

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88253; File No. SR-ICC-2019-010)

February 20, 2020

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change, as Modified by Partial Amendment No. 1 and Partial Amendment No. 2, Relating to Amendments to the ICC Clearing Rules to Address Non-Default Losses, on an Accelerated Basis

I. INTRODUCTION

On August 8, 2019, ICE Clear Credit LLC (“ICC”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change to amend ICC’s Clearing Rules (the “Rules”)³ to address treatment of losses not related to a Clearing Participant default. The proposed rule change was published for comment in the Federal Register on August 28, 2019.⁴ The Commission received comments regarding the proposed rule change.⁵

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

⁴ Self-Regulatory Organizations; ICE Clear Credit LLC; Proposed Rule Change, Security-Based Swap Submission, or Advance Notice Relating to the ICC Clearing Rules; Exchange Act Release No. 86729 (Aug. 22, 2019); 84 Fed. Reg. 45191 (Aug. 28, 2019) (SR-ICC-2019-010) (“Notice”).

⁵ Comments are available at <https://www.sec.gov/comments/sr-icc-2019-010/sricc2019010.htm>.

On October 4, 2019, the Commission designated a longer period of time for Commission action on the proposed rule change until November 26, 2019.⁶ On October 7, 2019, ICC filed a partial amendment (“Partial Amendment No. 1”) to modify the proposed rule change.⁷ On November 25, 2019, the Commission published notice of Partial Amendment No. 1, solicited comments from interested persons on the proposed rule change as modified by Partial Amendment No. 1, and instituted proceedings under Section 19(b)(2)(B) of the Act⁸ to determine whether to approve or disapprove the proposed rule change as modified by Partial Amendment No. 1.⁹ On January 24, 2020, ICC filed Partial Amendment No. 2 to the proposed rule change.¹⁰ Notice of Partial

⁶ Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change Relating to Amendments to the ICC Clearing Rules To Address Non-Default Losses; Exchange Act Release No. 87225 (Oct. 4, 2019); 84 Fed. Reg. 54712 (Oct. 10, 2019) (SR-ICC-2019-010).

⁷ In Partial Amendment No. 1 to the proposed rule change, ICC provided additional details and analyses surrounding the proposed rule change in the form of a confidential Exhibit 3.

⁸ 15 U.S.C. 78s(b)(2)(B).

⁹ Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change, as Modified by Partial Amendment No. 1, Relating to Amendments to the ICC Clearing Rules To Address Non-Default Losses; Exchange Act Release No. 87622 (Nov. 25, 2019); 84 Fed. Reg. 66041 (Dec. 2, 2019) (SR-ICC-2019-010).

¹⁰ In Partial Amendment No. 2 to the proposed rule change, ICC modified the initial filing to (1) differentiate the treatment of investment losses in the Client Origin Account from the treatment of investment losses in the House Origin Account and (2) limit the allocation of investment losses to those Clearing Participants that have instructed, or are deemed to have instructed, ICC to invest the cash Initial Margin in the Client Origin Account.

Amendment No. 2 was published in the Federal Register on February 3, 2020, and in that notice the Commission requested comments on the proposed rule change, as modified by Partial Amendments No. 1 and No. 2.¹¹ The Commission did not receive any comments in response to the Notice of Partial of Amendment No. 2.

For the reasons discussed below, the Commission is approving the proposed rule change, as modified by Partial Amendment No. 1 and Partial Amendment No. 2 (hereinafter, “proposed rule change”) on an accelerated basis.

II. BACKGROUND

The proposed rule change is principally designed to address and manage the risks posed to ICC by potential non-default loss events, including investment losses, custodial losses with respect to margin and General Guaranty Fund contributions, and other losses resulting from general business risk, operational risk, or other non-default scenarios, to ensure that ICC has a mechanism to fully allocate any such losses and thereby enhance its ability to continue orderly clearing operations or otherwise maintain its viability as a going concern in the event that such losses are realized.¹² To that end, the proposed rule change would define three exclusive categories of losses not related to a Clearing Participant default: (i) Investment Losses, (ii) Custodial Losses, and (iii) Non-Default Losses. In addition, with respect to the treatment of such losses, the proposed rule change would: (i) define the resources of ICC that ICC would apply to cover each such category of losses; (ii) assign responsibility to Clearing Participants, in certain

¹¹ Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Partial Amendment No. 2 to Proposed Rule Change Relating to Amendments to the ICC Clearing Rules to Address Non-Default Losses; Exchange Act Release No. 88064 (Jan. 28, 2020); 85 Fed. Reg. 6007 (Feb. 3, 2020).

¹² See Notice, 84 Fed. Reg. at 45193.

circumstances, to make contributions with respect to Investment Losses and Custodial Losses (but not Non-Default Losses); and (iii) in the event that ICC recovers funds related to Investment Losses or Custodial Losses, address the treatment of recoveries by ICC with respect to such losses. The proposed rule change would also make additional changes related to all three categories of losses, including changes to take into account the effect of the proposed rule change on other ICC rules.

A. Loss Categories

The proposed rule change would add to Rule 102 new definitions for “Investment Losses” and “Non-Default Losses” and revise the definition of “Custodial Losses.”

Under the proposed rule change, Investment Losses would be defined as losses incurred or suffered by ICC in connection with the default of the issuer of any investment of Margin or General Guaranty Fund assets by ICC, or the default of the counterparty to any repurchase, reverse repurchase contract, or similar transaction used to invest or reinvest such Margin or General Guaranty Fund assets. The proposed rule change would also include as an Investment Loss change in value of investments due to market movements, but would exclude a Custodial Loss, a negative yield or interest rate on an investment, and a loss on a security or non-cash asset posted by a Clearing Participant as a Margin or Guaranty Fund contribution.

