

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-86364; File No. SR-ICEEU-2019-013)

July 12, 2019

Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Changes Related to the ICE Clear Europe Revised Recovery Plan

I. Introduction

On May 10, 2019, ICE Clear Europe Limited (“ICE Clear Europe”) filed with the Securities and Exchange Commission, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change related to its recovery plan. The proposed rule change was published for comment in the Federal Register on May 28, 2019.³ The Commission did not receive comments regarding the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

As a “covered clearing agency,”⁴ ICE Clear Europe is required to, among other things, “establish, implement, maintain and enforce written policies and procedures reasonably designed to . . . maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Exchange Act Release No. 85907 (May 21, 2019), 84 FR 24549 (May 28, 2019) (“Notice”).

⁴ The term “covered clearing agency” is defined in Rule 17Ad-22(a)(5), 17 CFR 240.17Ad-22(a)(5).

agency, which . . . includes plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.”⁵ The Commission has previously clarified that it believes that such recovery and wind-down plans are “rules” within the meaning of Exchange Act Section 19(b) and Rule 19b-4 thereunder because such plans would constitute changes to a stated policy, practice, or interpretation of a covered clearing agency.⁶ Accordingly, a covered clearing agency, such as ICE Clear Europe, is required to file its plans for recovery and orderly wind-down with the Commission.⁷

ICE Clear Europe’s current recovery plan (“Existing Recovery Plan”) was approved by the Commission on July 17, 2018.⁸ Recently, ICE Clear Europe has proposed changes to its rules concerning, among other things, its recovery tools.⁹ ICE Clear Europe has proposed to adopt a revised recovery plan to incorporate these proposed rule changes as well as make other changes (“Revised Recovery Plan” or “Plan”). The Revised Recovery Plan would supersede the Existing Recovery Plan.

⁵ 17 CFR 240.17Ad-22(e)(3)(ii).

⁶ Standards for Covered Clearing Agencies, Exchange Act Release No. 78961 (Sep. 28, 2016), 81 FR 70786, 70809 (Oct. 13, 2016) (“CCA Standards Adopting Release”).

⁷ The description of the Revised Recovery Plan is substantially excerpted from the Notice. Moreover, capitalized terms not otherwise defined herein have the meanings assigned to them in ICE Clear Europe Clearing Rules (“Rules”) or the Revised Recovery Plan.

⁸ Exchange Act Release No. 34-83651 (July 17, 2018), 83 FR 34891 (July 23, 2018) (SR-ICEEU-2017-016).

⁹ Exchange Act Release No. 34-85848 (May 13, 2019), 84 FR 22530 (May 17, 2019) (SR-ICEEU-2019-003).

ICE Clear Europe’s Revised Recovery Plan, among other things, (a) identifies the critical services that ICE Clear Europe provides; (b) outlines recovery scenarios that may result in significant financial losses, a liquidity shortfall, suspension or failure of its critical services and related functions and systems, and damage to other financial market infrastructures; and (c) describes the recovery tools, mechanisms, and options that ICE Clear Europe may use to address a recovery scenario and continue to provide its critical services.¹⁰ Notably, the Revised Recovery Plan is based on, and intended to be consistent with, the ICE Clear Europe Rules, Procedures, and existing risk management frameworks, policies, and procedures,¹¹ several aspects of which ICE Clear Europe recently revised.¹² The elements of the Revised Recovery Plan are described in further detail below.

Critical Services, Service Providers, and Interdependencies. ICE Clear Europe’s prior determination that its futures and options (“F&O”) and credit default swap (“CDS”) product category clearing services, as well as its related treasury and banking services, are critical services remains in the Revised Recovery Plan. The Revised Recovery Plan identifies entities that depend on ICE Clear Europe’s critical services, the service providers supporting ICE Clear Europe’s critical services, and the interdependencies between ICE Clear Europe and other financial market infrastructures. ICE Clear Europe states that it

¹⁰ In the Recovery Plan, ICE Clear Europe refers to its recovery tools, mechanisms, and options as “Recovery Options.” The Commission has generally referred to these items as “recovery tools.” See CCA Standards Adopting Release, 81 FR at 70810. For the purposes of this Order, the term “recovery tools” is used to refer to Recovery Options.

¹¹ Capitalized terms used but not defined herein have the meanings specified in the Rules.

¹² Exchange Act Release No. 34-86259 (July 1, 2019), 84 FR 32483 (July 8, 2019) (SR-ICEEU-2019-003).

mitigates risk from these relationships through various mechanisms, including, for example, by using multiple substitute providers where possible and practical. The Revised Recovery Plan further identifies technology systems that support critical services and states how risks associated with these systems are mitigated.

