



July 19, 2023

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 Rule 40.6
– Clearing Rules

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, amendments to its Clearing Rules (the “Rules”) to address more consistently the treatment of certain losses that do not result from Clearing Member default, including certain investment losses and custodial losses.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 Rules to address more consistently the treatment of certain losses that do not arise from the default of a Clearing Member, generally referred to as non-default losses, including certain investment losses and custodial losses, as discussed in more detail herein.

¹ Capitalized terms used but not defined herein have the meanings specified in the Rules.

I. Summary of Proposed Amendments.²

As amended, the Rules, among other matters:

- Define several exclusive categories of relevant losses: (1) Investment Losses, (2) Custodial Losses, (3) Pledged Collateral Losses, (4) Title Transfer Collateral Losses and (5) Non-Default Losses.
- Specify the resources of the Clearing House, if applicable, that will be applied to cover such categories of losses.
- Specify the responsibility of Clearing Members, in defined circumstances, to make contributions with respect to Investment Losses and Custodial Losses.
- Specify the responsibility of Clearing Members for Pledged Collateral Losses and Title Transfer Collateral Losses.
- Address the treatment of recoveries by the Clearing House with respect to such categories of losses.

II. Definitions of Relevant Loss Categories.

In Rule 101, new definitions will be added for “Custodial Losses,” “Pledged Collateral Losses,” “Title Transfer Collateral Loss” (and related terms) and the definitions of “Investment Losses” and “Non-Default Losses” (and related terms) will be revised, as follows.

Custodial Losses

Custodial Losses will be defined as losses suffered by the Clearing House with respect to Custodial Assets, including from declines in the value thereof, arising as a result of or in connection with (1) a default, insolvency, system failure, force majeure event or similar event with respect to a Custodian or Delivery Facility, a breach of agreement by the Custodian or Delivery Facility or pursuant to any loss allocation or contribution provisions of the Custodian or Delivery Facility, or (2) any theft, cyber attack or similar event with respect to Custodial Assets by any person (other than the Clearing House and its directors, officers or employees). Custodial Losses are defined to exclude both Pledged Collateral Losses or Title Transfer Collateral Losses. Custodial Losses also exclude any losses subject to a power of assessment for default losses under Rule 909 or any mechanism that has the effective of reducing such losses pursuant to reduced gains distributions under Rule 914, partial tear-up under Rule 915 or contract termination under Rule 916. The existing definition of Custodian will be revised to specifically reference approved financial institutions, concentration banks, intermediary

² The amendments are intended to comprehensively and consistently address non-default losses in a manner consistent with relevant UK law applicable to the Clearing House and relevant internationally accepted principles for clearing organizations. See Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges, Clearing Houses and Central Securities Depositories) Regulations 2001/995, Schedule, Pt. 5, para. 29A, which requires the central counterparty to maintain effective arrangements for ensuring that losses that arise otherwise than as a result of clearing member default and threaten the solvency of the central counterparty are allocated with a view to ensuring that the central counterparty can continue to operate. See also CPMI-IOSCO, Principles for Financial Market Infrastructures (Principles 15 and 16); CPMI-IOSCO, Discussion Paper on Central Counterparty Practices to Address Non-Default Loss (Aug. 2022).

financial institutions, investment agent banks, system banks and TARGET2 Concentration Banks, as defined in the Rules (in addition to the more general categories of financial institution currently included). The changes reflect the currently understood scope of the Custodian definition in its existing form but will provide greater clarity in light of the amendments discussed herein. Custodial Assets will be defined as any asset or property of the Clearing House (or any person acting on its behalf or holding assets for it) representing original or initial margin, variation margin, guaranty fund contributions or permitted cover, deliverables or settlement amounts. As discussed below, Custodial Losses will be allocated through the use of Custodial Loss Assets of the Clearing House and thereafter contributions of Clearing Members under Rule 919.