Currently, Rule 406(g) defines Custodial Losses as those arising out of or relating to the holding, investment, or use of the Client Omnibus Margin Account or assets credited thereto from time to time, and specifies that ICC shall not be liable for any such losses except to the extent that they result from the gross negligence or willful misconduct of ICC, or from the investment of such assets by ICC in its discretion within the meaning of CFTC Rule 1.29(b). The proposed rule change would move the definition

of Custodial Losses to Section 102 of ICC's Rules (Definitions) and revise it to mean losses of Margin or General Guaranty Fund assets (including declines in the value thereof) as a result of (i) the insolvency or failure of a Custodian or (ii) the embezzlement or theft of such assets by any person (other than ICC or its employees or representatives). The proposed rule change would define a Custodian for this purpose as a bank or trust company, central bank, central securities depository or other third party settlement system used by ICC for the deposit, holding, custody or transfer of cash or securities. Additionally, because the proposed rule change would create a stand-alone definition of Investment Losses, as described above, the revised definition of Custodial Losses would specify that Custodial Losses would not include Investment Losses.

The proposed rule change would define Non-Default Losses to include losses incurred or suffered by ICC that are neither Investment Losses nor Custodial Losses and arise in connection with an event other than a Clearing Participant's default. The definition thus would capture losses from general business or operational risk that do not constitute Custodial Losses or Investment Losses.

B. Treatment of Losses

i. ICC Resources

The proposed rule change would require that, with respect to an Investment Loss or Custodial Loss, ICC would first apply any available Investment Loss Resources or Custodial Loss Resources, as applicable. ICC would determine the amount of such resources based on its assessment of its potential exposure to investment losses under its investment policies and procedures, and the ICC Board would periodically conduct a

risk-based assessment of the appropriate level of Investment Loss Resources.¹³ As an initial measure of its potential exposure to investment losses, ICC has taken into account components of the European Union capital requirements applicable to central counterparties (which are not directly applicable to ICC), in particular the capital requirements for credit, counterparty and market risks and operational and legal risks.¹⁴ Based on its initial assessment of ICC's potential Investment Losses utilizing this methodology, ICC determined that its potential exposure to Investment Losses is \$20 million, and therefore the proposed rule change would initially define Investment Loss Resources as \$20 million of ICC's own assets designated by ICC as available to be applied to Investment Losses. Similarly, based on ICC's initial assessment of its potential Custodial Losses utilizing this methodology, ICC determined that its potential exposure to Custodial Losses is \$32 million, and therefore the proposed rule change would initially define Custodial Loss Resources as \$32 million of ICC's own assets designated by ICC as available to be applied to Custodial Losses. In either case, as noted, the ICC Board could modify the amount from time to time, and such determination would be risk-based in light of ICC's potential exposure to such losses.

Unlike Investment Losses and Custodial Losses, the proposed rule change would not define or place a cap on the specific ICC resources available to satisfy Non-Default Losses. Rather, proposed Rule 811(b) would require that Non-Default Losses, whatever the amount, be met from available ICC capital and other ICC assets (including available retained earnings, Investment Loss Resources, and Custodial Loss Resources). Thus, the

¹³ See Notice, 84 Fed. Reg. at 45194.

¹⁴ See id.

proposed rule change would make ICC solely responsible for Non-Default Losses and would not allocate Non-Default Losses to Participants. Similarly, proposed Rule 811(b) would prohibit ICC from covering Non-Default Losses with ICC contributions to default resources or with Clearing Participant contributions to Margin, General Guaranty Fund, or Assessments.

ii. Responsibility of Clearing Participants

Unlike Non-Default Losses, for which ICC would be solely responsible, in the event Investment Loss Resources are insufficient to cover an Investment Loss (an “Investment Loss Shortfall”), ICC would have the right, under proposed Rule 811(d), to allocate the Investment Loss Shortfall to Clearing Participants (including any Defaulting Participants). In that event, the Clearing Participants would be obligated to make a contribution (an “Investment Loss Contribution”), based on their pro rata share of the Investment Loss Shortfall, determined based on the methodology described below. Investment Loss Contributions could only be applied to Investment Loss Shortfalls (and not Custodial Loss Shortfalls). Under proposed Rule 811(e), a Clearing Participant’s pro rata Investment Loss Contribution in respect of any event giving rise to an Investment Loss could not exceed its aggregate Initial Margin (both house and customer) and General Guaranty Fund contributions (its “Participant IM/GF Contribution”).

The method for determining a Clearing Participant’s Investment Loss Contribution would depend on whether the Investment Loss occurred with respect to the House Origin Account or Client Origin Account. In the case of an Investment Loss in the House Origin Account, a Clearing Participant’s Investment Loss Contribution would be based on the proportion of its Participant IM/GF Contribution as compared to the aggregate Participant IM/GF Contributions for all Participants. In the case of an

Investment Loss in the Client Origin Account, only those Clearing Participants that are “Investing Participants” (as defined below) would be obligated to make an Investment Loss Contribution. Specifically, each Investing Participant would be obligated to pay an Investment Loss Contribution equal to its pro rata share of the Investment Loss Shortfall, determined based on the proportion of its Participant IM/GF Contribution to the aggregate Participant IM/GF Contributions of all Investing Participants, rather than the aggregate Participant IM/GF Contributions of all Clearing Participants (as would be the case in the House Origin Account). In the event of simultaneous Investment Losses for the House Origin Account and Client Origin Account, ICC would apply available Investment Loss Resources pro rata based on the amount of such Investment Losses. Thus, with respect to an Investment Loss Shortfall in the Client Origin Account, only those Clearing Participants that are Investing Participants would be required to contribute to the shortfall, rather than all Clearing Participants, and, moreover, each Investing Participant’s pro rata share of the shortfall would be determined by the ratio of its Participant IM/GF Contribution to the aggregate Participant IM/GF Contributions of all Investing Participants.

