

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90743; File No. SR–CboeBZX–2020–089]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Its Fees Schedule

December 21, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b–4 thereunder,² notice is hereby given that on December 10, 2020, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform (“BZX Options”) by removing certain fee codes related to routed orders and by updating certain fee codes in connection with routing orders in SPY options to Nasdaq PHLX LLC (“PHLX”).³

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 16% of the market share and currently the Exchange represents approximately 8% of the market share.⁴ Thus, in such a low-concentrated and highly competitive market, no single options exchange, including the Exchange, possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange’s transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange assesses fees in connection with orders routed away to various exchanges. Currently, under the Fee Codes and Associated Fees section of the Fee Schedule, fee codes D1, D2, D3 and D4 are appended to Members’ Directed ISOs, a routing option under which an intermarket sweep order (“ISO”) entered by a User bypasses the System and is sent by the System to another options exchange specified by the User.⁵ Specifically, these fee codes function as follows:

³ The Exchange initially filed the proposed fee changes on December 1, 2020 (SR–CboeBZX–2020–086). On December 9, 2020, the Exchange withdrew that filing and submitted this proposal.

⁴ See Cboe Global Markets U.S. Options Market Month-to-Date Volume Summary (November 23, 2020), available at https://markets.cboe.com/us/options/market_statistics/.

⁵ See Rule 21.9(a)(2)(D).

- Fee code D1 is appended to Directed ISOs to Nasdaq Options Market LLC (“NOM”), NYSE Arca, Inc. (“ARCA”) or ISE Gemini, LLC (“ISE Gemini”) in Non-Penny classes and assesses a charge of \$1.25 per contract;

- fee code D2 is appended to Non-Customer Directed ISOs to Nasdaq BX Options (“BX”) in Non-Penny classes and assesses a charge of \$0.95 per contract;

- fee code D3 is appended to Non-Customer Directed ISOs to Cboe C2 Exchange, Inc. (“C2”) or PHLX and assesses a charge of \$0.95 per contract; and

- fee code D4 is appended to Directed ISOs (unless otherwise specified in the Fee Schedule) and assesses a charge of \$0.85 per contract.

The Exchange has observed a minimal amount of volume in recent months in orders yielding fee codes D1, D2, D3 or D4. The Exchange believes that, because so few Users elect to route their orders as Directed ISOs, the current demand does not warrant the infrastructure and ongoing Systems maintenance required to support separate fee codes specifically applicable to Directed ISOs. Therefore, the Exchange now proposes to delete fee codes D1, D2, D3 and D4 in the Fee Schedule. The Exchange notes that Users will continue to be able to choose to route their orders as Directed ISOs and such orders will be assessed the fees currently in place for routed orders generally (*i.e.*, fee codes RN,⁶ RO,⁷ RP,⁸ RQ⁹ and RR¹⁰) as follows:

- A Directed ISO to which fee code D1 would have prior been appended (routed to NOM, ARCA or ISE Gemini in a Non-Penny class) will yield fee code RR, if it is a Customer order, which is appended to Customer orders in Non-Penny classes routed to NOM, ARCA or ISE Gemini (among other exchanges) and assesses a charge of \$1.25 per contract, or will yield fee code RO, if it is a Non-Customer order, which is appended to routed Non-Customer

⁶ Fee code RN is appended to routed Non-Customer orders in Penny Program classes and assesses a charge of \$0.90 per contract.

⁷ Fee code RO is appended to all routed Non-Customer orders in Non-Penny classes and assesses a charge of \$1.25 per contract.

⁸ Fee code RP is appended to routed Customer orders to AMEX, BOX, BX, Cboe, EDGX Options, ISE Mercury, MIAx or PHLX and assesses a charge of \$0.25 per contract.

⁹ Fee code RQ is appended to routed Customer orders in Penny Program classes to ARCA, C2, ISE, ISE Gemini, MIAx Emerald, MIAx Pearl or NOM and assesses a charge of \$0.85 per contract.