Pledged Collateral Losses

The amendments define Pledged Collateral Losses as those losses arising out of or relating to the holding of Pledged Collateral³ or the assets in any Pledged Collateral Account. Such losses with respect to Pledged Collateral are addressed in the existing Rules, and the amendments will not change the treatments of such losses. (Under the existing Rules, and as discussed below for the Rules as proposed to be amended, such losses are solely the responsibility of the relevant Clearing Member.) For clarity and consistency, a defined term for Pledged Collateral Losses will be added in Rule 101 (based on the existing defined term for “Custodial Losses” in Rule 502(j), which will be deleted). Relevant existing provisions addressing such losses will be moved to Rule 919, as discussed below, so that all non-default losses are addressed in the same section of the Rules.

Title Transfer Collateral Losses

Title Transfer Collateral Losses will be defined as losses resulting from a reduction in value or change of exchange rates of initial or original margin, guaranty fund contributions or permitted cover, which have been transferred to the Clearing House (other than as Pledged Collateral)⁴ and which are not invested or reinvested by the Clearing House but are held with a Custodian. Such losses are not currently subject to an express loss-sharing mechanism under the Rules. Accordingly, ICE Clear Europe will formally define this category of loss, and as discussed below, such losses will be solely the responsibility of the relevant Clearing Member under the Rules. In this respect, the resulting treatment will be generally consistent with that applicable to Pledged Collateral Losses under the current and revised Rules.

Investment Losses

Conforming changes will be made to the definition of Investment Losses, an existing category of loss identified in the Rules, to expressly exclude Custodial Losses, Pledged Collateral Losses and Title Transfer Collateral Losses. A sentence excluding losses from the default of a Custodian will be deleted as such losses will be expressly covered by the Custodial Loss definition (which in turn will be excluded from the Investment

³ Pledged Collateral and Pledged Collateral Accounts are currently only used in connection with the Customer Accounts of FCM/BD Clearing Members.

⁴ Currently, most collateral received by the Clearing House is pursuant to a title transfer collateral arrangement.

Loss definition as noted above). For consistency with the other new definitions, the definition will also explicitly reference losses from assets representing variation margin and settlement amounts in addition to the other listed categories.

Non-Default Losses

Conforming changes to the definition of Non-Default Losses will be made to exclude Custodial Losses, Pledged Collateral Losses and Title Transfer Collateral Losses. The definition will also expressly exclude losses incorporated in the calculation of the ICE Deposit Rate under the Finance Procedures (such as arising from negative interest rates). The amendments will eliminate a requirement that the Non-Default Losses threaten the Clearing House's solvency in order to qualify as such. ICE Clear Europe does not believe the limitation to losses that threaten solvency is needed (as all such Non-Default Losses shall be addressed by the Rules).

Loss Assets and other Definitions

The amendments will add new defined terms for Investment Loss Assets and Custodial Loss Assets, which are assets of the Clearing House available to be applied to Investment Losses or Custodial Losses, respectively, and Non-Default Losses. The existing term Loss Assets will be revised accordingly to refer to Investment Loss Assets and Custodial Loss Assets. New defined terms for Investment Loss Amount and Custodial Loss Amount will also be added, reflecting the amount of Investment Losses or Custodial Losses, as applicable, as determined under Rule 919 after application of applicable Loss Assets.

III. Treatment of Losses in Various Categories.

The amendments to Rule 919 will incorporate the concepts of Custodial Loss, Pledged Collateral Loss and Title Transfer Collateral Loss.