Proposed Rule 402(k) would define “Investing Participant” as any Clearing Participant that (1) has instructed ICC to invest the cash Initial Margin in its Client Origin Account or (2) is deemed to have instructed ICC to invest the cash Initial Margin in its Client Origin Account. As provided in proposed Rule 402(k), a Clearing Participant would be required to instruct ICC whether ICC should invest cash Initial Margin. If instructed to invest, ICC would invest the cash in accordance with its Rules and investment policies procedures and applicable law. If instructed not to invest, ICC would

hold the cash in a deposit account with a Custodian in accordance with ICC's policies and procedures. If a Clearing Participant does not provide an instruction, then (i) for US dollar cash, the Clearing Participant would be deemed to have instructed ICC not to invest such cash, and (ii) for cash in other (non US dollar) currencies, the Clearing Participant would be deemed to have instructed ICC to invest such cash. Thus, the term Investing Participant and therefore responsibility for an Investment Loss Shortfall in the Client Origin Account would apply to any Clearing Participant that instructs ICC to invest cash Initial Margin or that makes no instruction with respect to cash Initial Margin in currencies other than US dollars.

Likewise, in the event that Custodial Loss Resources are insufficient to cover a Custodial Loss (a "Custodial Loss Shortfall"), ICC would have the right, under proposed Rule 811(f), to allocate the Custodial Loss Shortfall to all Clearing Participants (including any Defaulting Participants). The proposed rule change would give ICC the right to allocate Custodial Loss Shortfalls to Clearing Participants in the same fashion as ICC would allocate Investment Loss Shortfalls in the House Origin Account. In other words, each Clearing Participant would be obligated to make a contribution based on its pro rata share of the Custodial Loss Shortfall, determined based on the proportion of its Participant IM/GF Contribution as compared to the aggregate Participant IM/GF Contributions for all Participants. In the event of a Custodial Loss where the Custodian is a central bank, however, proposed Rule 811(f) would make the entire Custodial Loss as a Custodial Loss Shortfall subject to allocation to Clearing Participants (as opposed to first applying Custodial Loss Resources). As discussed in the Notice, ICC believes such an approach is justified by the remote nature of such a failure by a central bank and the

preference among regulators and Clearing Participants for central bank custody.¹⁵

Finally, as with Investment Losses, a Clearing Participant's pro rata contribution in respect of any event giving rise to a Custodial Loss could not exceed its Participant IM/GF Contribution.

iii. Recoveries by ICC

Proposed Rule 811(l) would provide a "reverse waterfall" for allocation of any recoveries ICC obtains with respect to an Investment Loss or Custodial Loss allocated to Clearing Participants. Under the proposed rule, after deduction of expenses of ICC, ICC would provide the recoveries to the parties that bore the loss (whether ICC, Clearing Participants, or both) in the reverse order from which they were initially applied. The proposed rule change would also set out ICC's obligations to seek recoveries in respect of Investment Losses and Custodial Losses, generally using the same degree of care as it exercises with respect to its own assets that are not subject to allocation under proposed Rule 811.

C. Additional Changes

Proposed Rule 811(u) would contain a general disclaimer by ICC of losses resulting from the holding, deposit, custody, transfer, or investment of Margin, General Guaranty Fund contributions and Assessment Contributions, except as otherwise provided in Rule 811, and provided that Rule 811 would not limit any liability of ICC for its own gross negligence or willful misconduct. The proposed rule change would relatedly amend Rule 406 to remove an existing disclaimer for custodial losses, which would be superseded by the new provisions in the proposed rule change.

¹⁵ Notice, 84 Fed. Reg. at 45195.

Proposed Rule 811 would also address certain procedures for notices to Participants of the use of Investment Loss Resources and Custodial Loss Resources and of required Loss Contributions in respect of Investment Losses and Custodial Losses. The proposed rule would also define the timing and manner of collection of Loss Contributions (including through offset against obligations of ICC to return margin or other assets), and for currency conversions as necessary. The proposed rule would specify that the requirement to make Loss Contributions would not reduce or otherwise affect other obligations of a Clearing Participant to make payments or deliveries to ICC under the Rules, or otherwise limit ICC's netting, setoff and other rights under the Rules. In particular, the proposed rule would separate obligations to make Loss Contributions from any obligation to make an Assessment Contribution and would specify that the limitations on Assessments under the Rules would not apply to liabilities for Loss Contributions. The proposed rule would similarly explain that use of the Loss Contribution procedures would also not be deemed to constitute an ICE Clear Credit Default under the Rules.

Finally, proposed Rule 811 would require ICC to disclose to Clearing Participants the amount of Custodial Loss Resources and Investment Loss Resources at least annually, and to notify Clearing Participants promptly following any changes in such amounts. Proposed Rule 811 would further specify that if such loss resources are applied as a result of a loss event, any replenishment of such resources by ICC would not reduce the amount of any Custodian Loss Shortfall or Investment Loss Shortfall (or resulting Loss Contributions) for that loss event. Finally, proposed Rule 811 would explicitly limit ICC's liability for Custodial Losses or Investment Losses to the amount of designated

Custodial Loss Resources or Investment Loss Resources, as applicable, from time to time.

