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SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-89409; File No. SR-ICEEU-2020-005]

Self-Regulatory Organizations; ICEEU Limited; Order Approving Proposed Rule Change Relating to amendments to the ICEEU Clearing Rules

July 28, 2020.

I. Introduction

On June 2, 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 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to revise its Clearing Rules (the “Rules”)³ to account for default insurance proceeds. The proposed rule change was published for comment in the Federal Register on June 18, 2020.⁴ The Commission did not receive comments on the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

ICE Clear Europe proposes amendments to Parts 9 and 11 of the Rules relating to its use of default insurance that is intended to cover losses resulting from a Clearing

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Capitalized terms used but not defined herein have the meanings specified in the Rules.

⁴ Securities Exchange Act Release No. 89060 (June 12, 2020), 85 FR 36904 (June 18, 2020) (SR-ICEEU-2020-005) (“Notice”).

Member default.⁵ Currently, ICE Clear Europe includes proceeds from default insurance among the resources available to meet the obligations and liabilities arising from a default for the F&O contract category, but not for the CDS or FX contract categories. Such default insurance provides an additional default resource to cover losses from Clearing Member defaults, prior to the need to use guaranty fund resources or assessment contributions from non-defaulting Clearing Members.

As noted further below, the proposed rule change would add insurance proceeds to the assets available for defaults for the CDS and FX contract categories, and would alter the placement of insurance proceeds in the default waterfall for the F&O contract category. However, ICE Clear Europe is not, and would not be, required to obtain or maintain default insurance.

Specifically, the proposal would amend the default waterfalls in Rules 908(b) (for F&O-only Clearing Members or Sponsored Principals), (c) (for CDS-only Clearing Members or Sponsored Principals), (d) (for FX-only Clearing Members or Sponsored Principals) and (g) (for Clearing Members or Sponsored Principals in multiple membership categories), such that default insurance proceeds would be placed third in each of these default waterfalls, after first applying the Defaulter's resources and then ICE Clear Europe's initial contribution (often referred to as its "skin in the game") in the waterfall of assets used to meet the obligations and liabilities of a Defaulter and any shortfall, loss or liability to ICE Clear Europe upon an Event of Default. (In the case of a Defaulter with multiple membership categories, the proceeds of default insurance would

⁵ The following description of the proposed rule change is excerpted from the Notice, 85 FR 36904.

be applied to each Default Amount on a pro rata basis, as provided in Rule 908(g)(iii).) Default insurance proceeds would thus be applied before guaranty fund contributions and assessment contributions from non-defaulting Clearing Members.⁶

Rule 1103(e) sets forth certain limitations with respect to the benefits of default insurance. The proposed rule change would amend this rule to clarify that ICE Clear Europe is not obligated to obtain or keep in place or make any claim under any default insurance policy, or to make or receive the proceeds under any claim prior to moving to the next levels of assets in the applicable waterfalls in Rule 908, and subject to the payment order specified in Rule 1102(k). The amendments would further reflect that there could be a delay in receiving insurance proceeds, such that other assets applicable under Rule 908 may be called prior to insurance proceeds being received, and that proceeds of any insurance claim may need to be applied to meet losses across more than one Event of Default if there are multiple Defaulters.

In addition, the proposed rule change would amend the Rules to set out the order in which proceeds of default insurance claims would be paid out if there are multiple Defaulters within a certain period. Specifically, insurance proceeds would not be applied to defaults for which there were no further losses after applying default resources up to and including the ICE Clear Europe initial contribution. If there are further losses, then insurance proceeds would be applied to remaining losses based on which default occurred

⁶ Conforming amendments would be made to the Rule 101 definitions of “ICE Clear Europe CDS GF Contribution,” “ICE Clear Europe F&O GF Contribution,” and “ICE Clear Europe FX GF Contribution” as well as to Rule 909(a), reflecting the placement of default insurance proceeds in the applicable waterfalls under Rule 908.

first in time, and to losses from defaults occurring simultaneously (which includes defaults occurring on the same day) on a pro rata basis.

Rule 1102(k) currently addresses the allocation of amounts recovered from a Defaulter to Guaranty Fund Contributions of non-defaulting Clearing Members. The proposed rule change would amend this rule to address application of these recoveries to pay amounts owed to default insurers, as well as reimbursements to other Clearing Members and ICE Clear Europe with respect to their contributions and assessments. Specifically, these recoveries would be paid in the reverse order of which assets were applied under Rule 908 (i.e., to non-defaulting Clearing Members in respect of their guaranty fund contributions that had been applied, then to the default insurance provider in respect of amounts owed to it, and then to ICE Clear Europe in respect of its initial contribution). Rule 1102(k) would also be revised to clarify that application of such amounts would be subject to (i) retaining or repaying amounts applied by ICE Clear Europe (which would no longer include claims under insurance policies) or other third parties applied to meet shortfalls; (ii) if applicable, reimbursing payments to Persons that made Assessment Contributions in the reverse order specified in Rule 908; and (iii) if applicable, meeting certain repayment obligations under Rules 909(j), 914(j) or 916(n).