Rule 919(b) will be amended to provide that Non-Default Losses will be met first by Investment Loss Assets and Custodial Loss Assets available to the Clearing House. The amendments will clarify that the first portion of any Investment Loss will be met by the Clearing House applying Investment Loss Assets available to it at the time of the relevant event giving rise to the loss. Similarly, a new provision will be added that the first portion of any Custodial Loss will be met by the Clearing House applying Custodial Loss Assets available to it at the time of the relevant event. Rule 919(b) will also provide that the obligations in the subsection only apply to the extent the relevant Loss Assets remain available to the Clearing House in cleared funds and have not themselves been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss or Title Transfer Collateral Loss. Rule 919(c) will be amended to address Custodial Losses in addition to Investment Losses, such that if there are Investment Losses or Custodial Losses exceeding the available amount of Investment Loss Assets or Custodial Loss Assets, respectively, Clearing Members will be required to pay Collateral Offset Obligations to the Clearing House. The relevant formula for calculating Collateral Offset Obligations under Rule 919(d) will be amended to reflect Custodial Losses as well as Investment Losses, as applicable. In addition, the relevant fraction for purposes of determining a particular Clearing Member's obligation in respect of Collateral Offsets Obligations will be revised to take into account amounts

recorded as variation margin, deliverables and settlement amounts. In addition, a clarification will be made that, in the case of a Defaulter, the calculation will include the Defaulter's Guaranty Fund Contributions only to the extent not used to offset default losses, an approach which is consistent with the treatment of other specified assets of the Defaulter. Similarly, under Rule 919(e), the maximum Collateral Offset Obligation will be amended to include the variation margin, deliverables and settlement amounts transferred (or due to be transferred) to the Clearing House. Rule 919(f) will be amended to provide that Collateral Offset Obligations may be offset or netted against obligations to pay or return variation margin, deliverables or settlement amounts in addition to other margin payments and guaranty fund contributions.

Rule 919(g) will provide that Collateral Offset Obligations resulting from an Investment Loss can be applied solely to Investment Losses, and Collateral Offset Obligations resulting from a Custodial Loss can be applied solely to Custodial Losses. Rule 919(h), which addresses the allocation by the Clearing House of recoveries in respect of Investment Losses, will be expanded to cover recoveries from Custodial Losses as well. Certain additional clarifications in this subsection will be made to contemplate recovery and allocation of assets other than cash and to state that the Clearing House's obligation to reimburse for recoveries only applies to the extent the relevant assets remain available to the Clearing House in cleared funds. Rule 919(i), which provides, among other things, that Clearing Members remain liable to make margin and guaranty fund contributions notwithstanding Collateral Offset Obligations, will be revised to reference payment of variation margin, payment of settlement amounts and delivery of deliverables as well. A drafting clarification will also be made regarding Clearing Members' obligations to make and receive timely delivery to improve readability of the provision. Rule 919(j), which provides for return of excess Collateral Offset Obligations, will be revised to account for Collateral Offset Obligations in respect of Custodial Losses and to clarify that the obligation to return only applies to the extent the relevant amounts remain available to the Clearing House in cleared funds. Rule 919(k) will clarify that Collateral Offset Obligations are independent of obligations in respect of Assessment Contributions, Cash Loser Adjustments or Cash Gainer Adjustments, Partial Tear-Up Prices or Product Termination Amounts. A clarifying cross-reference to Rule 209 will be added to an existing statement that caps on Assessment Contributions under relevant rules do not limit liability for Collateral Offset Obligations. A statement that the conditions for contract termination under Rule 916(a)(ii)(B)(2) will not be met solely because of a Non-Default Loss or Investment Loss will be removed as unnecessary in light of the other amendments to Rule 919(k). A conforming change will be made in Rule 919(n), which provides that Rule 919 does not require the Clearing House is not required to pursue any litigation against any Person, to specifically reference Delivery Facilities.