III. STATUTORY STANDARDS

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.¹⁶ The Commission addresses in its review of the proposed rule change the following relevant provisions of the Exchange Act and the rules and regulations thereunder applicable to registered clearing agencies:

- Section 17A(b)(3)(D) of the Exchange Act requires, in part, that the rules of ICC provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.¹⁷
- Section 17A(b)(3)(F) of the Exchange Act requires, in part, that the rules of ICC be designed to promote the prompt and accurate clearance and settlement of securities transactions, to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible, and to protect investors and the public interest.¹⁸
- Rule 17Ad-22(d)(3) under the Exchange Act requires that ICC establish, implement, maintain and enforce written policies and procedures reasonably

¹⁶ 15 U.S.C. 78s(b)(2)(C).

¹⁷ 15 U.S.C. 78q-1(b)(3)(D).

¹⁸ 15 U.S.C. 78q-1(b)(3)(F).

designed to hold assets in a way that minimizes risk of loss or of delay in its access to them.¹⁹

- Rule 17Ad-22(d)(8) under the Exchange act requires that ICC establish, implement, maintain and enforce written policies and procedures reasonably designed to have governance arrangements that are clear and transparent to fulfill the public interest requirements in Section 17A of the Act applicable to clearing agencies, to support the objectives of owners and participants, and to promote the effectiveness of ICC’s risk management procedures.²⁰

IV. DISCUSSION AND COMMISSION FINDINGS

After considering the entire record, and for the reasons given below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) and (D) of the Act²¹ and Rules 17Ad-22(d)(3) and 17Ad-22(d)(8) thereunder.²²

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

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of ICC be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible, and, in general, to protect

¹⁹ 15 U.S.C. 17Ad-22(d)(3).

²⁰ 15 U.S.C. 17Ad-22(d)(8).

²¹ 15 U.S.C. 78q-1(b)(3)(F), (D).

²² 17 CFR 240.17Ad-22(d)(3) and (d)(8).

investors and the public interest.²³ Based on its review of the record, the Commission finds the proposal is consistent with Section 17A(b)(3)(F) of the Exchange Act.

The Commission believes that the proposed rule change as a whole would help enhance ICC's ability to manage non-default losses generally, and more specifically to continue operating as a going concern in the event that it incurs potential operational, general business risk, or other non-default losses by, among other things, ensuring that ICC's Rules clearly and transparently identify, define and address specific categories of potential non-default risks that ICC will attempt to assess and cover. For example, ICC has assessed its potential exposure to Investment, Custodial, and Non-Default Losses—taking into account relevant components of the European Union capital requirements applicable to central counterparties, including the capital requirements for credit, counterparty, market, operational, and legal risks—to determine an initial measure of ICC's exposure to such risks, and has selected and set its level of Investment Loss Resources and Custodial Loss Resources to be commensurate with those measures.²⁴ At the same time, ICC proposes to designate the specific ICC resources that would be used to cover such losses and the process for replenishing such resources should such losses materialize. Similarly, with respect to Non-Default Losses, ICC proposes to designate that such losses be met from available ICC capital and other ICC assets and to prohibit the use of ICC contributions to default resources or Clearing Participant contributions to Margin, General Guaranty Fund, or Assessments to cover such losses. In addition, ICC

²³ 15 U.S.C. 78q-1(b)(3)(F).

²⁴ See Notice, 84 Fed. Reg. at 45194.

also proposes to periodically conduct risk-based assessments of the appropriate level of ICC resources designed to fully cover such potential losses and to reserve the ability to adjust such resources as needed.²⁵ Correspondingly, ICC proposes to create new definitions for Investment Losses and Non-Default Losses and the term Custodian, and modify the existing definition of Custodial Losses to ensure consistency with the above descriptions. The Commission did not receive any comments on these aspects of the proposal.

The proposed rule change would also limit ICC's liability for Custodial Losses or Investment Losses in various ways. For example, the proposed rule change would specify that ICC's liability for Custodial and Investment Losses would be limited to the amount of the designated Custodial Loss Resources or Investment Loss Resources, respectively, and would clarify that ICC would not be liable for losses resulting from the holding, deposit, custody, transfer, or investment of Margin, General Guaranty Fund contributions, and Assessment Contributions, absent ICC's own gross negligence or willful misconduct. As such, the proposed rule change is designed to align the limitation of ICC's liability for Custodial and Investment Losses with the amount that ICC has determined is sufficient to fully cover its potential exposure to such losses.

As discussed in more detail in the Notice, ICC views potential loss scenarios where Investment or Custodial Losses could exceed applicable ICC resources (*i.e.*, an Investment Loss Shortfall or Custodial Loss Shortfall), as extreme and therefore remote.²⁶ Nevertheless, by stipulating that ICC may only allocate Investment Loss

²⁵ See Id.

²⁶ Notice, 84 Fed. Reg. at 45195.

Shortfalls in the House Origin Account and Custodial Loss Shortfalls to Clearing Participants and Investment Loss Shortfalls in the Client Origin Account to Investing Participants (up to their Participant IM/GF Contribution), the proposed rule change is designed to allow ICC to plan for, and fully allocate Investment Losses and Custodial Losses that materialize as a result of, remote and unprecedented, but potentially extreme, loss events that could exceed ICC's designated Investment Loss and Custodial Loss Resources.²⁷ The Commission believes that this aspect of the proposed rule change also would enhance ICC's ability to fully cover its potential exposure to potential Investment and Custodial Losses, including such losses that could exceed ICC's available Investment Loss and Custodial Loss Resources.

