

**SECURITIES AND EXCHANGE COMMISSION**  
(Release No. 34-94079; File No. SR-ICEEU-2022-002)

January 27, 2022

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the ICE Clear Europe Delivery Procedures

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 18, 2022, ICE Clear Europe Limited (“ICE Clear Europe” or the “Clearing House”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule changes described in Items I, II and III below, which Items have been prepared primarily by ICE Clear Europe. ICE Clear Europe filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(4)(ii) thereunder,<sup>4</sup> such that the proposed rule change was immediately effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Clearing Agency’s Statement of the Terms of Substance of the Proposed Rule Change**

- (a) The principal purpose of the proposed amendments is for ICE Clear Europe to amend its Delivery Procedures (“Delivery Procedures”) on the basis of certain settlement discipline requirements under the European Union's Central Securities

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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

<sup>4</sup> 17 CFR 240.19b-4(f)(4)(ii).

Depositories Regulation<sup>5</sup> (the "CSDR") and Settlement Discipline Regulatory Technical Standards<sup>6</sup> (the "RTS"). These requirements are set to come into force on 1 February 2022.<sup>7</sup> A copy of the proposed amendments to the Delivery Procedures is attached [sic] as Exhibit 5.

**II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, ICE Clear Europe included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

**(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

(a) Purpose

ICE Clear Europe is proposing to amend its Delivery Procedures due to new settlement discipline requirements contained in the CSDR and RTS, which take effect on

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<sup>5</sup> Regulation (EU) 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012.

<sup>6</sup> Commission Delegated Regulation (EU) 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline.

<sup>7</sup> Capitalized terms used but not defined herein have the meanings specified in the Delivery Procedures or, if not defined therein, the ICE Clear Europe Clearing Rules.

1 February 2022. The settlement discipline requirements, which include settlement failure reporting and cash penalties for settlement failures, would impose certain requirements on ICE Clear Europe as a central counterparty and market participant in its interaction with EU-based settlement facilities. Specifically, the requirements apply to securities that the Clearing House settles on a European Union ("EU") central securities depository ("CSD") under F&O Contracts that are equity or bond futures and options, where the underlying is traded on an EU trading venue or cleared by another EU-based CCP.

The settlement discipline requirements that will come into effect on 1 February 2022 will include settlement failure reporting and cash penalties for settlement failures.<sup>8</sup>

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<sup>8</sup> Although the CSDR and RTS provide for additional settlement discipline measures, including certain mandatory buy-in requirements, relevant EU authorities have indicated that the entry into force of such provisions will be delayed. See press statement from the European Commission dated 25 November 2021, available here: [https://ec.europa.eu/commission/presscorner/detail/en/mex\\_21\\_6293](https://ec.europa.eu/commission/presscorner/detail/en/mex_21_6293).

The European Securities and Markets Authorities ("ESMA") issued a public statement which notes that although the legislators have agreed upon an amendment to the CSDR that could give effect to the delay described in the foregoing paragraph, it is anticipated that this will not enter into force prior to the settlement discipline rules becoming applicable on 1 February 2022. Given this situation, ESMA has indicated that it expects national regulators to not prioritize supervisory actions in relation to the buy-in regime. ESMA, Public Statement, Supervisory approach on the implementation of the CSDR buy-in provisions, 17 December 2021, ESMA70-156-5153.

A number of major trade associations have also issued a public statement confirming that in their view EU legislators do not expect market participants to take further action towards implementation of the mandatory buy-in requirements, but that other CSDR settlement discipline measures will be implemented by 1 February 2022. Joint Statement, Industry Approach to CSDR Settlement Discipline Regime dated 22 December 2021, available here: [https://www.afme.eu/Portals/0/DispatchFeaturedImages/Industry%20Approach%](https://www.afme.eu/Portals/0/DispatchFeaturedImages/Industry%20Approach%20to%20CSDR%20Settlement%20Discipline%20Regime.pdf)

In the context of ICE Clear Europe, the requirements will apply with respect to Euro-Denominated Government Bond Futures and Options Contracts (covered in Part W of the Delivery Procedures) and Financials & Softs Equity Futures and Options (covered in Part Z of the Delivery Procedures), where the underlying deliverable is listed on an EU exchange or cleared via an EU CCP and settlement occurs through an EU settlement system.<sup>9</sup>

A change would also be introduced as regards the holding accounts for deliveries of deliverable EU emissions allowances pursuant to futures contracts on such allowances, to ensure that the CSDR regime does not inadvertently interfere with emissions deliveries.

