



January 14, 2022

Mr. Christopher J. Kirkpatrick
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: ICE Clear Europe Self-Certification Pursuant to Commission Rule 40.6 –
Delivery Procedure amendments

Dear Mr. Kirkpatrick:

ICE Clear Europe Limited (“ICE Clear Europe” or the “Clearing House”), a registered derivatives clearing organization under the Commodity Exchange Act, as amended (the “Act”), hereby submits to the Commodity Futures Trading Commission (the “Commission”), pursuant to Commission Rule 40.6 for self-certification, the amendments to its Delivery Procedures (“Delivery Procedures”) discussed herein.¹ The amendments will become effective on the first business day following the tenth business day after submission, or such later date as ICE Clear Europe may determine.

Concise Explanation and Analysis

ICE Clear Europe is amending its Delivery Procedures due to new settlement discipline requirements contained in the European Union Central Securities Depositories

¹ Capitalized terms used but not defined herein have the meanings specified in the Delivery Procedures or, if not defined therein, the ICE Clear Europe Clearing Rules.

Regulation² (“CSDR”) and Settlement Discipline Regulatory Technical Standards³ (“RTS”), which take effect on 1 February 2022. The settlement discipline requirements, which include settlement failure reporting and cash penalties for settlement failures, impose certain requirements on ICE Clear Europe as a central counterparty and market participant in its interaction with EU-based settlement facilities. Specifically, the requirements apply to securities that the Clearing House settles on a European Union (“EU”) central securities depository (“CSD”) under F&O Contracts that are equity or bond futures and options, where the underlying is traded on an EU trading venue or cleared by another EU-based CCP.

The settlement discipline requirements that will come into effect on 1 February 2022 will include settlement failure reporting and cash penalties for settlement failures.⁴ In the context of ICE Clear Europe, the requirements will apply with respect to Euro-Denominated Government Bond Futures and Options Contracts (covered in Part W of the Delivery Procedures) and Financials & Softs Equity Futures and Options (covered in Part Z of the Delivery Procedures), where the underlying deliverable is listed on an EU exchange or cleared via an EU CCP and settlement occurs through an EU settlement system.⁵

² Regulation (EU) 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012.

³ Commission Delegated Regulation (EU) 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline.

⁴ Although the CSDR and RTS provide for additional settlement discipline measures, including certain mandatory buy-in requirements, relevant EU authorities have indicated that the entry into force of such provisions will be delayed. See press statement from the European Commission dated 25 November 2021, available here: https://ec.europa.eu/commission/presscorner/detail/en/mex_21_6293.

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

A number of major trade associations have also issued a public statement confirming that in their view EU legislators do not expect market participants to take further action towards implementation of the mandatory buy-in requirements, but that other CSDR settlement discipline measures will be implemented by 1 February 2022. Joint Statement, Industry Approach to CSDR Settlement Discipline Regime dated 22 December 2021, available here: <https://www.afme.eu/Portals/0/DispatchFeaturedImages/Industry%20Approach%20to%20CSDR%20Settlement%20Discipline%20Regime%20FINAL%2022122021.pdf>.

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

⁵ Although the UK has adopted some aspects of the CSDR under the European Union (Withdrawal) Act 2018, none of the EU settlement discipline provisions that were meant to come into force by 1 February 2022 will be implemented in the UK. Financial Services Update, Statement made on 23 June

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

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

General Provisions of Delivery Procedures

The General Provisions section of the Delivery Procedures are being amended to add new Paragraphs 22 and 23. Paragraph 22 addresses the liabilities for penalties or costs assessed under the CSDR because of a delay or failure in matching for settlement. Specifically, it provides that the Buyer and Seller will each indemnify the Clearing House in accordance with Rule 111 in respect of costs or penalties for any delay or failure in matching arising under the CSDR or otherwise, save to the extent that the Clearing House or its settlement agent is at fault for such failure or delay. The amount of such cost or penalty will be charged to such Clearing Member. Paragraph 23 addresses penalties or costs assessed under CSDR in respect of late settlement. Specifically, it provides that the Seller will indemnify the Clearing House in accordance with Rule 111 in respect of costs or penalties for any delay or failure in settlement arising under the CSDR or otherwise, save to the extent that the Clearing House or its settlement agent is at fault in respect of such failure or delay. The amount of such costs or penalties will be charged to such Clearing Member.

The CSDR and RTS feature a two-tier scheme for penalty collection and distribution in respect of settlement fails, which is as follows: (1) where the failing or receiving participant is a CCP, CCPs are to collect and distribute penalties using information provided by CSDs; and (2) in all other circumstances, CSDs collect and distribute the penalties. ICE Clear Europe holds securities at EU CSDs through nominees, rather than as a direct participant. As such, ICE Clear Europe is not necessarily known by or identified to the CSDs as a CCP. Therefore, CSDs will collect penalties in respect of securities to be delivered under F&O Contracts that ICE Clear Europe clears in accordance with scenario 2. It is possible that when Buyers or Sellers are late to match or Sellers are late to settle (as applicable); this will have run-on impacts on the Clearing House's ability to onwards deliver securities. If the Clearing House does not deliver in a timely fashion because of this late matching, it could be subject to a cash penalty under CSDR. In these circumstances, the late Clearing Member will be required to indemnify ICE Clear Europe. These amendments reflect the existing position under the general indemnity in Rule 111, but provide clarity that such indemnity will be applicable in the particular circumstances described in these paragraphs.