¹⁰ Fee code RR is appended to routed Customer orders in Non-Penny classes to ARCA, C2, ISE, ISE Gemini, MIAx Emerald, MIAx Pearl or NOM and assesses a charge of \$1.25 per contract.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

orders in Non-Penny classes and also assesses a charge of \$1.25 per contract;

- a Directed ISO to which fee code D2 would have prior been appended (Non-Customer to BX in a Non-Penny class) will yield fee code RO;

- a Directed ISO to which fee code D3 would have prior been appended (Non-Customer to C2 or PHLX) will yield fee code RN, if in a Penny class, which is appended to Non-Customer orders routed in Penny classes and assesses a charge of \$0.90 per contract, or will yield fee code RO, if it is in a Non-Penny class; and

- a Directed ISO to which fee code D4 would have prior been appended (unless otherwise specified) may yield any of fee codes RN, RO, RP, RQ and RR, depending on whether the order is a (1) routed Customer order in a Penny class (to which fee code RP, which assess a charge of \$0.25 per contract, or RQ, which assesses a charge of \$0.85 per contract, could apply depending on the away exchange), (2) a routed Customer order in a Non-Penny class (to which fee code RP or RR could apply depending on the away exchange), (3) is a routed Non-Customer order in a Penny class (to which fee code RN will apply), or (4) is a routed Non-Customer order in a Non-Penny Class (to which fee code RO will apply).

The Exchange also proposes to update fee codes RP and RQ in connection with routed Customer orders in SPY options to PHLX. Currently, fee code RP is appended to routed Customer orders to NYSE American ("AMEX"), BOX Options Exchange ("BOX"), BX, Cboe Exchange, Inc. ("Cboe"), Cboe EDGX Exchange, Inc. ("EDGX Options"), ISE Mercury, LLC ("ISE Mercury"), MIAX Options Exchange ("MIAX") or PHLX and assesses a charge of \$0.25 per contract. Fee code RQ is appended to routed Customer orders in Penny Program classes to ARCA, C2, ISE, ISE Gemini, MIAX Emerald Exchange ("MIAX Emerald"), MIAX Pearl Exchange ("MIAX Pearl"), or NOM and assesses a charge of \$0.85 per contract. The Exchange notes that its current approach to routing fees is to set forth in a simple manner certain sub-categories of fees that approximate the cost of routing to other options exchanges based on the cost of transaction fees assessed by each venue as well as costs to the Exchange for routing (*i.e.*, clearing fees, connectivity and other infrastructure costs, membership fees, etc.) (collectively, "Routing Costs"). The Exchange then monitors the fees charged as compared to the costs of its routing services and adjusts its routing fees and/or sub-categories to ensure that the Exchange's

fees do indeed result in a rough approximation of overall Routing Costs, and are not significantly higher or lower in any area. Currently, PHLX assesses a charge of \$0.42 per contract for Customer orders in SPY options that remove liquidity.¹¹ As described above, the Exchange currently assesses a flat routing fee of \$0.25 per contract for Customer orders routed to PHLX which yield fee code RP. This structure does not currently take into account the \$0.42 per contract fee assessed by PHLX for Customer orders in SPY options.

Therefore, in order to assess fees more in line with the Exchange's current approach to routing fees, that is, in a manner that approximates the cost of routing to Customer orders in SPY options to PHLX, along with other away options exchanges, based on the general cost of transaction fees assessed by the sub-category of away options exchanges for such orders (as well as the Exchange's Routing Costs), the Exchange proposes to exclude Customer orders is SPY options routed to PHLX from orders that yield fee code RP and are assessed a charge of \$0.25 per contract and, instead, add Customer orders routed to PHLX in SPY options only to orders that yield fee code RQ¹² and are assessed a charge of \$0.85 per contract.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,¹³ in general, and furthers the objectives of Section 6(b)(4),¹⁴ in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and issuers and other persons using its facilities. The Exchange also believes that the proposed rule change is consistent with the objectives of Section 6(b)(5)¹⁵ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect

investors and the public interest, and, particularly, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members. The Exchange notes that other options exchanges currently approximate routing fees in a similar manner as the Exchange's current approach.¹⁶

