

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59527; File No. S7-05-09)

March 6, 2009

ORDER GRANTING TEMPORARY EXEMPTIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934 IN CONNECTION WITH REQUEST ON BEHALF OF ICE US TRUST LLC RELATED TO CENTRAL CLEARING OF CREDIT DEFAULT SWAPS, AND REQUEST FOR COMMENTS

I. Introduction

In response to the recent turmoil in the financial markets, the Securities and Exchange Commission (“Commission”) has taken multiple actions to protect investors and ensure the integrity of the nation’s securities markets.¹ Today the Commission is taking further action designed to address concerns related to the market in credit default swaps (“CDS”). The over-the-counter (“OTC”) market for CDS has been a source of concerns to us and other financial regulators. These concerns include the systemic risk posed by CDS, highlighted by the possible

¹ A nonexclusive list of the Commission's actions to stabilize financial markets during this credit crisis include: adopting a package of measures to strengthen investor protections against naked short selling, including rules requiring a hard T+3 close-out, eliminating the options market maker exception of Regulation SHO, and expressly targeting fraud in short selling transactions (See Securities Exchange Act Release No. 58572 (September 17, 2008), 73 FR 54875 (September 23, 2008)); issuing an emergency order to enhance protections against naked short selling in the securities of primary dealers, Federal National Mortgage Association (“Fannie Mae”), and Federal Home Loan Mortgage Corporation (“Freddie Mac”) (See Securities Exchange Act Release No. 58166 (July 15, 2008), 73 FR 42379 (July 21, 2008)); taking temporary emergency action to ban short selling in financial securities (See Securities Exchange Act Release No. 58592 (September 18, 2008), 73 FR 55169 (September 24, 2008)); approving emergency rulemaking to ensure disclosure of short positions by hedge funds and other institutional money managers (See Securities Exchange Act Release No. 58591A (September 21, 2008), 73 FR 55557 (September 25, 2008)); proposing rules to strengthen the regulation of credit rating agencies and making the limits and purposes of credit ratings clearer to investors (See Securities Exchange Act Release No. 57967 (June 16, 2008), 73 FR 36212 (June 25, 2008)); entering into a Memorandum of Understanding with the Board of Governors of the Federal Reserve System (“FRB”) to make sure key federal financial regulators share information and coordinate regulatory activities in important areas of common interest (See Memorandum of Understanding Between the U.S. Securities and Exchange Commission and the Board of Governors of the Federal Reserve System Regarding Coordination and Information Sharing in Areas of Common Regulatory and Supervisory Interest (July 7, 2008), http://www.sec.gov/news/press/2008/2008-134_mou.pdf).

inability of parties to meet their obligations as counterparties and the potential resulting adverse effects on other markets and the financial system.² Recent credit market events have demonstrated the seriousness of these risks in a CDS market operating without meaningful regulation, transparency,³ or central counterparties (“CCPs”).⁴ These events have emphasized the need for CCPs as mechanisms to help control such risks.⁵ A CCP for CDS could be an important step in reducing the counterparty risks inherent in the CDS market, and thereby help mitigate potential systemic impacts. In November 2008, the President’s Working Group on Financial Markets stated that the implementation of a CCP for CDS was a top priority⁶ and, in furtherance of this recommendation, the Commission, the FRB and the Commodity Futures Trading Commission (“CFTC”) signed a Memorandum of Understanding⁷ that establishes a framework for consultation and information sharing on issues related to CCPs for CDS. Given the continued uncertainty in this market, taking action to help foster the prompt development of

² In addition to the potential systemic risks that CDS pose to financial stability, we are concerned about other potential risks in this market, including operational risks, risks relating to manipulation and fraud, and regulatory arbitrage risks.

³ See Policy Objectives for the OTC Derivatives Market, The President’s Working Group on Financial Markets, November 14, 2008, available at <http://www.ustreas.gov/press/releases/reports/policyobjectives.pdf> (“Public reporting of prices, trading volumes and aggregate open interest should be required to increase market transparency for participants and the public.”).

⁴ See The Role of Credit Derivatives in the U.S. Economy Before the H. Agric. Comm., 110th Cong. (2008) (Statement of Erik Sirri, Director of the Division of Trading and Markets, Commission).

⁵ See *id.*

⁶ See Policy Objectives for the OTC Derivatives Market, The President’s Working Group on Financial Markets (November 14, 2008), <http://www.ustreas.gov/press/releases/reports/policyobjectives.pdf>. See also Policy Statement on Financial Market Developments, The President’s Working Group on Financial Markets (March 13, 2008), http://www.treas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf; Progress Update on March Policy Statement on Financial Market Developments, The President’s Working Group on Financial Markets (October 2008), <http://www.treas.gov/press/releases/reports/q4progress%20update.pdf>.

⁷ See Memorandum of Understanding Between the Board of Governors of the Federal Reserve System, the U.S. Commodity Futures Trading Commission and the U.S. Securities and Exchange Commission Regarding Central Counterparties for Credit Default Swaps (November 14, 2008), <http://www.treas.gov/press/releases/reports/finalmou.pdf>.

CCPs, including granting conditional exemptions from certain provisions of the federal securities laws, is in the public interest.