Part A: ICE Endex Deliverable EU Emissions Contracts

The Clearing House is amending Part A of the Delivery Procedures to ensure that the new settlement discipline procedures under the CSDR and RTS will not apply to the physical delivery of Carbon Emissions Allowances ("EUA") or Aviation

2020, available here: <https://questions-statements.parliament.uk/written-statements/detail/2020-06-23/HCWS309>.

Emissions Allowances (“EUAA”). The amendments are intended to preserve the Clearing House’s current approach with respect to settlement of emissions futures contracts and ensure that CSDR will not interfere with deliveries under such contracts.

The definition of “Registry Account” is being amended to set down the national administrators of registry accounts that may be used, and to confirm that no registry account may be held by or through a CSD as intermediary or account holder. Paragraph 9 of Part A of the Delivery Procedures is added to provide that no Clearing Member, Customer, Transferor or Transferee to whom or from whom delivery is to be made of an EUA or EUAA may be registered as a CSD under the CSDR. Additionally, Paragraph 9 provides that pursuant to the definition of “Registry Account”, no EUAs or EUAAs may be settled by or through a CSD. Accordingly, Buyers and Sellers will not be bound by the settlement discipline provisions set out in the CSDR and, accordingly, the Clearing House will not administer buy-ins, cash penalties, cash compensation or other requirements under the CSDR and its delegated regulations in respect of EUAs or EUAAs. The amendments provide that Buyers and Sellers acknowledge that neither the Clearing House nor any other Person will offer them the protections related to settlement set forth under CSDR and their sole remedies in the case of settlement failure are as set forth in the Delivery Procedures. In connection with these changes, ICE Clear Europe is also adding new definitions of “CSD” and “CSDR”.

Part W: Euro-Denominated Government Bonds Contracts

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

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

Part Z: Financials and Softs Equity Futures/Options

Part Z of the Delivery Procedures is being amended to add a similar new provision to Paragraph 3.3 which empowers ICE Clear Europe to debit cash penalties imposed by a relevant settlement system from Clearing Members in delivery default and to credit cash penalties to the account of the Clearing Member that is affected by the settlement fail. Although, as described above, it is anticipated that CSDs will administer cash penalties for ICE Clear Europe-cleared trades, ICE Clear Europe will retain this power in case its account structure changes and it is required to administer penalties under the CSDR.

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

Compliance with the Act and CFTC Regulations

The amendments to the Delivery Procedures are potentially relevant to the following core principles: (E) Settlement Procedures and (R) Legal Risk and the applicable regulations of the Commission thereunder.

- *Settlement Procedures.* As discussed above, the changes to the Delivery Procedures are designed to address and accommodate certain settlement discipline provisions under the CSDR and RTS that will come into effect on 1 February 2022 and may affect settlement under certain F&O Contracts. Principally, the amendments address potential fines that may be imposed under the CSDR and RTS in connection with settlement failures relating to deliveries of certain securities underlying F&O Contracts and enhance reporting to the Clearing House in the case of certain settlement failures under such contracts. In particular, the amendments explicitly address the possibility of fines for settlement failures in the context of settlement of government bond futures and options and equity futures and options cleared by the Clearing House, where the underlying is listed or cleared on an EU facility and settlement occurs through an EU settlement facility. The amendments also clarify that the CSDR settlement discipline provisions do not apply to settlement of certain emissions futures contracts. The amendments will thus clarify the obligations of the Clearing House, Clearing Members and designated transferors and transferees in the context of settlement failures that may occur with respect to securities delivered in settlement of specified F&O Contracts, and facilitate the management by the Clearing House of the risks of such failures. The amendments do not otherwise change the manner in which such contracts are cleared and settled. As such, ICE Clear Europe believes the amendments are consistent with the requirements of Core Principle E and Commission Rule 39.14.
- *Legal Risk.* As noted above, the amendments are intended to address new requirements under EU law applicable to settlement activity conducted by the Clearing House with EU settlement facilities relating to underlying securities traded or cleared on EU facilities. As such, the amendments support the Clearing House's legal framework for operation in the EU. ICE Clear Europe thus believes the amendments are consistent with the requirements of Core Principle R and CFTC Rule 39.27

As set forth herein, the amendments consist of the amendments to the Delivery Procedures, a copy of which is attached hereto.

ICE Clear Europe hereby certifies that the amendments comply with the Act and the Commission's regulations thereunder.

ICE Clear Europe received no substantive opposing views in relation to the proposed amendments.

ICE Clear Europe has posted a notice of pending certification and a copy of this submission on its website concurrent with the filing of this submission.

If you or your staff should have any questions or comments or require further information regarding this submission, please do not hesitate to contact the undersigned at George.milton@theice.com or +44 20 7429 4564.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'G. Milton', with a stylized flourish underneath.

George Milton
Head of Regulation & Compliance