Pursuant to revised Rule 919(p), the Clearing House will be obligated to notify Clearing Members by Circular of the amount of Investment Loss Assets and Custodial Loss Assets as determined by ICE Clear Europe from time to time. ICE Clear Europe has removed a specific reference to the total amount of Loss Assets from the Rule. ICE Clear Europe believes that it is appropriate for the Clearing House to have the flexibility to update the amount of Investment Loss Assets and Custodial Loss Assets from time to time in light of its ongoing business and other relevant factors, without the need to amend the Rules. Such updates may, for example, reflect changes in relevant

components of its capital requirements, in particular the capital requirements for credit, counterparty and market risks and operational and legal risks, that ICE Clear Europe considers in determining the appropriate level of such loss assets. ICE Clear Europe intends that with the adoption of the amendments, the amount of Investment Loss Assets will be increased to USD 195 million and the initial amount of Custodial Loss Assets will be set at USD 80 million, as will be confirmed by Circular. Such amounts will remain in effect until a subsequent Circular, and the Clearing House's liability under Rule 919(b) will be limited to the notified amount of such assets.

Rule 919(q) will be amended to provide for notification of the amount of Loss Assets applied in connection with Non-Default Losses, Investment Losses or Custodial Losses, as applicable. The amendments will further clarify that replenishment of regulatory capital may be made using the resources of third parties (in addition to the Clearing House and its Affiliates). The Clearing House will be obligated to issue a new Circular pursuant to Rule 919(p) following any such replenishment. In the case of replenishment, the replenished or new Loss Assets or capital will not be applied to any pre-existing Non-Default Loss, Custodial Loss or Investment Loss. Various conforming and clarifying changes will be made to Rule 919(r), including to refer to Delivery Facilities and to remove an unnecessary reference to Approved Financial Institutions.

Under Rule 919(s), the Clearing House will not be liable to any Clearing Member, Customer or other Person for any Pledged Collateral Losses. Accordingly, the Clearing Member (or its Customer) will bear the risks of Pledged Collateral Losses, except to the extent directly resulting from fraud, bad faith, gross negligence or willful misconduct by the Clearing House or its directors, officers, employees or committees. While a new provision, Rule 919(s) is essentially equivalent in substance to the relevant part of current Rule 502(j). The corresponding portions of current Rule 502(j) will be deleted as unnecessary in light of Rule 919(s). Under Rule 919(t), if the Clearing House recovers any amount in respect of Pledged Collateral Losses (less expenses), it will be obligated to pay such amounts to the Clearing Members that bore such losses on a pro rata basis, after application of any amounts applied by the Clearing House or other Person to meet such losses.

For Title Transfer Collateral Losses, Rule 919(u) will provide that the Clearing House will not be liable to any Clearing Member, Customer or other Person for such losses. The provision is without limitation of the Clearing House's ability to charge a negative ICE Deposit Rate under the Finance Procedures. Rule 919(u) will further provide that where title transfer collateral is provided, the Clearing Member is entitled to the redelivery of an equivalent asset, without any compensation for Title Transfer Collateral Losses or other losses, and accordingly the Clearing Member (or its Customer, if applicable) bears the risk of Title Transfer Collateral Losses.

Rule 919(v) will clarify that a negative yield or interest rate on assets provided as initial or original margin, guaranty fund contributions, permitted cover or a deliverable will not constitute an Investment Loss or Non-Default Loss and will be for the account of the Clearing Member (or its Customer, if applicable). Under Rule 919(w), ICE Clear Europe will have no liability for any loss relating to any investment decision by any

Clearing Member, Customer or other person, including any choice as between different kinds of Permitted Cover, or for the results of any such choices or investments.

IV. Additional Amendments.

In various locations in the Rules, clarifications will be made that obligations of the Clearing House to return or provide certain funds or property to Clearing Members apply only to the extent such assets are received by and remain available to the Clearing House in cleared funds and are not themselves subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss or Title Transfer Collateral Loss, reflecting the consequences of Rule 919. This includes Rules 301(f), 908(b)(iii), 908(c)(iii), 908(d)(iii), 908(g)(iii), 913(a)(iv), 914(j) and 916(n). Similarly, Rule 1102(k) will provide that the obligation of the Clearing House to apply amounts received from the Defaulter to repay guaranty fund contributions used in the default, retain assets in respect of Clearing House Contributions or reimburse insurers for default insurance proceeds, as applicable, will be subject to the Clearing House not having suffered a loss equivalent to an Investment Loss, Custodial Loss, Pledged Collateral Loss or Title Transfer Collateral Loss in respect of such amounts. Rule 1103(e) will be amended to address the potential situation where amounts received in respect of default insurance may themselves be subject to losses similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss or Title Transfer Collateral Loss. Accordingly, application of such amounts can only be made to the extent that such amounts remain available to the Clearing House 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, reflecting the consequences of Rule 919.