Rule 909(j), which addresses reimbursement of Assessment Contributions, would also be amended to reflect the application of default insurance. The amendments would expand the existing provision to provide that if, after any Assessment Contribution has been paid in relation to an Event of Default, ICE Clear Europe collects on the defaulted obligation, loss or shortfall in whole or in part from an insurer, ICE Clear Europe would refund the collected amount, less expenses, to non-defaulting Clearing Members in

respect of their paid Assessment Contributions. The amendment would also add a drafting clarification that such reimbursements are subject to ICE Clear Europe retaining or repaying amounts applied to meet any shortfall and certain repayment obligations, if applicable, under Rules 914(j) (addressing payment of recoveries to persons that were subject to reduced gains distributions under Rule 914) and 916(n) (addressing payments of recoveries to persons that received reduced amounts in the case of product termination under Rule 916), which is consistent with the existing language of Rule 914(j) and 916(n).

The term “Available Non-Defaulter Resources” in Rule 913 would be amended to include cash proceeds from claims under default insurance policies available to be applied pursuant to Rule 908, provided that such proceeds were received at the time ICE Clear Europe performs a calculation of Available Non-Defaulter Resources.

The proposed rule change would also amend Rule 914(j) with respect to the application of recoveries in the context of reduced gains distribution. Currently, this Rule provides that if ICE Clear Europe receives an amount from a Defaulter or another Clearing Member or Sponsored Principal that would, had it been paid on time, have increased ICE Clear Europe’s Available Resources on a day on which a Margin Account Adjustment was made in connection with Reduced Gains Distributions, ICE Clear Europe would distribute the amounts received first, to non-defaulting Contributors who were liable to pay an adjustment on a pro rata basis, and second, in accordance with Rule 1102(k) (as described above). Under the amendment, default insurance proceeds would be included in the type of received amounts subject to the rule.

Similarly, the proposed rule change would amend Rule 916(n), which addresses application of recoveries in the context of product termination. Currently, Rule 916, in general, permits ICE Clear Europe to terminate the open contracts in a relevant contract category (e.g., F&O or CDS) under specified circumstances, including in certain cases following an Under-priced Auction or where ICE Clear Europe determines there are not sufficient Clearing Members to support continued clearing of the relevant contract category. Currently, pursuant to Rule 916(n), in the event that ICE Clear Europe terminates a contract category and receives an amount that would, had it been paid on time, have increased the amount owed to (or decreased the amount owed by) Clearing Members or Sponsored Principals upon termination of a contract category, ICE Clear Europe would distribute the amount received first to non-defaulting Clearing Members or Sponsored Principals who received less in respect of product termination than they were otherwise owed, then in accordance with Rule 914(j) (as discussed above), and then in accordance with Rule 1102(k) (as discussed above). The amendment would include default insurance proceeds in the type of received amounts subject to distribution under Rule 916(n).

III. 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 the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the organization presenting it.⁷ For the reasons given below, the

⁷ 15 U.S.C. 78s(b)(2)(C).

Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act⁸ and Rules 17Ad-22(e)(4)⁹ and 17Ad-22(e)(13)¹⁰ thereunder.

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, 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, and, in general, to protect investors and the public interest.¹¹

As discussed above, the proposed rule change would amend the default waterfalls for the CDS and FX categories to include the proceeds of default insurance, if any, as an additional default resource after the application of the Defaulter's own resources and ICE Clear Europe's own initial contributions and prior to the application of guaranty fund contributions or assessments from non-defaulting Clearing Members. In addition, the proposed rule change would alter the order of the resources identified in the default waterfall for the F&O category, such that proceeds from default insurance would come third, after the application the Defaulter's own resources and ICE Clear Europe's initial contribution and prior to the application of Guaranty Fund contributions or assessments from non-defaulting Clearing Members. The Commission believes that by including

⁸ 15 U.S.C. 78q-1(b)(3)(F).

⁹ 17 CFR 240.17Ad-22(e)(4).

¹⁰ 17 CFR 240.17Ad-22(e)(13).

¹¹ 15 U.S.C. 78q-1(b)(3)(F).

additional financial resources in its default management system, ICE Clear Europe would enhance the financial resources used to manage defaults. Specifically, the Commission believes that the ability to use the proceeds of default insurance in this manner would provide ICE Clear Europe with an additional potential source of default liquidity with respect to the CDS and FX product categories. In addition, the placement of the default insurance proceeds in the default waterfalls for all three categories could allow ICE Clear Europe to avoid utilizing the resources of non-defaulting Clearing Members, which, in turn could reduce the risk of loss contagion (i.e., the risk of losses arising at non-defaulting Clearing Members if ICE Clear Europe has to utilize the guaranty fund, which would then be subject to replenishment). In addition, these financial resources would be more likely to remain available for subsequent defaults and also provide additional financial resources necessary to ensure ICE Clear Europe's ability to safeguard securities and funds.