Recovery Scenarios, Triggers, and Early Warning Indicators. The Revised Recovery Plan analyzes two recovery scenarios. The first is default losses, where financial losses or liquidity shortfalls arise from a clearing member default or multiple clearing member defaults. The trigger for the Plan in this scenario would be when the ICE Clear Europe guaranty fund is exhausted, or is likely to be exhausted, and uncovered losses remain. The second recovery scenario is non-default losses, where financial losses or liquidity shortfalls arise from investments, operational incidents, or other business activities not involving a clearing member default. The Plan would be triggered in this scenario when ICE Clear Europe's Base Capital is, or is likely to be, breached.

The Revised Recovery Plan also distinguishes between "business as usual" risk management (e.g., margin, guaranty fund, liquid resources) and recovery scenarios, stating that recovery scenarios are where ICE Clear Europe is unable to cover losses within its business as usual risk management processes. The Revised Recovery Plan also describes the early warning indicators of a recovery trigger that ICE Clear Credit would monitor as part of its business as usual risk management.

Recovery Tools. The Revised Recovery Plan describes the key aspects of the recovery tools ICE Clear Europe may implement in a recovery scenario. Those tools include powers of assessment (Rule 909), reduced gains distribution (Rule 914), partial tear-ups (Rule 915), payment delays (Rule 110), investment loss allocation (Rule 919), invoicing

back (Rule 104), and the Capital Replenishment Framework. The Revised Recovery Plan also describes the goals and procedures for designing the recovery tools, including that they are designed to be comprehensive, effective, transparent, measurable, manageable, and controllable. The Plan would specify that the recovery tools are intended to create appropriate incentives and minimize negative impact, and also would describe the governance process for development of the recovery tools that would impact Clearing Members, as well as the decision-making considerations for each recovery tool.

Decision-Making, Governance, and Communications. The Revised Recovery Plan would require that ICE Clear Europe's President ("President") attempt to convene the Board for approval of material recovery decisions and keep regulators informed in advance of material decisions, assuming this could be done in a timely manner. If the Board could not be convened in advance of such a decision, it would be convened thereafter to ratify or modify the decision. The President would be supported by the Default Management Committees in a default loss scenario and by the Executive Risk Committee in a non-default loss scenario. Consistent with the Rules and Procedures, exercising the recovery tools would not require the approval of Clearing Members, exchanges, or any other external stakeholders, however, in making decisions regarding the use of recovery tools, the President and the Board would be required to take into consideration the interests of ICE Clear Europe, Clearing Members, customers, other stakeholders, and the broader goal of providing safe and sound central counterparty services to reduce systemic risk in an efficient and legally compliant manner.

The Revised Recovery Plan states that ICE Clear Europe's communication and coordination objectives in a recovery scenario are to provide Clearing Members,

regulators, and the wider market with timely and accurate information, and to ensure effective coordination and escalation across affiliated ICE Group exchanges, clearing houses, and financial market infrastructures. ICE Clear Europe would endeavor to keep regulators informed in advance of triggering the Revised Recovery Plan or exercising recovery tools.

Recovery Playbook. The Revised Recovery Plan would include a recovery playbook for both default loss and non-default loss scenarios. ICE Clear Europe does not intend the playbook to serve as a prescriptive instruction manual for all recovery scenarios, but rather as an example and a guide for how a recovery might progress. To that end, the playbook would identify key steps in the recovery process, such as declaring a default event and determining the likely scope of losses, Board consultation, triggering the Plan, communicating with regulators, and selecting particular recovery tools.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Exchange 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 Exchange Act and the rules and regulations thereunder applicable to such organization.¹³ For the reasons given below, the Commission finds that the proposed rule change are consistent with Section 17A(b)(3)(F) of the Exchange Act¹⁴ and Rules 17Ad-22(e)(2), and 17Ad-22(e)(3)(ii) thereunder.¹⁵

¹³ 15 U.S.C. 78s(b)(2)(C).

¹⁴ 15 U.S.C. 78q-1(b)(3)(F).

¹⁵ 17 CFR 240.17Ad-22(e)(2); (e)(3)(ii).

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

Section 17A(b)(3)(F) of the Exchange Act requires, among other things, that the rules of ICE Clear Europe be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds which are in the custody or control of ICE Clear Europe or for which it is responsible, and, in general, to protect investors and the public interest.¹⁶

As described above, the Revised Recovery Plan would identify the steps that ICE Clear Europe could take in recovery and the governance framework applicable to taking such steps. It would analyze the anticipated impact of the recovery tools, the incentives created by such tools, and the risks associated with using such tools. The Revised Recovery Plan would also explain how the tools used in the Plan are transparent, measurable, manageable, and controllable. The Commission believes that by identifying the steps ICE Clear Europe could take and the tools it would use to bring about recovery in the face of losses, the Revised Recovery Plan would increase the likelihood that recovery would be orderly, efficient, and successful. By increasing the likelihood of an orderly, efficient, and successful recovery, the Commission believes that the Revised Recovery Plan would enhance ICE Clear Europe's ability to maintain the continuity of its critical services (including its clearance of CDS transactions) during, through, and following periods of extreme stress giving rise to the need for recovery, thereby promoting the prompt and accurate settlement of CDS transactions. The Commission also believes that the Revised Recovery Plan would help assure the safeguarding of securities or funds in the custody or

¹⁶ 15 U.S.C. 78q-1(b)(3)(F).

control of ICE Clear Europe or for which it is responsible by reducing the likelihood of a disorderly or unsuccessful recovery that could disrupt access to such securities or funds. For the same reasons, the Commission believes the Revised Recovery Plan would be consistent with the protection of investors and the public interest.