A number of other non-substantive drafting and formatting updates will also be made.

Compliance with the Act and CFTC Regulations

The amendments to the Clearing Rules are potentially relevant to the following core principles: (B) Financial Resources, (D) Risk Management, (E) Settlement Procedures, and (F) Treatment of Funds and the applicable regulations of the Commission thereunder.

- *Financial Resources.* As set forth above, ICE Clear Europe does not propose in these amendments to change the amount or composition of financial resources required of Clearing Members as margin or guaranty fund contributions. ICE Clear Europe is also not proposing to change its own resources that it contributes to default resources. The amendments are designed, however, to address and mitigate the risk to the Clearing House that its financial resources available to cover Clearing Member defaults could be lost or reduced in value as a result of Custodial Losses, Investment Losses or other types of non-default loss. Specifically, under the amendments, with respect to Custodial Losses, ICE Clear Europe will be responsible for losses up to the amount of Custodial Loss Assets, which is to be determined by ICE Clear Europe from time to time. ICE Clear Europe has determined the initial level of Custodial Loss Assets taking into account components of its capital requirements applicable to central counterparties, in particular the capital

requirements for credit, counterparty and market risks. The amendments would provide for allocation of Custodial Losses in excess of such resources to Clearing Members, who would be obligated to pay Collateral Offset Obligations to the extent of such excess. Under the amendments, Custodial Losses in excess of the amount of Custodial Loss Assets would be shared among Clearing Members proportionally based on their respective aggregate margin, guaranty fund contributions, deliverables and settlement amounts recorded across all account categories. This approach is largely consistent with the allocation of Investment Losses under the current Rules. The approach mutualizes both Investment Losses and Custodial Losses across all Clearing Members, in these remote loss scenarios where such losses exceed applicable Clearing House resources allocated to such losses. While Clearing Members may be required to make Collateral Offset Obligations that are independent of the particular mix of cash and securities provided by the Clearing Member as margin or guaranty fund contributions, ICE Clear Europe believes that the approach is appropriate in light of the remote nature of the potential losses, the fact that margin and guaranty fund assets are invested and custodied collectively in accordance with investment policies that are reviewed by the applicable risk committee and are transparent to Clearing Members, and the practical and operational considerations that would be required for an approach that attempted to allocate losses based on a Clearing Member's particular assets and elections.

Overall, the amendments clarify the resources available to address Investment Losses, Custodial Losses and other losses not resulting from Clearing Member default. In addition to providing resources to permit continued operation of the Clearing House in the face of such losses, these provisions in effect also provide protection against the loss of the financial resources provided by Clearing Members to support the default waterfall. The amendments thus enhance the ability of ICE Clear Europe to maintain sufficient financial resources to withstand defaults by Clearing Members as required under Commission regulations.

In addition, under the amended Rules, Loss Assets (including both Investment Loss Assets and Custodial Loss Assets) will be available to cover Non-Default Losses, which include losses from general business risk. Such losses will thereafter be covered by the Clearing House's capital and other assets. ICE Clear Europe does not propose to change the level of its own equity capital, which supports its operations and covers general business losses.

For the foregoing reasons, the amendments are consistent with the financial resources' requirements of Core Principle B and Commission Rule 39.11.