For these reasons, the Commission finds that the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions and to assure the safeguarding of securities and funds in ICE Clear Europe's custody and control. Therefore, the Commission finds the proposed rule change is consistent with section 17A(b)(3)(F) of the Act.¹²

B. Consistency with Rule 17Ad-22(e)(4)

Rule 17Ad-22(e)(4)¹³ requires ICE Clear Europe to establish, implement, maintain, and enforce written policies and procedures reasonably designed to, as

¹² 15 U.S.C. 78q-1(b)(3)(F).

¹³ 17 CFR 240.17Ad-22(e)(4).

applicable, effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining additional financial resources at a minimum to enable it to cover a wide range of foreseeable stress scenarios that include, but are not limited to, the default of the two participant families that would potentially cause the largest aggregate credit exposure in extreme but plausible market conditions.¹⁴

As noted above, the proposed rule change would revise ICE Clear Europe's rules to account for the receipt of default insurance proceeds for all product categories prior to the need to use guaranty fund contributions and assessments from non-defaulting Clearing Members, such that default insurance proceeds would be placed third in the waterfall of assets after Defaulter resources and ICE Clear Europe's initial contribution used to meet the obligations and liabilities of a Defaulter. Further, in the event insurance proceeds are received after mutualized default or other resources are used, the proposed rule change would allow the proceeds to repay non-defaulting Clearing Members, including for such things as assessments or reduced gains distributions that otherwise would not have been made had the insurance proceeds been received at the time. The Commission believes that by adding insurance proceeds to its financial resources in this way, the proposal should help ICE Clear Europe to preserve mutualized default resources and the resources of individual non-defaulting Clearing Members, which in turn would give it the ability to manage its credit exposures and cover a wide range of foreseeable stress scenarios with additional financial resources.

¹⁴ 17 CFR 240.17Ad-22(e)(4)(ii).

As noted above, the proposed rule change would also allow for the use of insurance proceeds in circumstances when ICE Clear Europe terminates open contracts. Specifically, where ICE Clear Europe receives an amount that would, had it been paid on time, have increased the amount owed to (or decreased the amount owed by) Clearing Members or Sponsored Principals upon termination of a contract category, ICE Clear Europe would distribute the amount received first to non-defaulting Clearing Members or Sponsored Principals who received less in respect of product termination than they were otherwise owed. The proposal would include default insurance proceeds in the type of received amounts subject to distribution. The Commission believes that the application of additional financial resources in this way would strengthen its overall ability to deal with a variety of stress scenarios by lessening the burden on Clearing Members during contract termination.

For these reasons, the Commission finds that the proposed rule change is consistent with Rule 17Ad-22(e)(4)(ii)¹⁵.

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

Rule 17Ad-22(e)(13) requires ICE Clear Europe to establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, ensure it has the authority and operational capacity to take timely action to contain losses and liquidity demands and continue to meet its obligations.¹⁶

As noted above, the proposed rule change would provide that ICE Clear Europe would not be obligated to obtain or keep in place or make any claim under any default

¹⁵ 17 CFR 240.17Ad-22(e)(4)(ii).

¹⁶ 17 CFR 240.17Ad-22(e)(13).

insurance policy or make, or receive the proceeds under, any claim prior to processing to the next levels of assets in the event of a default. Further, the proposed rule change would specify how ICE Clear Europe would apply the proceeds of any default insurance after other resources, such as non-defaulting Clearing Members' guaranty fund contributions or assessments, had been used to address losses arising from a default. The Commission believes that these aspects of the proposed rule change will enable ICE Clear Europe to, if necessary, use the contributions of non-defaulting Clearing Members to the guaranty fund prior to the receipt of proceeds owed under the default insurance provided that those Clearing Members are reimbursed from the insurance proceeds when received, which in turn ensures that ICE Clear Europe can take timely action to contain losses and meet liquidity demands even if there are delays in making and processing an insurance claim and that the existence and use of default insurance does not interfere with meeting such obligations.

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

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)(4) and 17Ad-22(e)(13) thereunder.¹⁹

¹⁷ 17 CFR 240.17Ad-22(e)(13).

¹⁸ 15 U.S.C. 78q-1(b)(3)(F).

¹⁹ 17 CFR 240.17Ad-22(e)(4) and 17 CFR 240.17Ad-22(e)(13).

IT IS THEREFORE ORDERED pursuant to Section 19(b)(2) of the Act²⁰ that the proposed rule change (SR-ICEEU-2020-005) 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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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).