

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-98071; File No. SR-ICEEU-2023-010)

August 7, 2023

Self-Regulatory Organizations; ICE Clear Europe Limited; Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1 and Amendment No. 2, to the ICE Clear Europe Clearing Rules Relating to Non-Default Losses

I. Introduction

On April 21, 2023, 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”),<sup>1</sup> and Rule 19b-4,<sup>2</sup> a proposed rule change to amend the ICE Clear Europe Clearing Rules (the “Rules”) regarding the treatment of non-default losses. On May 2, 2023, ICE Clear Europe filed Amendment No. 1 to the proposed rule change.<sup>3</sup> Notice of the proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on May 10, 2023.<sup>4</sup> On June 21, 2023, the Commission designated a longer period for Commission action on the proposed rule change until August 8, 2023.<sup>5</sup> On June 30, 2023, ICE Clear Europe filed Amendment No. 2 to the proposed rule change.<sup>6</sup> Notice of Amendment No. 2 to the proposed rule change was published for comment in the Federal

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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> Amendment No. 1 amended and restated in its entirety the Form 19b-4 and Exhibit 1A in order to correct the narrative description of the proposed rule change.

<sup>4</sup> Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to the Clearing Rules, Exchange Act Release No. 97429 (May 4, 2023); 88 FR 30187 (May 10, 2023) (SR-ICEEU-2023-010) (“Notice”).

<sup>5</sup> Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to the Clearing Rules; Exchange Act Release No. 97780 (June 21, 2023), 88 FR 41711 (June 27, 2023) (File No. SR-ICEEU-2023-010).

<sup>6</sup> Amendment No. 2 modified Exhibit 5 to clarify when certain funds are considered available to ICE Clear Europe to be applied in accordance with the Rules as proposed to be amended.

Register on July 12, 2023.<sup>7</sup> The Commission did not receive comments regarding the proposed rule change, as modified by Amendment Nos. 1 and 2 (hereafter, the “proposed rule change”). For the reasons discussed below, the Commission is approving the proposed rule change on an accelerated basis.

## II. Description of the Proposed Rule Change

### A. Background

ICE Clear Europe is registered with the Commission as a clearing agency for the purpose of clearing security-based swaps.<sup>8</sup> In its role as a clearing agency for clearing security-based swaps, ICE Clear Europe provides services to its Clearing Members, and Clearing Members in turn transfer assets to ICE Clear Europe. For example, ICE Clear Europe’s Clearing Members transfer to ICE Clear Europe cash and other assets to satisfy their margin and Guaranty Fund requirements. ICE Clear Europe maintains these assets at banks for settlement and custodianship and also invests the assets on behalf of Clearing Members.

Maintaining and investing Clearing Members’ assets exposes those assets to risk. For example, if ICE Clear Europe’s custodial bank were to default, ICE Clear Europe could lose access to, or suffer a decline in value of, assets that it maintains at the bank. Similarly, if an investment counterparty were to default, ICE Clear Europe could lose access to, or suffer a decline in value of, assets invested with that counterparty. These potential losses can be described generally as non-default losses because they do not arise from the default of a Clearing

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<sup>7</sup> Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Amendment No. 2 to Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to the Clearing Rules, Exchange Act Release No. 97851 (July 7, 2023); 88 FR 44418 (July 12, 2023) (SR-ICEEU-2023-010).

<sup>8</sup> Capitalized terms not otherwise defined herein have the meanings assigned to them in ICE Clear Europe’s Clearing Rules.

Member, but rather from the default of another counterparty to which ICE Clear Europe is exposed through its custody and investment of assets.

As explained in more detail below, ICE Clear Europe's Rules currently define and categorize non-default losses. The Rules also specify ICE Clear Europe's responsibility to pay for such losses, set aside financial resources to cover such losses, and allocate non-default losses among Clearing Members in certain situations.

The proposed rule change would amend the Rules to revise this overall framework for non-default losses. As described more fully below, the proposed rule change would: (i) add new types of non-default losses and amend the definitions of the existing types; (ii) define the responsibilities of ICE Clear Europe and of Clearing Members with respect to the different types of non-default losses, including the amount of financial resources put forth by ICE Clear Europe to cover non-default losses; and (iii) make other clarifications related to the treatment of non-default losses.

#### B. Types of Non-Default Losses

The Rules currently divide non-default losses into two categories. First, there are Investment Losses. Investment Losses are losses that ICE Clear Europe incurs in connection with the investment of a Clearing Member's assets representing Original/Initial Margin,<sup>9</sup> Guaranty Fund Contributions,<sup>10</sup> or Permitted Cover<sup>11</sup> otherwise provided to cover margin and Guaranty

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<sup>9</sup> Original Margin means Permitted Cover provided to ICE Clear Europe as collateral for the obligations of a Clearing Member in respect of F&O Contracts. Initial Margin means Permitted Cover provided to ICE Clear Europe as collateral for the obligations of a Clearing Member in respect of CDS Contracts. See ICE Clear Europe Rule 101.

<sup>10</sup> Guaranty Fund Contribution means Permitted Cover transferred by a Clearing Member to the Clearing House as a contribution to the Guaranty Fund. See ICE Clear Europe Rule 101.

<sup>11</sup> Permitted Cover means cash in Eligible Currencies and other assets determined by ICE Clear Europe as permissible for Margin or Guaranty Fund Contributions. See ICE Clear Europe Rule 101.

Fund requirements. Second, there are Non-Default Losses. Non-Default Losses are all losses that (i) are not Investment Losses, (ii) ICE Clear Europe incurs other than by an Event of Default,<sup>12</sup> and (iii) threaten ICE Clear Europe's solvency.

The proposed rule change would add three new types of losses: Custodial Losses, Pledged Collateral Losses, and Title Transfer Collateral Loss.

A Custodial Loss would include a loss that ICE Clear Europe incurs with respect to Custodial Assets in connection with two events: (i) the default, Insolvency, failure, or similar event with respect to a Custodian<sup>13</sup> or Delivery Facility<sup>14</sup> and (ii) the embezzlement, theft, defalcation of, or similar event affecting, Custodial Assets. The proposed rule change would define Custodial Assets as any cash, deposit, holding, and similar property that is or represents a Clearing Member's Original/Initial Margin, Variation Margin, Guaranty Fund Contributions, Permitted Cover, proceeds thereof, Deliverables, or settlement amounts. The definition of Custodial Losses would specifically exclude any Pledged Collateral Losses or Title Transfer Collateral Losses.

While a Custodial Loss would arise from the default of a Custodian or theft of Custodial Assets, a Title Transfer Loss would arise from a reduction in value of collateral held at a Custodian, due to, for example, a change in market value or exchange rates. Specifically, the

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<sup>12</sup> Rule 901(a) lists certain events that constitute an Event of Default with respect to a Clearing Member, such as a Clearing Member being unable, or likely to be unable, to meet its obligations under the Rules or in respect of any of its Contracts.

<sup>13</sup> The term Custodian would mean, among other entities, any bank, custodian, sub-custodian, registry, nominee, agent, depository or settlement system. See ICE Clear Europe Rule 101.