Given the anticipated entry into force and application of elements of the CSDR and the RTS, ICE Clear Europe proposes to update its Delivery Procedures as described below.

#### General Provisions of Delivery Procedures

The General Provisions section of the Delivery Procedures would be amended to add new Paragraphs 22 and 23. Paragraph 22 would address the liabilities for penalties or

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20to%20CSDR%20Settlement%20Discipline%20Regime%20FINAL%2022122021.pdf.

Accordingly, ICE Clear Europe is not proposing to make amendments to its Delivery Procedures with respect to the CSDR buy-in regime at this time.

<sup>9</sup> Although the UK has adopted some aspects of the CSDR under the European Union (Withdrawal) Act 2018, none of the EU settlement discipline provisions that were meant to come into force by 1 February 2022 will be implemented in the UK. Financial Services Update, Statement made on 23 June 2020, available here: <https://questions-statements.parliament.uk/written-statements/detail/2020-06-23/HCWS309>.

costs assessed under the CSDR because of a delay or failure in matching for settlement. Specifically, it would provide that the Buyer and Seller would each indemnify the Clearing House in accordance with Rule 111 in respect of costs or penalties for any delay or failure in matching arising under the CSDR or otherwise, save to the extent that the Clearing House or its settlement agent is at fault for such failure or delay. The amount of such cost or penalty would be charged to such Clearing Member. Paragraph 23 would address penalties or costs assessed under CSDR in respect of late settlement. Specifically, it would provide that the Seller would indemnify the Clearing House in accordance with Rule 111 in respect of costs or penalties for any delay or failure in settlement arising under the CSDR or otherwise, save to the extent that the Clearing House or its settlement agent is at fault in respect of such failure or delay. The amount of such costs or penalties would be charged to such Clearing Member.

The CSDR and RTS feature a two-tier scheme for penalty collection and distribution in respect of settlement fails, which is as follows: (1) where the failing or receiving participant is a CCP, CCPs are to collect and distribute penalties using information provided by CSDs; and (2) in all other circumstances, CSDs collect and distribute the penalties. ICE Clear Europe holds securities at EU CSDs through nominees, rather than as a direct participant. As such, ICE Clear Europe is not necessarily known by or identified to the CSDs as a CCP. Therefore, CSDs would collect penalties in respect of securities to be delivered under F&O Contracts that ICE Clear Europe clears in accordance with scenario 2. It is possible that when Buyers or Sellers are late to match or Sellers are late to settle (as applicable); this would have run-on impacts on the Clearing House's ability to onwards deliver securities. If the Clearing House does not deliver in a

timely fashion because of this late matching, it could be subject to a cash penalty under CSDR. In these circumstances, the late Clearing Member would be required to indemnify ICE Clear Europe. These amendments reflect the existing position under the general indemnity in Rule 111, but provide clarity that such indemnity will be applicable in the particular circumstances described in these paragraphs.

Part A: ICE Endex Deliverable EU Emissions Contracts

Amendments would be made to Part A of the Delivery Procedures to ensure that the new settlement discipline procedures under the CSDR and RTS will not apply to the physical delivery of Carbon Emissions Allowances (“EUA”) or Aviation Emissions Allowances (“EUAA”). The amendments are intended to preserve the Clearing House’s current approach with respect to settlement of emissions futures contracts and ensure that CSDR will not interfere with deliveries under such contracts.