Relatedly, the proposed rule change would enhance ICC's ability to replenish the resources available to satisfy Investment Losses and Custodial Losses in the event that such Losses materialize by putting in place a process for collecting and using Loss Contributions, defining the timing and manner of notices to Participants on the amount and use Loss Contributions, and defining the timing and manner of collection of Loss Contributions, which ICC could, in turn, use to satisfy Investment Loss Shortfalls and Custodial Loss Shortfalls. The proposed rule change also would define ICC's responsibility for, and the standard of care it would be required to utilize in, seeking

²⁷ Notice, 84 Fed. Reg. at 45193-45194. As discussed in more detail below, one commenter expressed the belief that ICC's Clearing Participants should not be responsible for Investment Losses and Custodial Losses but rather ICC should ensure adequate capitalization to address all non-default losses, including Investment Losses and Custodial Losses. The Commission discusses and addresses this comment below in Section IV.B.

recoveries from Investment Losses and Custodial Losses, and how ICC would allocate such recoveries.

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 ICC's ability to cover losses arising from the default of a Clearing Participant. In particular, the proposed rule change would: (i) specify that Loss Contributions would not reduce or otherwise affect other obligations of a Clearing Participant to make payments or deliveries to ICC under the Rules, or otherwise limit ICC's netting, setoff and other rights under the Rules; (ii) separate a Clearing Participant's obligation to make Loss Contributions from any obligation to make an Assessment Contribution; (iii) specify that the limitations on Assessments under the Rules would not apply to liabilities for Loss Contributions; and (iv) clarify that action by ICC under proposed Rule 811 (specifying ICC's treatment of Non-Default Losses, Investment Losses, and Custodial Losses) would not be deemed to constitute an ICE Clear Credit Default under the Rules. The Commission believes that these provisions will help ensure that ICC's treatment and allocation of losses not arising from the default of a Clearing Participant do not hinder ICC's ability to cover and fully allocate losses arising from the default of one or more Clearing Participants.

Taken together, the Commission believes that the various components of the proposed rule change discussed above would enhance ICC's ability to manage the specific categories of general business risk, operational risk, and other non-default scenarios that ICC has identified and assessed, which in turn would reduce the risk that ICC would be unavailable to clear and settle security-based swap transactions and

therefore is consistent with promoting prompt and accurate clearance and settlement of such transactions. Accordingly, the Commission finds that the proposed rule change is consistent with the requirements of Section 17A(b)(3)(F) of the Act.²⁸

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

Section 17A(b)(3)(D) of the Act requires that the rules of ICC provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.²⁹ As discussed below, based on its review of the record, the Commission finds that ICC's proposed rule change—as relevant here, the proposal to allocate Investment Losses and Custodial Losses to Clearing Participants in the event that such Losses exceed ICC's Investment Loss and Custodial Loss Resources—is consistent with Section 17A(b)(3)(D) of the Exchange Act.³⁰

As noted, the purpose of the proposed rule change as a whole is to ensure that ICC has resources sufficient to recover operations and continue as a going concern in the event that it incurs non-default losses. To that end, as discussed above, ICC has assessed its potential exposure to Investment, Custodial, and Non-Default Losses—taking into account relevant components of the European Union capital requirements applicable to central counterparties, including the capital requirements for credit, counterparty, market, operational, and legal risks³¹—and designated specific ICC resources in the form of \$20 million in Investment Loss Resources and \$32 million in Custodial Loss Resources that

²⁸ 15 U.S.C. 78q-1(b)(3)(F).

²⁹ 15 U.S.C. 78q-1(b)(3)(D).

³⁰ Id.

³¹ See Notice, 84 Fed. Reg. at 45194.

ICC believes should be sufficient to cover such potential Losses. The Commission did not receive any comments on this aspect of the proposed rule change. Based on our review of the record, the Commission believes that ICC’s efforts to determine its reasonable potential exposure to Investment and Custodial Losses are reasonable.

As discussed above, the proposed rule change would make ICC’s Clearing Participants responsible for any amount of Investment Losses and Custodial Losses beyond ICC’s contributions of \$20 million and \$32 million respectively, and solely responsible for any amount of Custodial Loss where the Custodian is a central bank. ICC views the potential risk of such Losses as remote, but intends this aspect of the proposed rule change as necessary to allow it to “plan for remote and unprecedented, but potentially extreme, types of loss event[s]”³²

One commenter, the Futures Industry Association (“FIA”), submitted a comment letter generally expressing the belief that ICC’s Clearing Participants should not be responsible for Investment Losses and Custodial Losses but rather ICC should ensure adequate capitalization to address all non-default losses, including Investment Losses and Custodial Losses.³³ The FIA suggests this is appropriate because it believes that Investment Losses and Custodial Losses are under the exclusive control and governance of ICC.³⁴ As evidence, the FIA points to ICC’s investment policy and its relationships

³² Notice, 84 Fed. Reg. at 45194.

³³ See letter from Jacqueline Mesa, Chief Operating Officer & Senior Vice President of Global Policy, Futures Industry Association, dated September 18, 2019, to Vanessa Countryman, Secretary, Commission (“FIA Letter”) at 2.