<sup>14</sup> The term Delivery Facility means any Person or facility used for the delivery of Deliverables, such as warehouses, balancing systems, gas networks, central securities depositories, settlement systems, designated systems, and vessels. See ICE Clear Europe Rule 101.

proposed rule change would define a Title Transfer Collateral Loss as losses, liabilities, and damages incurred in connection with a reduction in value of a Clearing Member's Original/Initial Margin, Guaranty Fund Contributions, or other Permitted Cover that: (i) Clearing Members have transferred to ICE Clear Europe other than by way of Pledged Collateral and (ii) ICE Clear Europe has not invested or reinvested.

This category would include, for example, losses related to collateral held at a Custodian, rather than invested. This category would be limited, however, to losses that arise from a reduction in value, such as one resulting from a change in exchange rates. It does not cover losses arising from the default of a Custodian. Those losses, to the extent incurred by ICE Clear Europe, would be Custodial Losses.

Unlike a Title Transfer Loss, a Pledged Collateral Loss would include any losses related to Pledged Collateral, and not just those incurred in connection with a reduction in value or change in exchange rates. The proposed rule change would define a Pledged Collateral Loss as any losses, liabilities, and damages arising out of or relating to holding any Pledged Collateral or the assets in any Pledged Collateral Account. Pledged Collateral is a Clearing Member's margin or Permitted Cover that is provided in a Pledged Collateral Account. With a Pledged Collateral Account, the Clearing Member provides ICE Clear Europe a security interest in the margin rather than transferring title in the margin to ICE Clear Europe outright. Because a Clearing Member never actually transfers such collateral to ICE Clear Europe, the Clearing Member remains responsible for any losses related to such collateral. This is the case both under ICE Clear Europe's current Rule 502(j),<sup>15</sup> and under the proposed rule change.

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<sup>15</sup> ICE Clear Europe Rule 502(j) currently provides that ICE Clear Europe "shall not be liable to any Clearing Member's Customer or other Person for any losses, liabilities, damages, costs, claims, shortfalls or

In addition to establishing these new categories of losses, the proposed rule change would amend the existing definitions of Investment Losses and Non-Default Losses. With respect to the definition of Investment Losses, the proposed rule change would exclude Custodial Losses, Pledged Collateral Losses, and any Title Transfer Collateral Loss. The proposed rule change also would delete language, currently in the definition, that Investment Losses do not include losses incurred as a result of a default of a Custodian. This language is no longer needed because those losses would be Custodial Losses, as discussed above.

With respect to the definition of Non-Default Losses, the proposed rule change similarly would exclude Custodial Losses, Pledged Collateral Losses, and any Title Transfer Collateral Loss (the definition already excludes Investment Losses). The proposed rule change also would exclude any losses that are included in the calculation of the ICE Deposit Rate.<sup>16</sup> Finally, the proposed rule change would delete the caveat that to be a Non-Default Loss, the loss must threaten ICE Clear Europe's solvency.

Taken together, these changes would remove certain losses from the definition of Non-Default Losses, thereby narrowing the definition. For example, the current definition of Non-Default Loss could include the sorts of losses that would be captured in the new term Custodial Losses. This could occur, for example, if a Custodian of ICE Clear Europe defaults, causing ICE Clear Europe to suffer a loss that threatens ICE Clear Europe's solvency. Moving such losses out of the definition of Non-Default Losses and into a new definition of Custodial Losses means, as

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expenses arising out of or relating to the holding of any Pledged Collateral or the assets in any Pledged Collateral Account . . . except to the extent such [losses] result from the gross negligence or wilful misconduct of the Clearing House.” As discussed below, the proposed rule change would delete this provision from Rule 502(j) and move it into new Rule 919(s).

<sup>16</sup> ICE Clear Europe generally pays Clearing Members interest on the cash balances from their margin deposits. It is possible, however, the ICE Clear Europe may charge a negative interest rate in certain circumstances.

discussed below, ICE Clear Europe's financial responsibility for such losses would be limited to certain predetermined financial assets.

At the same time, the proposed rule change would remove the requirement that Non-Default Losses threaten ICE Clear Europe's solvency. Under the proposed rule change, a Non-Default Loss would be any loss not incurred as part of an Event of Default, other than an Investment Loss, Custodial Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss. ICE Clear Europe could seemingly categorize less significant losses as Non-Default Losses because Non-Default Losses would no longer need to threaten ICE Clear Europe's solvency. As discussed below, this means ICE Clear Europe could cover losses using certain predetermined financial assets.

### C. Responsibilities of ICE Clear Europe and Clearing Members for Losses

#### 1. Current Rule 919

Rule 919 defines the responsibilities of ICE Clear Europe and Clearing Members with respect to losses not related to a Clearing Member's default. As discussed above, ICE Clear Europe currently categorizes such losses as either Investment Losses or Non-Default Losses. Accordingly, current Rule 919 applies to Investment Losses and Non-Default Losses only.

Rule 919 only applies where (i) there has been a Non-Default Loss or Investment Loss and (ii) there has not been a Clearing House Event.<sup>17</sup> In that situation, Rule 919 makes ICE Clear Europe responsible for a Non-Default Loss and the first portion of an Investment Loss. With respect to a Non-Default Loss, ICE Clear Europe meets that loss first with any available Loss Assets and satisfies any remaining loss using its own capital or assets. With respect to an

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<sup>17</sup> A Clearing House Event generally occurs if ICE Clear Europe is insolvent or otherwise fails to make a payment when due. See ICE Clear Europe Rule 913.

Investment Loss, ICE Clear Europe meets that loss first with any available Loss Assets and apportions any remaining loss among Clearing Members. Loss Assets are assets of ICE Clear Europe that are set aside to cover Non-Default Losses and Investment Losses.<sup>18</sup>

The apportionment of the remaining Investment Loss works as follows. First, ICE Clear Europe publishes a circular certifying that the Investment Loss is greater than the Loss Assets. Then, ICE Clear Europe determines the amount that each Clearing Member is required to pay to satisfy that loss, which Rule 919 calls a Collateral Offset Obligation. Each Clearing Member's Collateral Offset Obligation is determined by multiplying the amount of the remaining Investment Loss by a fraction, the numerator of which is the total of the Clearing Member's Original/Initial Margin, Guaranty Fund Contributions, and Permitted Cover, and the denominator of which is the total of such amounts among all Clearing Members. Thus, each Clearing Member's Collateral Offset Obligation would be derived from its proportionate share of Original/Initial Margin, Guaranty Fund Contributions, and Permitted Cover. Under current Rule 919(e), a Clearing Member's total Collateral Offset Obligation could not exceed its total Original/Initial Margin, Guaranty Fund Contributions, and Permitted Cover.

## 2. Amended Rule 919

The proposed rule change would maintain this framework for satisfying and apportioning losses but would add the additional categories of losses discussed above. Like the current rule, Rule 919 as amended would only apply where (i) there has been a Non-Default Loss, Investment Loss, Custodial Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss and (ii) there has

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<sup>18</sup> As discussed in the next section, the proposed rule change would eliminate the current set of Loss Assets and set aside two separate amounts to cover losses, one for Investment Losses and one for Custodial Losses.

not been a Clearing House Event. How amended Rule 919 would treat each of these categories of losses is discussed below.

With respect to a Non-Default Loss, ICE Clear Europe would meet that loss first with any available Investment Loss Assets<sup>19</sup> and Custodial Loss Assets.<sup>20</sup> After those sources are exhausted, ICE Clear Europe would satisfy any remaining Non-Default Loss using its own capital or assets. Rule 919 as amended therefore would treat Non-Default Losses the same as it does now, except that ICE Clear Europe could meet the loss first with any Investment Loss Assets and Custodial Loss Assets, instead of just Loss Assets.