In particular, the Exchange believes the proposed rule change to remove fee codes D1, D2, D3 and D4 is reasonable as the Exchange has observed a minimal amount of volume in orders yielding fee codes D1, D2, D3 or D4 and, therefore, the current use of Directed ISO orders does not warrant the infrastructure and ongoing Systems maintenance required to support separate fee codes specifically applicable to Directed ISOs, a type of routing option Users may elect for their orders. As such, the Exchange also believes that is reasonable and equitable to assess Directed ISO orders as it already does for all other routed orders, as applicable (*i.e.*, fee codes RN, RO, RP, RQ and RR).¹⁷ The Exchange notes that the use of Directed ISOs, as well as routing through the Exchange, is optional. The Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because Users will continue to have the option to elect to route their orders as Directed ISOs and such routed orders will be automatically and uniformly assessed the applicable charges already in place for all other routed orders.

The Exchange believes the proposed rule change to amend fee codes RP and RQ to account for PHLX's current assessment of fees for Customer orders in SPY options is reasonable because it

¹⁶ See *e.g.*, NYSE Arca Options Fees and Charges, "Routing Fees", which provides routing fees of "\$0.11 per contract on orders routed and executed on another exchange, plus (i) any transaction fees assessed by the away exchange (calculated on an order-by-order basis since different away exchanges charge different amounts) or (ii) if the actual transaction fees assessed by the away exchange(s) cannot be determined prior to the execution, the highest per contract charge assessed by the away exchange(s) for the relevant option class and type of market participant (*e.g.*, Customer, Firm, Broker/Dealer, Professional Customer or Market Maker)."

¹⁷ See *supra* notes 6–10.

¹¹ See Nasdaq Phlx Options 7 Pricing Schedule, Section 3 "Rebates and Fees for Adding and Removing Liquidity in SPY", Part A.

¹² The Exchange notes that SPY options are part of the Penny Program.

¹³ 15 U.S.C. 78f.

¹⁴ 15 U.S.C. 78f(b)(4).

¹⁵ 15 U.S.C. 78f(b)(5).

is reasonably designed to assess routing fees in line with the Exchange's current approach to routing fees. That is, the proposed rule change is intended to include Customer orders in SPY options routed to PHLX in the most appropriate sub-category of fees that approximates the cost of routing to a group of away options exchanges (including PHLX) based on the cost of transaction fees assessed by each venue as well as Routing Costs to the Exchange. The Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because all Members' Customer orders in SPY routed to PHLX will automatically yield fee code RQ and uniformly be assessed the corresponding fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change will impose any burden on intramarket competition because all Members Directed ISO order will automatically and uniformly be assessed the current fees already in place for routed orders, as applicable (*i.e.*, fee codes RN, RO, RP, RQ and RR).¹⁸ Likewise, all Members' Customer orders in SPY routed to PHLX will automatically yield fee code RQ and uniformly be assessed the corresponding fee.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that other options exchange approximate routing costs in a similar manner as the Exchange's current approach.¹⁹ Also, as previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including 15 other options exchanges and off-exchange venues. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 16% of the market share.²⁰ Therefore, no exchange possesses significant pricing power in the execution of option order flow. Indeed, participants can readily choose to send their orders to other exchange

and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."²¹ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . ."²² Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act²³ and paragraph (f) of Rule 19b-4²⁴ thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may

temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CboeBZX-2020-089 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to File Number SR-CboeBZX-2020-089. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make

¹⁸ See *supra* notes 6-10.

¹⁹ See *supra* note 16.

²⁰ See *supra* note 4.

²¹ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

²² *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

²³ 15 U.S.C. 78s(b)(3)(A).