³⁴ FIA Letter at 2.

with, and oversight of, Custodians, which the FIA maintains are determined and approved by ICC without the involvement of Clearing Participants.³⁵ In support of its argument the FIA also contends that “participants are provided with a specified return on collateral posted and do not directly receive the gain from ICC’s investment of funds.”³⁶

ICC disputes the FIA’s characterization and offers, as evidence, the regulations applicable to ICC as a registered clearing agency.³⁷ ICC maintains that these regulations dictate how ICC may invest Margin and Guaranty Fund assets, by requiring that ICC hold such assets in a manner that minimizes the risk of loss or delay in access and only invest in instruments and counterparties with minimal credit, market and liquidity risk.³⁸ ICC further explains that its investment and custodial policies are reviewed and approved by ICC’s Risk Committee, which is made up predominantly of representatives of ICC’s Clearing Participants, and ICC’s Board of Managers, which includes representatives of Clearing Participants.³⁹ Similarly, ICC represents that ICC’s procedures for the monitoring of ICC’s Custodians, investment counterparties and depositories, are subject to review by ICC’s Risk Committee.⁴⁰ In response to the FIA’s contention that participants are provided with a specified return on collateral posted, ICC asserts that the

³⁵ FIA Letter at 1, 2.

³⁶ FIA Letter at 1.

³⁷ See letter from Stanislav Ivanov, President, ICC, dated October 15, 2019, to Vanessa Countryman, Secretary, Commission (“ICC Letter”) at 1.

³⁸ ICC Letter at 1.

³⁹ ICC Letter at 2.

⁴⁰ ICC Letter at 2.

majority of the investment yield and depository interest received related to such custodial and investment activity is credited to Clearing Participants and therefore ICC effectively acts as an agent for the Clearing Participants and their clients.⁴¹ Thus, ICC maintains that, in taking custody and investing Margin and Guaranty Fund assets, ICC essentially is acting on behalf of Clearing Participants.⁴²

Based on our review of the record, the Commission does not agree with the FIA's characterization of Investment Losses and Custodial Losses as under the exclusive control and governance of ICC. As an initial matter, the Commission notes that ICC's ability to invest Margin and Guaranty Fund assets is subject to the requirements of Exchange Act Rule 17Ad-22(d)(3), which requires that ICC "[h]old assets in a manner that minimizes risk of loss or of delay in its access to them; and invest assets in instruments with minimal credit, market and liquidity risks."⁴³ Moreover, ICC invests pursuant to its policies and procedures, which must be filed with and approved by the Commission pursuant to Section 19(b)(1) of the Exchange Act⁴⁴ and Rule 19b-4 thereunder,⁴⁵ and which, once approved, ICC must comply with under Section 19(g)⁴⁶ of

⁴¹ ICC Letter at 2.

⁴² ICC Letter at 2.

⁴³ 17 CFR 240.17Ad-22(d)(3).

⁴⁴ 15 U.S.C. 78s(b)(1).

⁴⁵ 17 CFR 240.19b-4.

⁴⁶ 15 U.S.C. 78s(g).

the Exchange Act.⁴⁷ Specifically, under ICC Rule 502, ICC may not modify its policies and procedures regarding investment of Initial Margin and Guaranty Fund assets without consulting the Risk Committee,⁴⁸ and under ICC Rule 503, a majority of the Risk Committee consists of representatives of Clearing Participants.⁴⁹ Taken together, in the Commission’s view, these factors limit how and where ICC may invest its Clearing Participants’ Initial Margin and Guaranty Fund assets.

The FIA also states its belief that ICC has a duty of care to its clearing members and that ICC should not be able to pass through losses that are within the sole control of ICC.⁵⁰ As an initial matter, with respect to the FIA’s assertion that ICC owes Clearing Participants a duty of care, the Commission notes that ICC is subject to the requirements of Section 17A(b)(3)(F) of the Act, which requires that ICC’s Rules be designed to, among other things, assure the safeguarding of securities and funds which are in ICC’s

⁴⁷ See, e.g., Exchange Act Release No. 87859 (Dec. 26, 2019); 85 Fed. Reg. 157 (Jan. 2, 2020) (SR-ICC-2019-012); Exchange Act Release No. 84312 (Sep. 28, 2018); 83 Fed. Reg. 50124 (Oct. 4, 2018) (SR-ICC-2018-009); Exchange Act Release No. 78566 (Aug. 12, 2016); 81 Fed. Reg. 55254 (Aug. 18, 2016) (SR-ICC-2016-009); Exchange Act Release No. 76733 (Dec. 22, 2015); 80 Fed. Reg. 81384 (Dec. 29, 2015) (SR-ICC-2015-017); Exchange Act Release No. 74456 (Mar. 6, 2015); 80 Fed. Reg. 13055 (Mar. 12, 2015) (SR-ICC-2015-002); Exchange Act Release No. 72762 (Aug. 5, 2014); 79 Fed. Reg. 46896 (Aug. 11, 2014) (SR-ICC-2014-12).

⁴⁸ See ICC Rule 502(b) and (c) (“ICE Clear Credit shall not take nor permit to be taken any of the following actions without prior consultation with the Risk Committee . . . Modify the ICE Provisions that relate to . . . the application, or the use, rehypothecation or investment, of Margin and . . . Modify the ICE Provisions that relate to . . . the use, rehypothecation or investment of Collateral on deposit in the General Guaranty Fund . . .”).

⁴⁹ See ICC Rule 503(a) regarding appointment of nine Participant Appointees.

