibility for confusion in the application of the CDS Auction Terms by clarifying the terminology in the CDS Auction Terms and by identifying and defining the terms needed to enact the other changes discussed above. In addition, amending the defined terms with respect to certain operations of an auction, including changing the term Closing Time to Bidding Close Time and revising the definitions of Primary and Secondary CDS Auction Priority AC Sequence and Primary and Secondary CDS Auction Priority GF Sequence, should help to clarify these operational aspects of Auctions and thereby improve the efficiency of Auctions.

Moreover, adding provisions to explain how ICE Clear Europe would interpret and apply the CDS Auction Terms, as discussed in Part II.A.ii above, including how the CDS Auction Terms would relate to the ICE Clear Europe Rulebook, should help to reduce the possibility for confusion when interpreting and applying the CDS Auction Terms alongside the ICE Clear Europe Rulebook. Similarly, the additional provisions to explain that the CDS Contracts part of an Auction would include certain terminated CDS Contracts and hedging CDS Contracts should allow ICE Clear Europe to replace such contracts and establish a price to calculate its loss with respect to such contracts, thereby further improving the efficacy of Auctions.

Further, giving ICE Clear Europe the ability to postpone the Bidding Close Time and withdraw a lot after the Bidding Close Time, as discussed in Part II.A.iii above, should afford ICE Clear Europe flexibility to respond to changing conditions as Auctions are being conducted and therefore to respond as needed to conduct a successful Auction. Clearing Members should also benefit from additional clarity with respect to the consequences of making Bids in an

Auction as a result of the proposed rule change specifying the circumstances in which a Clearing Member is treated as having not made a Bid, in which ICE Clear Europe could exclude certain bids for purposes of calculating the CDS Auction Clearing Price, and in which a Bid would constitute an offer governed by ICE Clear Europe Rule 904(b) and Part 4 of the ICE Clear Europe Rulebook. Finally, the additional requirement that each Direct Participating Customer enter into a CDS Auction Participation Agreement with its CDS Clearing Member should provide an additional assurance that Customers participating in an Auction would comply with the requirements of the CDS Auction Terms.

As it relates to Minimum Bid Requirements discussed in Part II.A.iv above, the Commission believes that the proposed rule change could increase participation in Auctions by reducing the potential for avoidance of Minimum Bid Requirements, thereby leading to more successful Auctions. Three particular aspects of the proposed rule change should help to reduce the possibility that a Clearing Member elects not to participate in an Auction or avoids the Minimum Bid Requirement: (i) removal of the possibility that a Clearing Member could elect not to participate in an Auction; (ii) shortening the time by which a Clearing Member must provide notice to ICE Clear Europe that a Minimum Bid Requirement should not apply; and (iii) requiring ICE Clear Europe to confirm that it agrees to the Clearing Member's assessment

At the same time, the proposed rule change should increase the flexibility with which Clearing Members may address Minimum Bid Requirements by allowing Clearing Members to outsource the operational processing of their obligations under the CDS Auction Terms; continuing to allow Clearing Members to transfer their Minimum Bid Requirements to Affiliates (subject to both being Clearing Members and entering into an agreement); making explicit that a Clearing Member can satisfy its Minimum Bid Requirement with multiple Bids provided that

any individual Bid is equal to or larger than the applicable minimum Bid size; and adding a provision to state that only those Bids that count toward the Minimum Bid Requirement would be taken into account under the Primary and Secondary CDS Auction Priority AC Sequence, Primary and Secondary CDS Auction Priority GF Sequence, and ICE Clear Europe Rule 908(i). Similarly, the additional clarity provided regarding the continued liability of a Clearing Member that transfers its Minimum Bid Requirement or outsources other operational obligations would allow Clearing Members to better understand the consequences of transferring or outsourcing a Minimum Bid Requirement. The Commission believes that this additional flexibility and information should generally help to ensure Clearing Members comply with Minimum Bid Requirements, which, in turn, should help to increase the likelihood of a successful Auction.

As discussed in part II.A.v above, the proposed rule change would make a number of changes reflecting the role and operations of the DMS in the context of an Auction. These changes would replace manual communications with electronic ones and therefore should improve the efficiency and accuracy of communications regarding Auctions, which may help to avoid delays or miscommunications that could delay the successful completion of an Auction. Thus, requiring use of the DMS and amending the CDS Auction Terms to reflect the operation of the DMS should help to promote the smooth conduct and successful completion of Auctions.

The proposed rule change would also add All or Nothing Bids, and make related changes, to the CDS Auction Terms, as discussed in Part II.A.vi above. Because an All or Nothing Bid provides a means for a single bidder to take all of the contracts in an Auction and requires that ICE Clear Europe allocate such contracts to that bidder if the All or Nothing Bid meets the Auction Clearing Price, All or Nothing Bidding should increase the likelihood that ICE Clear Europe successfully sells all of a defaulting Clearing Member's contracts by an Auction. Thus,

the Commission believes that the changes discussed regarding All or Nothing Bids, including how an All or Nothing Bid would affect Minimum Bid Requirements and the calculation of bid price, should help to increase the likelihood of a successful Auction.

Moreover, adding provisions for the EU Market Abuse Regulations as discussed in Part II.A.vii above should ensure compliance with applicable EU law in the conduct of Auctions and should protect sensitive information shared as part of an Auction. The Commission believes this should, in turn, increase participants' confidence in the security of information shared as part of an Auction and therefore increase participation in an Auction.