The definition of “Registry Account” would be amended, to set down the national administrators of registry accounts that may be used, and to confirm that no registry account may be held by or through a CSD as intermediary or account holder. Paragraph 9 of Part A of the Delivery Procedures would be added to provide that no Clearing Member, Customer, Transferor or Transferee to whom or from whom delivery is to be made of an EUA or EUAA may be registered as a CSD under the CSDR. Additionally, Paragraph 9 would provide that pursuant to the definition of “Registry Account”, no EUAs or EUAAs may be settled by or through a CSD. Accordingly, Buyers and Sellers would not be bound by the settlement discipline provisions set out in the CSDR and, accordingly, the Clearing House would not administer buy-ins, cash penalties, cash compensation or other requirements under the CSDR and its delegated regulations in

respect of EUAs or EUAAs. The amendments would provide that Buyers and Sellers acknowledge that neither the Clearing House nor any other Person would offer them the protections related to settlement set forth under CSDR and their sole remedies in the case of settlement failure would be as set forth in the Delivery Procedures. In connection with these changes, ICE Clear Europe would also add new definitions of “CSD” and “CSDR”.

#### Part W: Euro-Denominated Government Bonds Contracts

The Delivery Timetable in Part W of the Delivery Procedures would be amended to provide that Clearing Members who have failed to deliver (including those whose Customer or Transferor has failed to deliver) by 8:00 on the Delivery Day would be required to contact the Clearing House to provide reasons for such failures and confirm any measures taken to facilitate delivery. Such information would notify the Clearing House of such delivery failure and allow it to take any action it deems necessary under the Rules and Procedures.

A new Paragraph 1.9 would be added to Part W which would empower ICE Clear Europe to debit cash penalties imposed by the relevant settlement system from Clearing Members in delivery default and to credit cash penalties to the account of the Clearing Member that is affected by the settlement fail. Although, as described above, it is anticipated that CSDs will administer cash penalties for ICE Clear Europe-cleared trades, the Clearing House will retain this power in case its account structure changes and it would be required to administer penalties under the CSDR.

#### Part Z: Financials and Softs Equity Futures/Options

Part Z of the Delivery Procedures would be amended to add a similar new provision to Paragraph 3.3 which empowers ICE Clear Europe to debit cash penalties

imposed by a relevant settlement system from Clearing Members in delivery default and to credit cash penalties to the account of the Clearing Member that is affected by the settlement fail. Although, as described above, it is anticipated that CSDs will administer cash penalties for ICE Clear Europe-cleared trades, ICE Clear Europe will retain this power in case its account structure changes and it would be required to administer penalties under the CSDR.

Paragraph 5 of Part Z would also be amended to expand the categories of information that would be made available by the Clearing House upon Clearing members' early exercise or expiry of a physically delivered Equity Future or Option Contract, or the execution of a stock contingent trade. Specifically, the amendments would add the following information to the report for early exercise or expiry: (i) cash consideration to be delivered or received, (ii) stock identifying ISIN code to be delivered and (iii) CSD settlement location. For stock contingent trades, the relevant report would be expanded to include certain information about the associated option. These amendments are intended to reflect what is generally included in the report already in practice.

(b) Statutory Basis

ICE Clear Europe believes that the proposed amendments to the Delivery Procedures are consistent with the requirements of Section 17A of the Act<sup>10</sup> and the regulations thereunder applicable to it. In particular, Section 17A(b)(3)(F) of the Act<sup>11</sup>

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

<sup>11</sup> 15 U.S.C. 78q-1(b)(3)(F).



requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of investors and the public interest. The proposed changes to the Delivery Procedures are designed to address and accommodate certain settlement discipline provisions under the CSDR and RTS that will come into effect on 1 February 2022. Principally, the proposed amendments would address potential fines that may be imposed under the CSDR and RTS in connection with settlement failures relating to deliveries of certain securities underlying F&O Contracts, and enhance reporting to the Clearing House in the case of certain settlement failures under such contracts. In particular, the proposed amendments explicitly address the possibility of fines for settlement failures in the context of settlement of government bond futures and options and equity futures and options cleared by the Clearing House, where the underlying is listed or cleared on an EU facility and settlement occurs through an EU settlement facility. The proposed amendments also clarify that the CSDR settlement discipline provisions would not apply to settlement of certain emissions futures contracts. The proposed amendments will thus clarify the role, responsibilities and liabilities of the Clearing House, Clearing Members and designated transferors and transferees in the context of settlement failures that may occur with respect to securities delivered in settlement of specified F&O Contracts. The proposed amendments would not otherwise change the manner in which such contracts are cleared and settled. As a result, in ICE Clear Europe's view, the proposed amendments would be consistent with the prompt and

accurate clearance and settlement of the contracts and the protection of investors, consistent with the requirements of Section 17A(b)(3)(F) of the Act.<sup>12</sup> The proposed amendments are also consistent with the public interest, including as reflected in the policies of the CSDR and RTS. (In ICE Clear Europe’s view, the proposed amendments would not affect the safeguarding of funds or securities in the custody or control of the clearing agency or for which it is responsible, within the meaning of Section 17A(b)(3)(F).<sup>13</sup>)