⁵⁰ FIA Letter at 2.

custody or control or for which it is responsible,⁵¹ as well as the requirements of Rule 17Ad-22(d)(3), which requires ICC to establish, implement, maintain, and enforce written policies and procedures reasonably designed to hold assets, including Clearing Participants' securities and funds, in a way that minimizes risk of loss or of delay in its access to them, and to invest assets in instruments with minimal credit, market, and liquidity risks.⁵² As discussed in more detail below, the Commission believes that ICC's proposal is consistent with these requirements. Further, as discussed above, in the Commission's view, where and how ICC may invest Margin and Guaranty Fund assets is subject to applicable Exchange Act requirements and Rules and ICC's own Rules, and therefore the Commission does not agree with the FIA's characterization of Investment Losses and Custodial Losses as under the exclusive control and governance of ICC.

Finally, the FIA states that it "is unclear . . . why ICC's own funds would not be used first" in case of a Custodial Loss resulting from a central bank acting as Custodian.⁵³ In response, ICC points to international standards, which encourage clearing houses to fully utilize central bank services.⁵⁴ Moreover, as ICC explained in the Notice, "[w]ith respect to Custodial Losses arising from a central bank custodial failure, ICC believes that such a scenario is extremely remote, and entirely outside of its control."⁵⁵ The

⁵¹ 15 U.S.C. 78q-1(b)(3)(F).

⁵² 17 CFR 240.17Ad-22(d)(3).

⁵³ FIA Letter at 2.

⁵⁴ ICC Letter at 1.

⁵⁵ Notice, 84 Fed. Reg. at 45195.

Commission recognizes ICC's point that clearing agencies may be encouraged in various ways to utilize central bank services when available and believes that ICC's position that a scenario involving Custodial Losses arising from a central bank custodial failure could be extremely remote is reasonable, and on that basis finds ICC's view on this point compelling.⁵⁶ Accordingly, the Commission believes that ICC's proposal to allocate to Clearing Participants all Custodial Losses arising from a central bank acting as custodian without first utilizing ICC's Loss Resources is reasonable.

In the Commission's view, because ICC uses Initial Margin and Guaranty Fund assets to manage the risks associated with clearing security-based swap transactions, it is vital to the ongoing operation of ICC that ICC have the ability to quickly replenish any Margin and Guaranty Fund assets depleted by Investment Losses and Custodial Losses. Based on its review of the record, the Commission finds the specific allocation of the Investment Losses and Custodial Losses that could potentially result from the investment of such assets between ICC and its Clearing Participants to be reasonable because ICC would be assuming liability commensurate with the risks associated to it with investment of the Margin and Guaranty Fund assets. As discussed above, ICC has assessed its potential exposure to Investment, Custodial, and Non-Default Losses—taking into account relevant components of the European Union capital requirements applicable to central counterparties, including the capital requirements for credit, counterparty, market, operational, and legal risks—to determine an initial measure of ICC's exposure to such risks, and has selected and set its level of Investment Loss, Custodial Loss, and Non-

⁵⁶ ICC Letter at 1.

Default Loss Resources to be commensurate with those measures.⁵⁷ As noted above, based on its review of the record, the Commission believes that ICC's efforts to determine its reasonable potential exposure to Investment and Custodial Losses are reasonable. At the same time, ICC proposes to designate the specific ICC resources that would be used to cover such losses and the process for replenishing such resources should such losses materialize. In addition, ICC also proposes to periodically conduct risk-based assessments of the appropriate level of ICC resources designed to fully cover such potential losses and to reserve the ability to adjust such resources as needed.⁵⁸ It would only be in the event that ICC incurred Investment or Custodial Losses that exceed ICC's Investment Loss or Custodial Loss Resources—an eventuality that ICC views as remote—that ICC would have the discretion to require Clearing Participants to make an Investment Loss Contribution or Custodial Loss Contribution. And, as noted above, in that event each Clearing Participant's Loss Contribution could not exceed that Clearing Participant's IM/GF Contribution. In the Commission's view, ICC's proposal to use its own resources to absorb Investment and Custodial Losses up to the amounts that ICC has determined represent reasonable assessments of such potential Losses, and to allocate Investment and Custodial Losses to Clearing Participants on a pro rata basis based on relevant Initial Margin and Guaranty Fund assets only in the event that such Losses exceed ICC's Resources, represents an appropriate and reasonable allocation of potential contingent non-default losses to Clearing Participants.

⁵⁷ See Notice, 84 Fed. Reg. at 45194.

⁵⁸ See Id.

Finally, as discussed above, the proposed rule change would allocate Investment Losses and Custodial Losses to Clearing Participants based on their participation in the investment of cash Initial Margin and their share of the total Initial Margin and Guaranty Fund assets. Moreover, each Clearing Participant's liability for an Investment Loss or Custodial Loss exceeding ICC's initial contributions could not exceed that Participant's aggregate contributions to the Guaranty Fund and the Initial Margin provided by the Participant, for both the House Origin Account and Client Origin Account. The Commission believes this allocation is equitable because it would distribute the losses based on each Clearing Participant's share of the Margin and Guaranty Fund assets that were depleted by the Investment Losses and Custodial Losses, and each Clearing Participant's liability could not exceed the total amount it contributed to Margin and the Guaranty Fund. Thus, the Commission believes this should help to ensure that Clearing Participants only contribute to the recovery from such losses in amounts commensurate with their contribution to Margin and Guaranty Fund assets in the first instance. Finally, in limiting the allocation of Investment Losses in the Client Origin Account to those Clearing Participants that have instructed, or are deemed to have instructed, ICC to invest cash Initial Margin, the Commission believes that the proposed rule change would help to ensure that only those Clearing Participants that have participated in an investment would contribute to the recovery of losses suffered on that investment.