With respect to an Investment Loss, ICE Clear Europe would meet that loss first with any available Investment Loss Assets. With respect to a Custodial Loss, ICE Clear Europe would meet that loss first with any available Custodial Loss Assets. After using the Investment Loss Assets or Custodial Loss Assets, ICE Clear Europe would apportion any remaining Investment Loss or Custodial Loss among Clearing Members. ICE Clear Europe would use the same method and formula to apportion this loss among Clearing Members discussed above, with a few additions. Under the proposed rule change, each Clearing Member's share would still be based on its portion of total Original/Initial Margin, Guaranty Fund Contributions, and Permitted Cover, but the proposed rule change would add Variation Margin, Deliverables, and settlement amounts to this formula.<sup>21</sup> A Clearing Member's total Collateral Offset Obligation could not exceed its total Original/Initial Margin, Guaranty Fund Contributions, Permitted Cover,

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<sup>19</sup> As discussed in the next section, Investment Loss Assets would be assets of ICE Clear Europe set aside to cover Investment Losses.

<sup>20</sup> As discussed in the next section, Custodial Loss Assets would be assets of ICE Clear Europe set aside to cover Custodial Losses.

<sup>21</sup> For the explanation of this particular change, see infra Section II.D.2 below.

Variation Margin, Deliverables, and settlement amounts, which is essentially the same as the current rule.

With respect to a Pledged Collateral Loss, a Clearing Member would be responsible for that loss except in certain circumstances. New Rule 919(s) would specify that ICE Clear Europe would not be liable to any Clearing Member, Customer or other Person for any Pledged Collateral Losses and the Clearing Member or Customer would bear the risk of loss. ICE Clear Europe could be liable for a Pledge Collateral Loss, however, if the loss resulted directly from its fraud, bad faith, gross negligence or wilful misconduct. New Rule 919(s) would mirror a provision found in current Rule 502(j).<sup>22</sup> As such, the proposed rule change would delete this provision from Rule 502(j).

With respect to a Title Transfer Collateral Loss, a Clearing Member would be solely responsible for that loss but would be entitled to get back assets equivalent to those it transferred to ICE Clear Europe. New Rule 919(u) would specify that ICE Clear Europe would not be liable to any Clearing Member, Customer or other Person for any Title Transfer Collateral Loss and the Clearing Member or Customer would bear the risk of loss. Where a Clearing Member has delivered collateral via title transfer, the Clearing Member would be entitled to get back an equivalent asset but would not be entitled to any compensation in respect of any losses. As discussed above, a Title Transfer Collateral Loss covers losses resulting from a decline in value of collateral that a Clearing Member has transferred to ICE Clear Europe, but which ICE Clear Europe has not invested, instead keeping that collateral at a Custodian. Thus, it follows that a

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<sup>22</sup> Under current Rule 502(j), ICE Clear Europe is not liable to any Clearing Member's Customer or other Person for any losses, liabilities, damages, costs, claims, shortfalls, or expenses arising out of or relating to the holding of any Pledged Collateral or the assets in any Pledged Collateral Account, except to the extent such Custodial Losses result from the gross negligence or wilful misconduct of ICE Clear Europe.

Clearing Member would bear the risk of a Title Transfer Collateral Loss but would be entitled to the return of its collateral or an equivalent asset.

### 3. Amount of ICE Clear Europe Resources to Cover Losses

Rule 919(p) currently provides that ICE Clear Europe will notify Clearing Members of the amount of Loss Assets by circular from time to time. Loss Assets are assets of ICE Clear Europe that it would use to first satisfy a Non-Default Loss or Investment Loss. Current Rule 919(p) further provides that the amount of Loss Assets is \$90 million.

The proposed rule change would delete the term Loss Assets and replace it with two separate terms: Investment Loss Assets and Custodial Loss Assets. Investment Loss Assets would be assets of ICE Clear Europe set aside to cover Investment Losses, while Custodial Loss Assets would be assets of ICE Clear Europe set aside to cover Custodial Losses.

The proposed rule change also would delete the set amount of such assets from Rule 919(p). Amended Rule 919(p) would no longer specify that Loss Assets are set at a level of \$90 million and amended Rule 919(p) would not specify any particular amount for Investment Loss Assets or Custodial Loss Assets. As under the current rule though, ICE Clear Europe would be required to notify Clearing Members from time to time, by circular, of the total amount of such assets. After issuing such a circular, ICE Clear Europe's liability for any subsequent Investment Loss or Custodial Loss would be limited to the amount of Investment Loss Assets and Custodial Loss Assets, as applicable, set out in the circular.

Despite deleting the set amount from Rule 919(p), ICE Clear Europe announced in the Notice that it is setting the current amount of Investment Loss Assets at \$195 million and

Custodial Loss Assets at \$80 million.<sup>23</sup> Thus, the proposed rule change would increase the amount of Investment Loss Assets and Custodial Loss Assets from the current \$90 million, while maintaining ICE Clear Europe's ability to change this amount by circular notification.

Rule 919(q) sets out further details regarding the assets set aside to cover non-default losses. Currently Rule 919(q) requires that ICE Clear Europe notify Clearing Members of the total amount of Loss Assets applied in connection with any Investment Loss prior to using such assets. Rule 919(q), as amended, would similarly require that ICE Clear Europe notify Clearing Members of the total amount of Investment Loss Assets applied in connection with any Investment Loss or Non-Default Loss prior to using such assets. Likewise, amended Rule 919(q) would require that ICE Clear Europe notify Clearing Members of the total amount of Custodial Loss Assets applied in connection with any Custodial Loss or Non-Default Loss prior to using such assets.

Rule 919(q) also allows ICE Clear Europe to replenish its capital and resources following an Investment Loss or Non-Default Loss. Such recapitalization does not reduce any Clearing Member's Collateral Offset Obligation or the amount of an Investment Loss. Similarly, ICE Clear Europe may replenish its Loss Assets by applying retained earnings, but doing so does not increase its liability beyond the amounts already set aside for Loss Assets (*i.e.*, \$90 million under the current rule). The proposed rule change would generally maintain these provisions, with amendments to incorporate the new defined terms, such as Custodial Losses and Custodial Loss Assets. Moreover, the proposed rule change would require that ICE Clear Europe, after replenishing its resources, issue a new circular pursuant to Rule 919(p) to notify Clearing

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<sup>23</sup> Notice, 88 FR at 30190.

Members of the amount of Investment Loss Assets and Custodial Loss Assets going forward. In such a situation though, ICE Clear Europe would not be obligated to apply the new amounts to any prior Non-Default Loss, Custodial Loss, or Investment Loss.

#### 4. Other Sections of Rule 919

In addition to the provisions discussed above, other sections of Rule 919 affect the responsibilities of ICE Clear Europe and Clearing Members for non-default losses, the apportionment of such losses, and the financial resources to cover such losses. The proposed rule change would amend some of these other sections to be consistent with the overall changes discussed above. This section discusses these amendments in the order in which they appear in Rule 919.