- *Risk Management.* The proposed rule changes are designed to address the risks posed to ICE Clear Europe by a significant loss event not resulting from a default by one or more Clearing Members. These events may include investment, custodial and collateral losses with respect to margin, guaranty fund contributions, deliverables and settlement amounts as well as other losses resulting from general business risk, operational risk or other non-default

scenarios. ICE Clear Europe, like all clearing organizations, faces the risk that such a loss event could affect its ability to continue orderly clearing operations or otherwise affect its viability as a going concern. The amendments are thus intended to enhance the ability of ICE Clear Europe to manage those risks by providing for a comprehensive framework to address such losses, even if extreme, and permit the continued operation of the Clearing House. As such, the amendments are consistent with the requirements of Core Principle D and Commission Rule 39.13.

- *Settlement Procedures.* As discussed above, the new provisions relating to Custodial Losses would, among other matters, protect against the risk of Custodial Losses relating to a failure of a settlement bank, and provide a means for allocating such losses to the Clearing House, to the extent of Custodial Loss Assets, and thereafter to Clearing Members through Collateral Offset Obligations. The amendments thus help the Clearing House manage and mitigate the risk of a settlement bank failure, and are consistent with the requirements of Core Principle E and Commission Rule 39.14.
- *Treatment of Funds.* ICE Clear Europe's existing investment policies and procedures provide for the investment of cash provided by Clearing Members as margin or guaranty fund contributions in investments with minimal credit, market and liquidity risks. Similarly, the policies provide for the use by ICE Clear Europe of Custodians to hold cash and securities in a manner designed to minimize the risk of loss or delay in access to such assets. ICE Clear Europe is not changing such policies and procedures in connection with these amendments. Rather, the amendments address the remote scenario where, despite the protections under such procedures, there is a failure by an investment issuer or counterparty or custodian resulting in an Investment Loss or Custodial Loss. Such a circumstance would be remote in ICE Clear Europe's view, and in any event, outside its control. In such circumstances, the amendments would allocate the loss as between ICE Clear Europe and Clearing Members, with ICE Clear Europe being responsible for a first loss position up to the amount of defined Loss Assets and with Clearing Members being responsible for the remaining loss, in proportion to their margin, guaranty fund and other relevant deposits to the Clearing House. The amendments will therefore enhance the overall protection of funds and assets provided by Clearing Members to ICE Clear Europe as margin and guaranty fund contributions. As such, the amendments are consistent with the requirements of Core Principle F and Commission Rule 39.15.

Consultation with Clearing Members

ICE Clear Europe conducted a public consultation with respect to the amendments.⁵ ICE Clear Europe did not receive any written responses to the public consultation. In addition, prior to the consultation, ICE Clear Europe engaged in a number of

⁵ See ICE Clear Europe Circular No. C22143 (Dec. 15, 2022).

discussions concerning the proposed amendments with an industry group representing numerous market participants. Through this process, market participants raised a number of questions concerning the amount of resources being allocated as Investment Loss Assets and Custodial Loss Assets and the basis for the determination of such amounts. Market participants also raised questions about the scope of Custodial Losses subject to allocation under the proposed Rules and the overall approach to the treatment of Custodial Losses in light of the manner in which ICE Clear Europe holds assets. As discussed with market participants, ICE Clear Europe believes that the approach taken is appropriate in light of the fact that assets are generally held either with relevant central banks or central securities depositories. The Clearing House also believes that the definition of Custodial Losses is appropriate to cover the appropriate range of risks of custodian failure, which are inherently fact- and situation-specific and may be difficult to predict in advance. ICE Clear Europe further explained in these discussions the basis for determination of relevant amounts, in light of the applicable capital requirements for credit, counterparty and market risks and operational and legal risks under relevant UK and EU law. ICE Clear Europe did not ultimately change the approach to Custodial Losses or the amount specified as Loss Assets in connection with these discussions. ICE Clear Europe received no other substantive opposing views in relation to the amendments.

As set forth herein, the amendments consist of the amendments to the Clearing Rules, 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 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,



George Milton
Head of Regulation & Compliance