For the reasons discussed above, the Commission believes that the proposed rule change is consistent with the requirement that ICC's rules provide for the equitable

allocation of fees. Accordingly, the Commission finds that the proposed rule change is consistent with the requirements of Section 17A(b)(3)(D) of the Act.⁵⁹

C. Consistency with Rule 17Ad-22(d)(3)

Rule 17Ad-22(d)(3) requires that ICC establish, implement, maintain and enforce written policies and procedures reasonably designed to hold assets in a way that minimizes risk of loss or of delay in its access to them.⁶⁰ The Commission believes that, in specifying that Clearing Participants must instruct ICC whether to invest cash Initial Margin in a Client Origin Account and that without an instruction to invest, ICC would (i) not invest US dollar cash and (ii) invest cash in other currencies in accordance with its rules and procedures, the proposed rule change would provide a procedure reasonably designed for ICC to hold cash Initial Margin in a Client Origin Account that minimizes risk of loss and of delay in access to such cash Initial Margin.

Further, in limiting the allocation of Investment Losses in the Client Origin Account to those Clearing Participants that have instructed, or are deemed to have instructed, ICC to invest cash Initial Margin in the Client Origin Account, the Commission believes that the proposed rule change would help to minimize risk of loss and of delay in access to cash Initial Margin by providing a means for Clearing Participants to opt out responsibility for Investment Losses with respect to the Client Origin Account.

⁵⁹ 15 U.S.C. 78q-1(b)(3)(D).

⁶⁰ 15 U.S.C. 17Ad-22(d)(3).

Accordingly, the Commission finds that the proposed rule change is consistent with the requirements of Rule 17Ad-22(d)(3).⁶¹

D. Consistency with Rule 17Ad-22(d)(8)

Rule 17Ad-22(d)(8) requires that ICC establish, implement, maintain and enforce written policies and procedures reasonably designed to have governance arrangements that are clear and transparent to fulfill the public interest requirements in Section 17A of the Act applicable to clearing agencies, to support the objectives of owners and participants, and to promote the effectiveness of ICC's risk management procedures.⁶²

The Commission believes that the proposed rule change, in providing that the ICC Board could modify the amount of Investment Loss Resources and Custodial Loss Resources from time to time, and specifying that such determination would be risk-based in light of ICC's potential exposure to such losses, would establish clear and transparent governance arrangements for determining the amount of such resources.

Accordingly, the Commission finds that the proposed rule change is consistent with the requirements of Rule 17Ad-22(d)(8).⁶³

V. ACCELERATED APPROVAL OF THE PROPOSED RULE CHANGE, AS MODIFIED BY PARTIAL AMENDMENT NO. 1 AND PARTIAL AMENDMENT NO. 2

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,⁶⁴ to approve the proposed rule change prior to the 30th day after the date of publication of

⁶¹ 15 U.S.C. 17Ad-22(d)(3).

⁶² 15 U.S.C. 17Ad-22(d)(8).

⁶³ 15 U.S.C. 17Ad-22(d)(8).

⁶⁴ 15 U.S.C. 78s(b)(2).

Partial Amendment No. 2 in the Federal Register. As discussed above, Partial Amendment No. 2 modifies the initial proposed rule change to (1) differentiate the treatment of Investment Losses in the Client Origin Account from the treatment of Investment Losses in the House Origin Account and (2) limit the allocation of Investment Losses to those Clearing Participants that have instructed, or are deemed to have instructed, ICC to invest cash Initial Margin in the Client Origin Account. In so doing, Partial Amendment No. 2 provides for a more clear and comprehensive understanding of the treatment of Investment Losses and the impact of the proposed rule change on Clearing Participants, which helps to improve the Commission's review of the proposed rule change for consistency with the Act.

For similar reasons as discussed above, the Commission finds that Partial Amendment No. 2 is designed to help assure the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds which are in the custody or control of ICC, consistent with Section 17A(b)(3)(F) of the Act,⁶⁵ and the equitable allocation of reasonable dues, fees, and other charges among ICC's Clearing Participants, consistent with the Section 17A(b)(3)(D) of the Act.⁶⁶ Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Partial Amendment No. 2, on an accelerated basis, pursuant to Section 19(b)(2) of the Exchange Act.⁶⁷

⁶⁵ 15 U.S.C. 78q-1(b)(3)(F).

⁶⁶ 15 U.S.C. 78q-1(b)(3)(D).

⁶⁷ 15 U.S.C. 78s(b)(2).

VI. CONCLUSION

On the basis of the foregoing, the Commission finds that the proposed rule change, as modified by Partial Amendment No. 1 and Partial Amendment No. 2, is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(F) and (D) of the Act⁶⁸ and Rules 17Ad-22(d)(3) and (d)(8) thereunder.⁶⁹

IT IS THEREFORE ORDERED pursuant to Section 19(b)(2) of the Act⁷⁰ that the proposed rule change, as modified by Partial Amendment No. 1 and Partial Amendment No. 2 (SR-ICC-2019-010), be, and hereby is, approved on an accelerated basis.⁷¹

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷²

Jill M. Peterson
Assistant Secretary

⁶⁸ 15 U.S.C. 78q-1(b)(3)(F), (D).

⁶⁹ 17 CFR 240.17Ad-22(d)(3) and (d)(8).

⁷⁰ 15 U.S.C. 78s(b)(2).

⁷¹ 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).

⁷² 17 CFR 200.30-3(a)(12).