Current Rule 919(f) provides details related to Collateral Offset Obligations. All Collateral Offset Obligations arise on the date specified in the circular published by ICE Clear Europe announcing the obligations. ICE Clear Europe collects the Collateral Offset Obligations using the same process for collecting additional cash Margin or Guaranty Fund Contributions. Moreover, ICE Clear Europe may offset any Collateral Offset Obligation against an obligation of ICE Clear Europe to return or pay any Original/Initial Margin, Guaranty Fund Contributions, or other Permitted Cover to a Clearing Member. The proposed rule change would maintain these provisions largely as they are currently written, but would add Variation Margin, Deliverables, or settlement amounts to Rule 919(f).<sup>24</sup>

Current Rule 919(g) requires that ICE Clear Europe apply Collateral Offset Obligations solely to meet Investment Losses. This provision is based on the current allocation framework

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<sup>24</sup> For the explanation of this particular change, see infra Section II.D.2 below.

explained above, where losses are either Non-Default Losses or Investment Losses, and Clearing Members are only liable for Investment Losses. Given that the proposed rule change would expand the categories of non-default losses, the proposed rule change also would amend this provision. As amended, Rule 919(g) would require that ICE Clear Europe apply Collateral Offset Obligations resulting from Investment Losses solely to meet those Investment Losses and Collateral Offset Obligations resulting from Custodial Losses solely to those Custodial Losses.

Current Rule 919(h) requires that ICE Clear Europe, if it recovers any money or assets that reduce an Investment Loss, pay the same amount to the Clearing Members that met their Collateral Offset Obligations, *pro rata*. In paying such recovered amounts to Clearing Members, ICE Clear Europe is allowed to pay itself back for any expenses it incurred and for any assets, other than Loss Assets, that it applied to meet the Investment Loss. The proposed rule change would largely retain this provision as written, with some edits. First, it would amend Rule 919(h) to apply to Custodial Losses, in addition to Investment Losses. Second, it would limit ICE Clear Europe's obligation to pay any money or assets to those assets that it recovers and that are received by and remain available to ICE Clear Europe. The proposed rule change also would add a more general caveat that the obligation to return amounts to Clearing Members only applies to the extent that such amounts or assets remain available to ICE Clear Europe in cleared funds and have not been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss or Title Transfer Collateral Loss. This particular change would help to recognize the possibility that such amounts could be subject to a loss before ICE Clear Europe is able to distribute them to Clearing Members. Finally, the proposed rule change would add, in new Rule 919(t), an identical provision to Rule 919(h), as amended, except that Rule 919(t) would apply to a Pledged Collateral Loss.

Current Rule 919(i) generally prohibits a Clearing Member from offsetting its Collateral Offset Obligation against other obligations that it owes to ICE Clear Europe. For example, Rule 919(i) provides that a Collateral Offset Obligation does not reduce or otherwise affect the liability of a Clearing Member to make Guaranty Fund Contributions, to replenish any of its Guaranty Fund Contributions, or to pay Assessment Contributions. Clearing Members remain liable for margin, Guaranty Fund Contributions, Assessment Contributions, and amounts they may owe to ICE Clear Europe. On the other hand, ICE Clear Europe must pay or release Margin and Permitted Cover in the usual way, subject to netting to take into account any Collateral Offset Obligation. The proposed rule change would retain Rule 901(i) largely as written, but would add references to Variation Margin, Deliverables, and settlement amounts.<sup>25</sup> For example, the proposed rule change would require that a Clearing Member, despite a Collateral Offset Obligation, continue to pay Variation Margin and make and receive timely delivery of all Deliverables.

Current Rule 919(j) requires that ICE Clear Europe, if it determines that it has provided for Collateral Offset Obligations in excess of that required or actually applied against an Investment Loss, or makes a recovery under Rule 919(h), credit the excess or recovered amount to the Clearing Member's Proprietary Account. The proposed rule change would largely retain this provision as written, with two amendments. First, it would amend Rule 919(j) to apply to Custodial Losses, in addition to Investment Losses. Second, it would add a general caveat that the obligation only applies to the extent that such amounts or assets remain available to ICE Clear Europe in cleared funds and have not been subject to an event similar to a Custodial Loss,

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<sup>25</sup> For the explanation of this particular change, see infra Section II.D.2 below.

Investment Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss. Similar, to amended Rule 919(h) described above, this particular change would help to recognize the possibility that such amounts could be subject to a loss before ICE Clear Europe is able to distribute them to Clearing Members.

Current Rule 919(k) clarifies that a Clearing Member's liability for a Collateral Offset Obligation is independent from ICE Clear Europe's power of assessment under Rule 909.<sup>26</sup> None of the caps on assessment liabilities found in Rule 909 or elsewhere limit any liability for a Collateral Offset Obligation. The proposed rule change would amend this provision to also refer to Rule 914,<sup>27</sup> Rule 915,<sup>28</sup> and Rule 916,<sup>29</sup> in addition to Assessment Contributions under Rule 909. Thus, a Clearing Member's liability for a Collateral Offset Obligation would be independent of any of its obligations under Rule 909, Rule 914, Rule 915, and Rule 916.

Current Rule 919(l) provides a general exception to the definition of Clearing House Event.<sup>30</sup> Specifically, if ICE Clear Europe exercises any of its authority or rights under Rule 919, then such exercise shall not be deemed to be any kind of Clearing House Event. The proposed rule change would retain this provision as written.

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<sup>26</sup> Following the default of a Clearing Member, and if certain other conditions are satisfied, Rule 909 allows ICE Clear Europe to assess Clearing Members for additional amounts as needed to resolve any shortfall resulting from the default.

<sup>27</sup> Following the default of a Clearing Member, and if certain other conditions are satisfied, Rule 914 allows ICE Clear Europe to reduce variation margin payments, as needed to retain cash and resolve any shortfall resulting from the default.

<sup>28</sup> Following the default of a Clearing Member, and if certain other conditions are satisfied, Rule 915 allows ICE Clear Europe to terminate open contracts that offset the defaulting Clearing Member's open contracts.

<sup>29</sup> Following the default of a Clearing Member, and if certain other conditions are satisfied, Rule 916 allows ICE Clear Europe to cease clearing specific categories of contracts.

<sup>30</sup> As discussed above, a Clearing House Event generally occurs if ICE Clear Europe is insolvent or otherwise fails to make a payment when due. See ICE Clear Europe Rule 913.

Current Rule 919(m) allows Clearing Members to make payments of Collateral Offset Obligations pursuant to Part 3 of the Rules and the Finance Procedures. Rule 919(m) further provides that Rule 919 does not prejudice ICE Clear Europe's right to set off any sum owed by a Clearing Member to ICE Clear Europe against sum payable by ICE Clear Europe to the Clearing Member. The proposed rule change would retain this provision as written.

Current Rule 919(n) provides that nothing in Rule 919 obligates ICE Clear Europe to pursue any litigation, claim, or other action against a Clearing Member, Defaulter, Custodian, or any other Person. The proposed rule change would retain this provision as written, with one amendment. It would further specify that ICE Clear Europe is not required to pursue any claim against a Delivery Facility, in addition to a Clearing Member, Defaulter, Custodian, or any other Person. This particular change would account for the new definition of Custodial Losses, which includes losses in connection with the default of a Delivery Facility, as discussed above.

Current Rule 919(o) allows ICE Clear Europe to convert any amounts denominated in one currency to another currency, when making any calculations or determinations under Rule 919. The proposed rule change would retain this provision as written.