Therefore, the Commission finds that the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions, assure the safeguarding of securities and funds in ICE Clear Europe's custody and control, and, in general, protect investors and the public interest, consistent with the Section 17A(b)(3)(F) of the Exchange Act.¹⁷

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

Rule 17Ad-22(e)(2) requires that ICE Clear Europe establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent and support the public interest requirements in Section 17A of the Exchange Act applicable to clearing agencies, and the objectives of owners and participants.¹⁸

The Revised Recovery Plan would enhance the level of detail provided regarding the decision-making process for material recovery decisions. Specifically, the Plan states that, when possible to be done in a timely manner, the President would be required to attempt to convene the Board and obtain its approval prior to any material recovery decisions. In the event that the Board could not be convened in advance of such decisions, the Plan would require the President to convene the Board to ratify or modify

¹⁷ 15 U.S.C. 78q-1(b)(3)(F).

¹⁸ 17 CFR 240.17Ad-22(e)(2).

the material recovery decision thereafter. By specifying the President's decision-making authority related to material recovery decisions and clarifying the process for the making of such material recovery decisions, the Commission believes that the Plan would enhance the overall transparency regarding material recovery decisions, which in turn would contribute to establishing, implementing, maintaining, and enforcing clear and transparent governance arrangements that support the public interest requirements in Section 17A of the Exchange Act applicable to clearing agencies, and the objectives of owners and participants.

Therefore, the Commission finds that the proposed rule change would establish clear and transparent governance arrangements for the Revised Recovery Plan, consistent with Rule 17Ad-22(e)(2).¹⁹

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

Rule 17Ad-22(e)(3)(ii) requires that ICE Clear Europe establish, implement, maintain, and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by ICE Clear Europe, which includes plans for the recovery and orderly wind-down of ICE Clear Europe necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.²⁰

The Commission believes that the information the Revised Recovery Plan would provide about the steps that ICE Clear Europe would take, and the tools it would use, to

¹⁹ 17 CFR 240.17Ad-22(e)(2).

²⁰ 17 CFR 240.17Ad-22(e)(3)(ii).

effectuate a recovery of ICE Clear Europe would enhance ICE Clear Europe's ability to recover from credit losses, liquidity shortfalls, general business risk losses, or other losses, consistent with Rule 17Ad-22(e)(3)(ii).²¹ Specifically, by clarifying the recovery tools that ICE Clear Europe may use to effectuate a recovery, the Revised Recovery Plan would enhance ICE Clear Europe's ability to prepare in advance for, and practice the use of, such tools, which the Commission believes would enhance ICE Clear Europe's ability to use such tools effectively to carry-out a successful recovery. In addition, by continuing to utilize the Plan as the single source of information about, and steps needed to effectuate, a recovery of ICE Clear Europe, the Revised Recovery Plan continues to help ensure that ICE Clear Europe's personnel would have the information and guidance necessary to effectuate a recovery in a consistent and coordinated fashion, which could thereby increase the likelihood of a successful recovery. Moreover, the Commission believes that by identifying and assessing available recovery tools, the Revised Recovery Plan would enhance ICE Clear Europe's ability to identify in advance which tools may be most effective for different situations or needs, which in turn would enhance ICE Clear Europe's ability to use such tools effectively to bring about a recovery, consistent with Rule 17Ad-22(e)(3)(ii).²²

Therefore, the Commission finds that the proposed rule change would be a plan for the orderly recovery of ICE Clear Europe, consistent with Rule 17Ad-22(e)(3)(ii).²³

²¹ 17 CFR 240.17Ad-22(e)(3)(ii).

²² 17 CFR 240.17Ad-22(e)(3)(ii).

²³ 17 CFR 240.17Ad-22(e)(3)(ii).

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act, and in particular, Section 17A(b)(3)(F) of the Exchange Act²⁴ and Rules 17Ad-22(e)(2), and 17Ad-22(e)(3)(ii) thereunder.²⁵

IT IS THEREFORE ORDERED pursuant to Section 19(b)(2) of the Exchange Act that the proposed rule change (SR-ICEEU-2019-013) be, and hereby is, approved.²⁶

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.²⁷

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Assistant Secretary

²⁴ 15 U.S.C. 78q-1(b)(3)(F).

²⁵ 17 CFR 240.17Ad-22(e)(2); (e)(3)(ii).

²⁶ In approving the proposed rule change, the Commission considered the proposal's impacts on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

²⁷ 17 CFR 200.30-3(a)(12).