Rule 17Ad-22(e)(1) requires that a clearing agency “establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, provide for a well-founded, clear, transparent and enforceable legal basis for each aspect of its activities in all relevant jurisdictions.”<sup>14</sup> The proposed amendments are intended to address new requirements under EU law applicable to settlement activity conducted by the Clearing House with EU settlement facilities relating to underlying securities traded or cleared on EU facilities. As such, the proposed amendments support the Clearing House’s legal framework for operation in the EU, consistent with the requirements of Rule 17Ad-22(e)(1).<sup>15</sup>

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<sup>12</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>13</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>14</sup> 17 C.F.R. 240.17Ad-22(e)(1).

<sup>15</sup> 17 C.F.R. 240.17Ad-22(e)(1).

In addition, Rule 17Ad-22(e)(10)<sup>16</sup> provides that “[e]ach covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable [...] establish and maintain transparent written standards that state its obligations with respect to the delivery of physical instruments, and establish and maintain operational practices that identify, monitor and manage the risks associated with such physical deliveries.” As discussed above, the proposed amendments would revise the Delivery Procedures for affected F&O Contracts as a result of the applicable CSDR and RTS settlement discipline provisions, particularly as they relate to fines for settlement failures and provision of additional information regarding settlement failures. The proposed amendments thus clarify the obligations of the Clearing House, Clearing Members and others with respect to settlement failures under such contracts. The proposed amendments also clarify that the CSDR settlement discipline provisions will not affect settlement under certain emissions contracts. The proposed amendments do not otherwise affect the procedures for delivery under such contracts. As a result, ICE Clear Europe believes the amendments are consistent with the requirements of Rule 17Ad-22(e)(10).<sup>17</sup>

(B) Clearing Agency’s Statement on Burden on Competition

ICE Clear Europe does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendments to the Delivery Procedures are

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<sup>16</sup> 17 C.F.R. 240.17Ad-22(e)(10).

<sup>17</sup> 17 C.F.R. 240.17Ad-22(e)(10).

intended to address new settlement discipline procedures applicable to certain contracts as provided in the CSDR and RTS. Although the procedures could result in certain additional costs to Clearing Members, if certain fines were imposed as a result of a settlement failure, those additional costs result from the requirements of relevant EU legislation applicable to settlements in the affected underlying securities which would be applicable to all market participants for the relevant contracts and it would be inappropriate for the Clearing House to bear the cost of late delivery fines, which should reasonably be passed on to the Clearing Members responsible for delivery failures. Furthermore, any such additional costs would result from a failure by the relevant Clearing Member or its customer to comply in a timely manner with its settlement obligations as specified under EU legislation. Accordingly, ICE Clear Europe does not believe the amendments would adversely affect competition among Clearing Members, materially affect the cost of clearing, adversely affect access to clearing for Clearing Members or their customers, or otherwise adversely affect competition in clearing services. Accordingly, ICE Clear Europe does not believe that the amendments would impose any impact or burden on competition that is not appropriate in furtherance of the purpose of the Act.

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

Written comments relating to the proposed amendments have not been solicited or received by ICE Clear Europe. ICE Clear Europe will notify the Commission of any comments received with respect to the proposed rule change.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>18</sup> and paragraph (f) of Rule 19b-4<sup>19</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>) or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ICEEU-2022-002 on the subject line.

#### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

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<sup>18</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>19</sup> 17 CFR 240.19b-4(f).

All submissions should refer to File Number SR-ICEEU-2022-002. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at <https://www.theice.com/notices/Notices.shtml?regulatoryFilings>.

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-2022-002 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>20</sup> 17 CFR 200.30-3(a)(12).