Current Rule 919(r) limits ICE Clear Europe's liability for the failure of any payment or securities services provider, including any Custodian or central securities depository. ICE Clear Europe is not liable to any Clearing Member, Customer or other Person for any losses, liabilities, damages, costs, claims, shortfalls or expenses arising out of or relating to any failure, in whole or in part, of any payment or securities services provider, including without limitation any Custodian, central securities depository, or central bank. This disclaimer of liability is subject to Rule 111, which generally limits ICE Clear Europe's liability to Clearing Members, except in certain circumstances. The proposed rule change would make a few edits to this provision. First,

it would specify that the limitation applies to such losses that are incurred by a Clearing Member, Customer, or Person. It also would add a Delivery Facility to the list of entities. Thus, under Rule 919(r), as amended, ICE Clear Europe would not be liable to any Clearing Member, Customer or other Person for any losses, liabilities, damages, costs, claims, shortfalls or expenses incurred by such Clearing Member, Customer, or other Person arising out of or relating to any failure, in whole or in part, of any payment or securities services provider, including without limitation any Custodian, Delivery Facility, central securities depository or central bank.

Finally, Rule 919(w) generally would limit ICE Clear Europe's liability for investments made by Clearing Members and their clients. ICE Clear Europe would have no liability for any loss, liability, cost, claim, shortfall, or expense relating to any investment decision by any Clearing Member, Customer, or any other Person, such as choosing cash in a particular currency to satisfy a margin requirement, or for the results of any such choices or investments. New Rule 919(w) would mirror a provision currently found in Rule 502(j). As such, the proposed rule change would delete this provision from Rule 502(j).

#### D. Other Clarifications Related to Non-Default Losses

In addition to making amendments to the types of non-default losses and the framework for covering and apportioning such losses, the proposed rule change would make other related amendments, as discussed in this section. These amendments would (i) confirm ICE Clear Europe's ability to charge a negative interest rate; (ii) add references to the terms Variation Margin, Deliverables, and settlement amounts; and (iii) clarify that ICE Clear Europe's responsibility to repay certain assets is limited to the extent those assets remain available to ICE Clear Europe.

## 1. Negative Interest Rate

The proposed rule change would clarify that certain provisions of Rule 919 would not limit ICE Clear Europe's ability to charge a negative interest rate. ICE Clear Europe generally pays Clearing Members interest on the cash balances from their margin deposits. It is possible, however, that ICE Clear Europe may charge a negative interest rate in certain circumstances. New Rules 919(s) and 919(u) each would specify that nothing there would limit ICE Clear Europe's ability to charge a negative or reduced ICE Deposit Rate pursuant to the Finance Procedures. Similarly, as discussed above, the revised definition of Non-Default Losses would exclude any losses that are included in the calculation of the ICE Deposit Rate. Finally, new Rule 919(v) would provide that a negative yield, negative interest rate, negative coupon or pre-agreed reduced principal repayment on a non-cash asset being or representing Original/Initial Margin, Guaranty Fund Contributions, Permitted Cover or any Deliverable would not be an Investment Loss or Non-Default Loss and would only be for the account of the relevant Clearing Member and/or its customer.

## 2. Variation Margin, Deliverables, and Settlement Amounts

The proposed rule change would add the terms Variation Margin,<sup>31</sup> Deliverables,<sup>32</sup> and settlement amounts to various definitions and provisions of the Rules. For example, the proposed rule change would include these terms in the new definition of Custodial Assets and add the terms Variation Margin and settlement amounts to the definition of Investment Losses. These amendments would have the effect of treating any losses of Variation Margin, Deliverables, and

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<sup>31</sup> Variation Margin is the cash transferred by Clearing Members to ICE Clear Europe, and vice versa, to reflect the change in the market value of a CDS contract. See ICE Clear Europe Rule 101.

<sup>32</sup> Deliverables include any property, right, interest, register or book entry, commodity, certificate, property entitlement or Investment, which is capable of being delivered pursuant to an F&O Contract or with respect to which settlement amounts are calculated. See ICE Clear Europe Rule 101.

settlement amounts as Custodial Losses or Investment Losses (assuming the losses otherwise meet the definitions of those terms). Thus, losses of Variation Margin, Deliverables, and settlement amounts that meet the definition of Custodial Losses or Investment Losses could be satisfied using Investment Loss Assets and Custodial Loss Assets and, if necessary, apportioned among Clearing Members using the framework discussed above.

The proposed rule change also would add Variation Margin, Deliverables, and settlement amounts to the formula in Rule 919(d). As discussed above, ICE Clear Europe would use this formula to determine each Clearing Member's Collateral Offset Obligation. The Collateral Offset Obligation is effectively each Clearing Member's share of any remaining Investment Loss or Custodial Loss. Adding Variation Margin, Deliverables, and settlement amounts to this formula would therefore take into account the value of these holdings in determining each Clearing Member's share of an Investment Loss or Custodial Loss.

Relatedly, the proposed rule change would add Variation Margin, Deliverables, and settlement amounts to 919(e). As discussed above, Rule 919(e) limits the amount of a Clearing Member's Collateral Offset Obligation. Specifically, the Clearing Member would not be obligated to pay any amount greater than the total of its Original/Initial Margin, Variation Margin, Guaranty Fund Contributions, Permitted Cover, Deliverables and settlement amounts. Thus, this change would include the value of a Clearing Member's Variation Margin, Deliverables, and settlement amounts in capping its overall liability for any Investment Loss or Custodial Loss.

For the sake of consistency with these amendments, the proposed rule change also would add Variation Margin, Deliverables, and settlement amounts to Rules 919(f) and (i). Rule 919(f) generally permits ICE Clear Europe to offset Collateral Offset Obligations owed to it by Clearing

Members against amounts that ICE Clear Europe owes to Clearing Members. Currently, this offset applies to any obligation that ICE Clear Europe may have to return Original/Initial Margin, Guaranty Fund Contributions, or other Permitted Cover. The proposed rule change would add Variation Margin, Deliverables, and settlement amounts.

Relatedly, Rule 919(i) generally prohibits a Clearing Member from offsetting its Collateral Offset Obligation against other obligations that it owes to ICE Clear Europe, as discussed above. The proposed rule change would add references to Variation Margin, Deliverables, and settlement amounts to Rule 919(i). This change would mean Clearing Members would remain liable to pay or transfer Variation Margin and Deliverables to ICE Clear Europe, despite a Collateral Offset Obligation.

3. Amendments to Rules Regarding Assets that Remain Available to ICE Clear Europe

In certain situations, ICE Clear Europe may recover funds on behalf of its Clearing Members. In those circumstances, ICE Clear Europe is generally required to return those funds to its Clearing Members. For example, Rule 301(f) describes how Clearing Members should make payments to ICE Clear Europe. Among other things, Rule 301(f) requires that all Clearing Members make payments by electronic transfer through an Approved Financial Institution.<sup>33</sup> Rule 301(f) further describes what happens when an Approved Financial Institution fails to make a payment to ICE Clear Europe. In that situation, the Clearing Member generally remains liable to ICE Clear Europe, while the Approved Financial Institution remains liable to ICE Clear Europe and the Clearing Member that submitted the payment. If ICE Clear Europe eventually

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<sup>33</sup> ICE Clear Europe Rule 101 defines “Approved Financial Institution” as “a credit institution, bank, trust company or other institution . . . which has been designated as an approved financial institution by the Clearing House for purposes of making and receiving cash transfers to and from the Clearing House. . . .”

receives money to make up the failed payment and certain other conditions are met, then Rule 301 requires ICE Clear Europe to pay back affected Clearing Members the money, net of costs and expenses, *pro rata*.