²⁴ 17 CFR 240.19b-4(f).

available publicly. All submissions should refer to File Number SR–CboeBZX–2020–089 and should be submitted on or before January 19, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90746; File No. SR–ICEEU–2020–016]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Publication of a Circular Regarding the Interpretation of References to EU Legislation in the Clearing Rules at the End of the Brexit Transition Period

December 21, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b–4 thereunder,² notice is hereby given that on December 11, 2020, ICE Clear Europe Limited (“ICE Clear Europe” or the “Clearing House”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule changes described in Items I, II and III below, which Items have been prepared primarily by ICE Clear Europe. ICE Clear Europe filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b–4(f)(1) thereunder,⁴ such that the proposed rule change was immediately effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency’s Statement of the Terms of Substance of the Proposed Rule Change

ICE Clear Europe is proposing to publish a Circular, titled ICE Clear Europe: Interpretation of References to EU Legislation in the Clearing Rules Post-Brexit (the “Circular”), to provide guidance as to the interpretation of references to European Union (“EU”) directives and regulations in the ICE Clear Europe Clearing Rules and

Procedures⁵ in the event that the United Kingdom (“UK”) ceases to be an EU member state, in circumstances where no withdrawal agreement stipulating that EU laws will continue to apply in the UK has been agreed between the UK and the EU–27. The interpretation contained in the Circular will only apply under such circumstances.

II. Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

The purpose of the proposed Circular is to provide guidance with respect to the interpretation of certain provisions in the Rules and Procedures in the event that the UK exits the Transition Period, in circumstances where no trade agreement has been agreed between the UK and the EU–27 stipulating that EU laws will continue to apply in the UK. In such circumstances, directly applicable EU directives and regulations will be incorporated into UK law with modifications at the end of the Transition Period pursuant to the European Union (Withdrawal) Act 2018 (the “EUWA”), which would result in there being two versions of a directly applicable EU legislative act which may be applicable to the Rules: (1) The version as enacted in the EU, directly applicable throughout the EU (and, in certain cases, the EEA); and (2) the version incorporated into UK law (referred to as “on-shored”).

There are various references to EU directives and regulations in the Rules and Procedures; others may arise by implication by virtue of definitions such as that of “Applicable Laws” or “Governmental Authority” (Rule 101). ICE Clear Europe is proposing to publish the Circular to provide guidance as to the proper interpretation of such references in the event of the end of the Transition Period without a trade

agreement in place that provides for continued applicability of EU law in the UK. The guidance is intended to be consistent with the views of legal practitioners in the UK with respect to references to EU directives and regulations in English law contracts generally, but applied to the particular definitions and situations that arise under the Rules and Procedures.

The Circular sets out several principles that will be applied by ICE Clear Europe when interpreting references to an EU regulation or directive in its Rules:

1. Where the reference concerns an obligation on, or otherwise applies to, the Clearing House or a UK Clearing Member:

- Where the reference is to an EU regulation, it should be interpreted as the regulation as it forms part of UK domestic law through section 3 of the EUWA, and as amended by UK law from time to time; and

- Where the reference is to an EU directive, it should be interpreted as the UK domestic law corresponding to the directive or provision thereof.

2. Where the reference concerns an obligation on, or otherwise applies to, an EU Clearing Member:

- Where the reference is to an EU regulation, it should be interpreted as the regulation as it applies in the EU, and as amended by EU law from time to time; and

- Where the reference is to an EU directive, it should be interpreted as the EU directive, as amended by EU law from time to time and as implemented in the relevant member state of the EU Clearing Member.

The Circular also addresses situations where both sets of laws apply, for example for entities established in the UK with an EU branch (or vice versa) or which continue to be regulated in both systems under cross-border licenses, the UK temporary permissions regime or other grandfathering arrangements (via reverse solicitation or otherwise). By way of example, it explains how Rule requirements that Clearing Members maintain sufficient capital would require UK Clearing Members to comply with the on-shored version of the applicable regulatory requirements as well as applicable EU requirements for any EU branch or to the extent they are subject to EU consolidated supervision. EU Clearing Members with a UK branch or which are subject to UK consolidated supervision would be required to comply with UK capital rules equivalent to the EU rules, to the extent applicable (in addition to their applicable home country requirements). Rule

²⁵ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b–4(f)(1).

⁵ Capitalized terms used but not defined herein have the meanings specified in the ICE Clear Europe Clearing Rules (the “Rules”).