Finally, the Commission believes that the changes to the Policy discussed in Part II.B above should improve ICE Clear Europe's ability to use the processes outlined in the Policy to respond to a Clearing Member's default and increase the clarity regarding the operation of the Policy, including when ICE Clear Europe may take certain actions and its authority for doing so. These changes include: (i) renaming the Policy; (ii) revising the timing requirements for certain actions; and (iii) specifying that ICE Clear Europe may convert the defaulting Clearing Member's non-cash Margin and Guaranty Fund Contributions into cash. Similarly, removing a statement that in the event that the President / Chief Operating Officer being absent, the Head of Clearing Risk has the ability to overrule any other head of department (including Head of Treasury and Head of Operations) to reflect a change in the Board's delegation of authority, should reduce the possibility for confusion or mistakes in taking action under the Policy. Amending the mechanics of bidding in an Auction to address the introduction of All or Nothing Bids should further help to implement All or Nothing Bidding, which, as discussed above, should increase the likelihood for a successful Auction. Deleting the requirement that ICE Clear Europe conduct a quarterly review and instead making the document owner responsible for

ensuring that the Policy is up-to-date and for reporting breaches, consistent with other ICE Clear Europe policies and governance processes, should establish a means for ensuring that ICE Clear Europe maintains and adheres to the Policy. For these reasons, the Commission believes the changes to the Policy should generally improve ICE Clear Europe's conduct of Auctions.

Through Auctions, ICE Clear Europe sells the open CDS contracts of a defaulting Clearing Member. Thus, in improving the efficiency of such Auctions, the Commission believes the proposed rule change should promote the prompt and accurate clearance and settlement of the CDS transactions resulting from such Auctions. Moreover, the Commission believes that the default of a Clearing Member, if not promptly resolved, could cause losses for ICE Clear Europe. The Commission believes the proposed rule change should help to avoid these losses by promoting the prompt resolution of Auctions, and therefore the prompt resolution of a Clearing Member's default. Because losses resulting from the default of a Clearing Member could disrupt ICE Clear Europe's ability to operate and therefore threaten ICE Clear Europe's ability to clear and settle transactions and access securities and funds, the Commission believes the proposed rule change also should help to promote the prompt and accurate clearance and settlement of transactions and assure the safeguarding of securities and funds in ICE Clear Europe's custody and control.

Therefore, the Commission finds that the proposed rule change should promote the prompt and accurate clearance and settlement of securities transactions and assure the

safeguarding of securities and funds in ICE Clear Europe’s custody and control, consistent with the Section 17A(b)(3)(F) of the Act.¹³

B. Consistency with Rule 17Ad-22(e)(2)(v)

Rule 17Ad-22(e)(2)(v) requires that ICE Clear Europe establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for governance arrangements that, among other things, specify clear and direct lines of responsibility.¹⁴ As discussed in Part II.B above, the proposed rule change would amend the Policy to make the document owner responsible for ensuring that the Policy is up-to-date and for reporting breaches. The Commission believes that this aspect of the proposed rule change would place on the document owner a clear and direct responsibility for ensuring that ICE Clear Europe maintains the Policy and complies with it. For this reason, the Commission finds that the proposed rule change is consistent with Rule 17Ad-22(e)(2)(v).¹⁵

C. Consistency with Rule 17Ad-22(e)(13)

Rule 17Ad-22(e)(13) requires that ICE Clear Europe establish, implement, maintain and enforce written policies and procedures reasonably designed to ensure ICE Clear Europe has the authority and operational capacity to take timely action to contain losses and liquidity demands and continue to meet its obligations by, at a minimum, requiring its Clearing Members and, when

¹³ 15 U.S.C. 78q-1(b)(3)(F).

¹⁴ 15 U.S.C. 17Ad-22(e)(2)(v).

¹⁵ 15 U.S.C. 17Ad-22(e)(2)(v).

practicable, other stakeholders to participate in the testing and review of its default procedures, including any close-out procedures, at least annually and following material changes thereto.¹⁶

As discussed above, the Commission believes the proposed rule change should generally improve the clarity and operation of the CDS Auction Terms and, therefore, ICE Clear Europe's ability to conduct a successful Auction via the CDS Auction Terms. Because ICE Clear Europe uses Auctions to close out a defaulting Clearing Member's contracts and contain the losses and liquidity demands stemming from a Clearing Member's default, the Commission believes the proposed rule change, in improving ICE Clear Europe's ability to conduct a successful Auction via the CDS Auction Terms, should help to ensure ICE Clear Europe has the authority and operational capacity to take timely action to contain losses and liquidity demands.

Moreover, as discussed in Part II.B above, the proposed rule change would amend the Policy to add a provision explaining that ICE Clear Europe, in coordination with its Clearing Members, would conduct an annual mock Clearing Member default test with the Clearing Risk Department, appropriate ICE Clear Europe management, and CDS Default Committee Members for each Clearing Member. The Commission believes this particular change should help to ensure that ICE Clear Europe requires its Clearing Members to participate in the testing and review of its default procedures.

For these reasons, the Commission finds that the proposed rule change is consistent with Rule 17Ad-22(e)(13).¹⁷

¹⁶ 15 U.S.C. 17Ad-22(e)(13).

¹⁷ 15 U.S.C. 17Ad-22(e)(13).

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(F) of the Act¹⁸ and Rules 17Ad-22(e)(2)(v) and (e)(13).¹⁹

IT IS THEREFORE ORDERED pursuant to Section 19(b)(2) of the Act²⁰ that the proposed rule change, as modified by Partial Amendment No. 1 (SR-ICEEU-2020-007), be, and hereby is, approved.²¹

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

J. Matthew DeLesDernier,
Assistant Secretary.

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¹⁸ 15 U.S.C. 78q-1(b)(3)(F).

¹⁹ 17 CFR 240.17Ad-22(e)(2)(v) and (e)(13).

²⁰ 15 U.S.C. 78s(b)(2).

²¹ In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

²² 17 CFR 200.30-3(a)(12).