The proposed rule change would revise Rule 301(f) with respect to this last part, ICE Clear Europe's obligation to pay back to the Clearing Member the amount of money it recovered. Specifically, the proposed rule change would add a caveat that limits the obligation to return the funds to the Clearing Member. Under the proposed rule change, ICE Clear Europe would only be obligated to return the money to the extent such assets are received by and remain available to ICE Clear Europe in cleared funds, not having been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss or Title Transfer Collateral Loss.

The proposed rule change would add this same or a similar caveat to Rules 908, 913, 914, 916, 919, 1102, and 1103, each as described further below.

Rule 908(b) explains the order in which ICE Clear Europe may apply assets to meet the obligations, liabilities, and any shortfall of a defaulting Clearing Member that was an F&O Clearing Member or a Sponsored Principal that was authorised to clear F&O (but was not a CDS Clearing Member, an FX Clearing Member, nor authorised to clear CDS or FX). In such a circumstance, Rule 908(b)(iii) provides that any claims under any default insurance come third in the order of priority, after the defaulting Clearing Member's resources and ICE Clear Europe's own contribution. Currently, Rule 908(b)(iii) makes available any claims under any default insurance policies (including the proceeds of any claim) of which ICE Clear Europe is the beneficiary that have been received by ICE Clear Europe as a result of the Event of Default. Under the proposed rule change, Rule 908(b)(iii) would make available any claims under any default insurance policies (including the proceeds of any claim) of which ICE Clear Europe is

the beneficiary that have been received by and remain available to ICE Clear Europe in Cleared Funds, not having been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss. The proposed rule change would make an identical amendment to Rules 908(c),<sup>34</sup> 908(d),<sup>35</sup> and 908(g).<sup>36</sup>

Rule 913 sets out the definitions that are used in Rules 914 through 919. These rules generally describe steps ICE Clear Europe could take to offset losses it may incur as a result of a Clearing Member's default or otherwise not as a result of a default (in the case of Rule 919, as discussed above). For example, as discussed above, Rule 914 authorizes ICE Clear Europe, in certain circumstances, to distribute losses to Clearing Members by implementing a haircut to variation margin payments. Rule 913 includes a formula for determining the losses incurred by ICE Clear Europe. This formula takes into account, among other things, ICE Clear Europe's Available Non-Defaulter Resources. Currently, that term as defined means the cash proceeds or equivalent cash value (as calculated by ICE Clear Europe) of the Guaranty Fund Contributions, Clearing House Contributions, Assessment Contributions, and any claims under any default insurance policies which are available to be applied pursuant to Rule 908, following a particular Event of Default. The definition also stipulates that Assessment Contributions and any claims

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<sup>34</sup> Like Rule 908(b), Rule 908(c) explains the order in which ICE Clear Europe may apply assets to meet a defaulting Clearing Member's obligations, liabilities, and shortfall. Rule 908(c) specifically applies to a defaulting Clearing Member that is a CDS Clearing Member or a Sponsored Principal authorized to clear CDS (but not an F&O Clearing Member, FX Clearing Member, nor authorized to clear F&O or FX).

<sup>35</sup> Like Rule 908(b), Rule 908(d) explains the order in which ICE Clear Europe may apply assets to meet a defaulting Clearing Member's obligations, liabilities, and shortfall. Rule 908(d) specifically applies to a defaulting Clearing Member that is a FX Clearing Member or a Sponsored Principal authorized to clear FX (but not an F&O Clearing Member, CDS Clearing Member, nor authorized to clear F&O or CDS).

<sup>36</sup> Like Rule 908(b), Rule 908(g) explains the order in which ICE Clear Europe may apply assets to meet a defaulting Clearing Member's obligations, liabilities, and shortfall. Rule 908(g) specifically applies to a defaulting Clearing Member that falls in multiple membership categories at ICE Clear Europe, such a CDS Clearing Member that is also an F&O Clearing Member.

under any default insurance policies only count as Available Non-Defaulter Resources if they have been received by the ICE Clear Europe in cleared funds at the time it calculates its resources. The proposed rule change would modify this stipulation, such that Assessment Contributions and any claims under any default insurance policies would only count if they have been received by and remain available to ICE Clear Europe, not having been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss.

Following the default of a Clearing Member, and if certain other conditions are satisfied, Rule 914 allows ICE Clear Europe to reduce variation margin payments as needed to retain cash and resolve any shortfall resulting from the default. This process of reducing variation margin payments is also known as haircutting. If the requirements of Rule 914 are met, ICE Clear Europe can use such haircuts to distribute losses resulting from a Clearing Member's default to non-defaulting Clearing Members. Rule 914(j) generally requires that ICE Clear Europe distribute to Clearing Members certain funds that would increase ICE Clear Europe's resources and therefore reduce the amount of loss that it is sharing via the haircuts. These funds could include, for example, payments made to ICE Clear Europe by the defaulting Clearing Member, by a non-defaulting Clearing Member, or an insurer. Under the proposed rule change, ICE Clear Europe would be obligated to distribute these funds only to the extent they remain available to ICE Clear Europe in cleared funds, not having been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss.

Following the default of a Clearing Member, and if certain other conditions are satisfied, Rule 916 allows ICE Clear Europe to cease clearing specific categories of contracts. If the requirements of Rule 916 are met, ICE Clear Europe can terminate the contracts. ICE Clear

Europe then calculates an amount owed to each Clearing Member with respect to the terminated contracts (or which each Clearing Member owes to ICE Clear Europe, in the case of a negative amount). Rule 916(n) generally requires that ICE Clear Europe distribute to Clearing Members certain funds that would increase this amount paid in respect of a contract termination (or decrease the amount owed by a Clearing Member). These funds could include, for example, payments made to ICE Clear Europe by the defaulting Clearing Member, by a non-defaulting Clearing Member, or an insurer. Under the proposed rule change, ICE Clear Europe would be obligated to distribute these funds only to the extent they remain available to ICE Clear Europe in cleared funds, not having been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss.

The proposed rule change would add the same caveat to rules 919(b), 919(h), 919(j), and 919(t), as discussed above.<sup>37</sup>

Rule 1102 describes generally Clearing Members' obligations to contribute to ICE Clear Europe's Guaranty Funds, and how ICE Clear Europe will collect, use, and in some circumstances, return the contributions. Rule 1102(k) explains that if (i) ICE Clear Europe has used the non-defaulting Clearing Members' Guaranty Fund Contributions, ICE Clear Europe's own contribution to the Guaranty Fund, or insurance proceeds, and (ii) subsequently has received payments or other monetary amounts from the defaulting Clearing Member, then (iii) ICE Clear Europe must repay the non-defaulting Clearing Members, retain assets to replenish its own contribution to the Guaranty Fund, or repay its insurers, in the reverse order to that specified in Rule 908. Rule 1102(k) sets out a number of conditions on such repayments. The proposed rule

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<sup>37</sup> For a discussion of Rule 919, see supra Section II.C above.

change would add a new condition that ICE Clear Europe has not suffered any loss equivalent to an Investment Loss, Custodial Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss with respect to the amounts received from the defaulting Clearing Member.

Rule 1103(e) applies to ICE Clear Europe's use of default insurance policies. The rule explains how ICE Clear Europe will apply the proceeds of any claim under a default insurance policy. The rule also explains certain limitations and conditions to ICE Clear Europe's use of default insurance, such as the policies being limited to a certain set of contracts cleared by ICE Clear Europe. The proposed rule change would add another condition, that any amounts that ICE Clear Europe receives from an insurer may be subject to losses similar to an Investment Loss, Custodial Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss prior to ICE Clear Europe being able to use the proceeds to offset losses.

Rule 1103(e) also explains how ICE Clear Europe would apply the proceeds of a claim under default insurance among multiple defaulting Clearing Members. The proposed rule change would not alter this explanation, but it would add an additional caveat. ICE Clear Europe would only apply the proceeds of a claim under default insurance among multiple defaulting Clearing Members to the extent that the proceeds remain available to ICE Clear Europe in cleared funds, not having been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss.

### 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.<sup>38</sup> For the reasons discussed below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(D) of the Act,<sup>39</sup> Section 17A(b)(3)(F) of the Act,<sup>40</sup> and Rule 17Ad-22(e)(17)(i) thereunder.<sup>41</sup>

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

Section 17A(b)(3)(D) of the Act requires that the rules of ICE Clear Europe provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.<sup>42</sup> Based on its review of the record, and for the reasons discussed below, the Commission believes the proposed rule change is consistent with the equitable allocation of reasonable dues, fees, and other charges among ICE Clear Europe's Clearing Members.

As explained above, the proposed rule change would add three new categories of non-default losses. ICE Clear Europe would continue to be responsible for Non-Default Losses, and it first would pay for Investment Losses and Custodial Losses out of the assets it has set aside for that purpose. ICE Clear Europe would apportion any remaining Investment Losses and Custodial Losses among Clearing Members using the same method as it does now, with the additional consideration of Variation Margin, Deliverables, and settlement amounts. ICE Clear Europe would allocate losses based on each Clearing Member's share of total Original/Initial Margin, Guaranty Fund Contributions, Permitted Cover, Variation Margin, Deliverables, and settlement amounts. Moreover, each Clearing Member's liability could not exceed the total of its

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<sup>38</sup> 15 U.S.C. 78s(b)(2)(C).

<sup>39</sup> 15 U.S.C. 78q-1(b)(3)(D).

<sup>40</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>41</sup> 17 CFR 240.17Ad-22(e)(17)(i).

<sup>42</sup> 15 U.S.C. 78q-1(b)(3)(D).

Original/Initial Margin, Guaranty Fund Contributions, Permitted Cover, Variation Margin, Deliverables, and settlement amounts.

The Commission believes this allocation of losses is equitable because it would distribute Investment Losses and Custodial Losses based on each Clearing Member's share of the assets that could potentially be depleted by such losses. As discussed above, the definition of Investment Losses would cover certain losses to Original/Initial Margin, Guaranty Fund Contributions, Permitted Cover, Variation Margin, and settlement amounts. The definition of Custodial Losses would move over certain losses to Custodial Assets, which would be defined to include assets being or representing Original/Initial Margin, Variation Margin, Guaranty Fund Contributions or Permitted Cover, or the proceeds of any of the foregoing, Deliverables or settlement amounts. Finally, each Clearing Member's liability could not exceed its total amount with respect to these assets. Thus, the Commission believes this should help to ensure that Clearing Members only contribute to the recovery from such losses in amounts commensurate with their Original/Initial Margin, Guaranty Fund Contributions, Permitted Cover, Variation Margin, Deliverables, and settlement amounts in the first instance.

The Commission also believes that it is consistent with 17A(b)(3)(D) of the Act<sup>43</sup> to make Clearing Members responsible for any Pledged Collateral Losses and a Title Transfer Collateral Loss as discussed above. Specifically, because a Pledged Collateral Loss relates to Pledged Collateral, the Commission believes it is consistent with 17A(b)(3)(D) of the Act<sup>44</sup> that a Clearing Member bear the risk of such loss and that ICE Clear Europe be liable only because of its fraud, bad faith, gross negligence, or other willful misconduct. The Commission believes this

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<sup>43</sup> 15 U.S.C. 78q-1(b)(3)(D).

<sup>44</sup> 15 U.S.C. 78q-1(b)(3)(D).

because, as discussed above, ICE Clear Europe only maintains a security interest in such collateral. Moreover, as discussed above, the new provision in Rule 919 regarding Pledged Collateral is essentially the same as an existing provision in Rule 502(j).

Because a Title Transfer Collateral Loss would result from a reduction in value or change of exchange rate of Original/Initial Margin, Guaranty Fund Contributions or Permitted Cover, the Commission believes it is consistent with 17A(b)(3)(D) of the Act<sup>45</sup> to allocate these losses to Clearing Members. Clearing Members are responsible for transferring assets to ICE Clear Europe to satisfy their margin and Guaranty Fund obligations. Clearing Members incur these obligations because of the transactions they submit for clearing at ICE Clear Europe. A decline in value of collateral that a Clearing Member transfers to ICE Clear Europe to satisfy its margin obligation would necessarily require the Clearing Member to transfer additional collateral to make up for that decline in value. Thus, allocating a Title Transfer Collateral Loss to a Clearing Member follows from ICE Clear Europe's overall risk management framework.

The Commission further believes the proposed rule change would not substantially alter ICE Clear Europe's responsibility for losses. ICE Clear Europe would remain responsible for Non-Default Losses. The proposed rule change would remove the caveat that a Non-Default Loss must threaten ICE Clear Europe's insolvency. This change would expand the losses for which ICE Clear Europe would be liable as Non-Default Losses, while also giving ICE Clear Europe access to financial resources to pay for those losses. As discussed above, ICE Clear Europe could pay for a Non-Default Loss first out of Investment Loss Assets and Custodial Loss Assets.

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<sup>45</sup> 15 U.S.C. 78q-1(b)(3)(D).

While that would be the case, ICE Clear Europe also would set aside more assets to cover these losses than it does currently. Currently, ICE Clear Europe has set aside \$90 million to cover a Non-Default Loss and / or an Investment Loss. Under the proposed rule change, \$195 million would be available for an Investment Loss and \$80 million would be available for a Custodial Loss. As under the current rule, ICE Clear Europe could use these amounts to cover a Non-Default Loss as well.

Finally, as discussed above in Section II.D.3, the proposed rule change would amend various ICE Clear Europe rules that require ICE Clear Europe to return money to Clearing Members in certain circumstances. As amended, these rules generally would require that ICE Clear Europe only return money to the extent ICE Clear Europe has received the assets and they remain available to ICE Clear Europe in cleared funds, not having been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss or Title Transfer Collateral Loss. The Commission believes adding these caveats to the existing rule provisions would help to recognize the possibility that such assets could be subject to a loss before ICE Clear Europe is able to distribute them to Clearing Members. In that situation, the Commission believes not requiring ICE Clear Europe to return the assets to Clearing Members is consistent with 17A(b)(3)(D) of the Act<sup>46</sup> given that ICE Clear Europe would no longer possess such assets.

On balance then, the Commission believes the proposed rule change would establish an equitable allocation of losses not relating to the default of a Clearing Member as between ICE Clear Europe and its Clearing Members and among ICE Clear Europe's Clearing Members.

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<sup>46</sup> 15 U.S.C. 78q-1(b)(3)(D).

Therefore, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(D) of the Act.<sup>47</sup>

B. 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.<sup>48</sup> Based on its review of the record, and for the reasons discussed below, the Commission believes the proposed rule change is consistent with the promotion of the prompt and accurate clearance and settlement of securities transactions.

The Commission believes that the proposed rule change would help enhance ICE Clear Europe's ability to manage non-default losses and continue operating as a going concern if it incurs losses not relating to a Clearing Member's default. Specifically, the proposed rule change would maintain ICE Clear Europe's existing framework for covering and sharing in such losses, while expanding the framework to cover new types of losses. The proposed rule change would add new categories of non-default losses, namely Custodial Losses, Pledged Collateral Losses, and a Title Transfer Collateral Loss. At the same time, the proposed rule change would cover losses to additional categories of assets, specifically Variation Margin, Deliverables, and settlement amounts.

The proposed rule change would also limit ICE Clear Europe's liability for Custodial Losses, Investment Losses, Pledged Collateral Losses, and a Title Transfer Collateral Loss. For Custodial Losses and Investment Losses, the proposed rule change would limit ICE Clear

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<sup>47</sup> 15 U.S.C. 78q-1(b)(3)(D).

<sup>48</sup> 15 U.S.C. 78q-1(b)(3)(F).

Europe's liability to the assets it has set aside, with any remaining losses apportioned among Clearing Members. ICE Clear Europe generally would have no liability for any Pledged Collateral Losses and a Title Transfer Collateral Loss except in the limited circumstances discussed above. Similarly, under new Rule 919(w), ICE Clear Europe generally would have no liability for investment decisions made by Clearing Members and their clients.

Relatedly, the proposed rule change would increase the amount of ICE Clear Europe's resources available to cover Non-Default Losses, Custodial Losses, and Investment Losses, and enhance ICE Clear Europe's ability to replenish those resources. Under the proposed rule change, ICE Clear Europe would set aside \$90 million to cover Custodial Losses and \$195 million to cover Investment Losses. This is an increase from the \$80 million set aside currently to cover Investment Losses. As noted above, ICE Clear Europe could also use these amounts to cover Non-Default Losses. Moreover, Rule 919(q) would allow ICE Clear Europe to replenish its capital and resources following an Investment Loss, Non-Default Loss, or Custodial Loss.

Finally, the Commission believes that various aspects of the proposed rule change would help to ensure that Non-Default Losses, Investment Losses, and Custodial Losses would not affect ICE Clear Europe's ability to collect other amounts owed by Clearing Members. For example, under Rule 919(i), Clearing Members would continue to be liable for Guaranty Fund Contributions, Assessment Contributions, and margin, including Variation Margin. ICE Clear Europe also would continue to be able to charge its Clearing Members a negative interest rate, as needed. The Commission believes that these provisions would help ensure that ICE Clear Europe's treatment and allocation of losses not arising from the default of a Clearing Member do not hinder its ability to enforce Clearing Members' other financial obligations, including those related to the default of a Clearing Member.

Taken together, the Commission believes that the various components of the proposed rule change discussed above would enhance ICE Clear Europe's ability to cover and allocate losses not related to a Clearing Member's default. The Commission believes that doing so would help ICE Clear Europe to avoid disruptions to its operations, which could occur if non-default losses are not fully covered or allocated. The Commission therefore believes the proposed rule change would be consistent with the promotion of the prompt and accurate clearance and settlement of securities transactions by helping ensure that ICE Clear Europe can continue to clear and settle securities transactions even when faced with non-default losses.

Therefore, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act.<sup>49</sup>

C. Consistency with Rule 17Ad-22(e)(17)(i) under the Act

Rule 17Ad-22(e)(17)(i) requires that ICE Clear Europe establish, implement, maintain, and enforce written policies and procedures reasonably designed to manage its operational risks by identifying plausible sources of operational risk, both internal and external, and mitigating their impact through the use of appropriate systems, policies, procedures, and controls.<sup>50</sup>

The Commission believes that non-default losses, meaning losses that do not arise from the default of a Clearing Member, are a plausible source of operational risk at ICE Clear Europe. For example, a theft of ICE Clear Europe's assets could threaten its ability to operate. The Commission therefore believes that by adding new categories of non-default losses and covering losses to additional categories of assets, as discussed above, the proposed rule change would identify plausible sources of operational risk.

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<sup>49</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>50</sup> 17 CFR 240.17Ad-22(e)(17)(i).

The Commission further believes that the proposed rule change would mitigate the impact of non-default losses by establishing appropriate procedures for categorizing, covering, and allocating such losses. For example, as discussed above, the proposed rule change would amend the existing framework for allocating non-default losses to cover Custodial Losses. The proposed rule change also would increase the amount of ICE Clear Europe's resources available to cover Non-Default Losses, Custodial Losses, and Investment Losses, and enhance ICE Clear Europe's ability to replenish those resources. Finally, as discussed above, the proposed rule change help ensure that ICE Clear Europe can enforce Clearing Members' other financial obligations, including those related to the default of a Clearing Member, despite any non-default losses.

Taken together, the Commission believes the proposed rule change would identify non-default losses as a plausible source of operational risk and mitigate the impact of such losses through the use of appropriate procedures.

Therefore, the Commission finds that the proposed rule change is consistent with Rule 17Ad-22(e)(17)(i).<sup>51</sup>

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<sup>51</sup> 17 CFR 240.17Ad-22(e)(17)(i).

IV. Accelerated Approval of the Proposed Rule Change as Modified by Amendment Nos. 1 and 2

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>52</sup> to approve the proposed rule change, as modified by Amendment Nos. 1 and 2, prior to the 30th day after the date of publication of Amendment No. 2 in the Federal Register. As discussed above, Amendment No. 1 amended and restated in its entirety the Form 19b-4 and Exhibit 1A in order to correct the narrative description of the proposed rule change. Amendment No. 2 modified the Exhibit 5 to clarify when certain funds are considered available to ICE Clear Europe to be applied in accordance with the Rules as proposed to be amended. By so doing, Amendment Nos. 1 and 2 provide for a more clear and comprehensive understanding of the proposed changes.

For the reasons discussed above, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with the Act and the applicable rules thereunder. Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.<sup>53</sup>

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<sup>52</sup> 15 U.S.C. 78s(b)(2).

<sup>53</sup> 15 U.S.C. 78s(b)(2).

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change, as modified by Amendment No. 1 and Amendment No. 2, is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(D) of the Act,<sup>54</sup> Section 17A(b)(3)(F) of the Act,<sup>55</sup> and Rule 17Ad-22(e)(17)(i) thereunder.<sup>56</sup>

IT IS THEREFORE ORDERED pursuant to Section 19(b)(2) of the Act<sup>57</sup> that the proposed rule change, as modified by Amendment Nos. 1 and 2 (SR-ICEEU-2023-010), be, and hereby is, approved on an accelerated basis.<sup>58</sup>

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>59</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>54</sup> 15 U.S.C. 78q-1(b)(3)(D).

<sup>55</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>56</sup> 17 CFR 240.17Ad-22(e)(17)(i).

<sup>57</sup> 15 U.S.C. 78s(b)(2).

<sup>58</sup> 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).

<sup>59</sup> 17 CFR 200.30-3(a)(12).