A CDS is a bilateral contract between two parties, known as counterparties. The value of this financial contract is based on underlying obligations of a single entity or on a particular security or other debt obligation, or an index of several such entities, securities, or obligations. The obligation of a seller under a CDS to make payments under a CDS contract is triggered by a default or other credit event as to such entity or entities or such security or securities. Investors may use CDS for a variety of reasons, including to offset or insure against risk in their fixed-income portfolios, to take positions in bonds or in segments of the debt market as represented by an index, or to capitalize on the volatility in credit spreads during times of economic uncertainty. In recent years, CDS market volumes have rapidly increased.⁸ This growth has coincided with a significant rise in the types and number of entities participating in the CDS market.⁹

The Commission's authority over this OTC market for CDS is limited. Specifically, Section 3A of the Securities Exchange Act of 1934 ("Exchange Act") limits the Commission's authority over swap agreements, as defined in Section 206A of the Gramm-Leach-Bliley Act.¹⁰ For those CDS that are swap agreements, the exclusion from the definition of security in Section 3A of the Exchange Act, and related provisions, will continue to apply. The Commission's

⁸ See Semiannual OTC derivatives statistics at end-December 2007, Bank for International Settlements ("BIS"), available at <http://www.bis.org/statistics/otcder/dt1920a.pdf>.

⁹ CDS were initially created to meet the demand of banking institutions looking to hedge and diversify the credit risk attendant with their lending activities. However, financial institutions such as insurance companies, pension funds, securities firms, and hedge funds have entered the CDS market.

¹⁰ 15 U.S.C. 78c-1. Section 3A excludes both a non-security-based and a security-based swap agreement from the definition of "security" under Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10). Section 206A of the Gramm-Leach-Bliley Act defines a "swap agreement" as "any agreement, contract, or transaction between eligible contract participants (as defined in section 1a(12) of the Commodity Exchange Act. . .) . . . the material terms of which (other than price and quantity) are subject to individual negotiation." 15 U.S.C. 78c note.

action today does not affect these CDS, and this Order does not apply to them. For those CDS that are not swap agreements (“non-excluded CDS”), the Commission’s action today provides conditional exemptions from certain requirements of the Exchange Act.

The Commission believes that using well-regulated CCPs to clear transactions in CDS would help promote efficiency and reduce risk in the CDS market and among its participants. These benefits could be particularly significant in times of market stress, as CCPs would mitigate the potential for a market participant’s failure to destabilize other market participants, and reduce the effects of misinformation and rumors. CCP-maintained records of CDS transactions would also aid the Commission’s efforts to prevent and detect fraud and other abusive market practices.

A well-regulated CCP also would address concerns about counterparty risk by substituting the creditworthiness and liquidity of the CCP for the creditworthiness and liquidity of the counterparties to a CDS. In the absence of a CCP, participants in the OTC CDS market must carefully manage their counterparty risks because the default by a counterparty can render worthless, and payment delay can reduce the usefulness of, the credit protection that has been bought by a CDS purchaser. CDS participants currently attempt to manage counterparty risk by carefully selecting and monitoring their counterparties, entering into legal agreements that permit them to net gains and losses across contracts with a defaulting counterparty, and often requiring counterparty exposures to be collateralized.¹¹ A CCP could allow participants to avoid these risks specific to individual counterparties because a CCP “novates” bilateral trades by entering

¹¹ See generally R. Bliss and C. Papathanassiou, “Derivatives clearing, central counterparties and novation: The economic implications” (March 8, 2006), at 6. See also “New Developments in Clearing and Settlement Arrangements for OTC Derivatives,” Committee on Payment and Settlement Systems, BIS, at 25 (March 2007), available at <http://www.bis.org/pub/cpss77.pdf>; “Reducing Risks and Improving Oversight in the OTC Credit Derivatives Market,” Before the Sen. Subcomm. On Secs., Ins. and Investments, 110th Cong. (2008) (Statement of Patrick Parkinson, Deputy Director, Division of Research and Statistics, FRB).

into separate contractual arrangements with both counterparties – becoming buyer to one and seller to the other.¹² Through novation, it is the CCP that assumes counterparty risks.

For this reason, a CCP for CDS would contribute generally to the goal of market stability. As part of its risk management, a CCP may subject novated contracts to initial and variation margin requirements and establish a clearing fund. The CCP also may implement a loss-sharing arrangement among its participants to respond to a participant insolvency or default.

A CCP would also reduce CDS risks through multilateral netting of trades.¹³ Trades cleared through a CCP would permit market participants to accept the best bid or offer from a dealer in the OTC market with very brief exposure to the creditworthiness of the dealer. In addition, by allowing netting of positions in similar instruments, and netting of gains and losses across different instruments, a CCP would reduce redundant notional exposures and promote the more efficient use of resources for monitoring and managing CDS positions. Through uniform margining and other risk controls, including controls on market-wide concentrations that cannot be implemented effectively when counterparty risk management is decentralized, a CCP can help prevent a single market participant's failure from destabilizing other market participants and, ultimately, the broader financial system.

In this context, IntercontinentalExchange, Inc. ("ICE") and The Clearing Corporation ("TCC"), on behalf of ICE US Trust LLC ("ICE Trust"), have requested that the Commission

¹² "Novation" is a "process through which the original obligation between a buyer and seller is discharged through the substitution of the CCP as seller to buyer and buyer to seller, creating two new contracts." Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissioners, Recommendations for Central Counterparties (November 2004) at 66.

¹³ See "New Developments in Clearing and Settlement Arrangements for OTC Derivatives," *supra* note 11, at 25. Multilateral netting of trades would permit multiple counterparties to offset their open transaction exposure through the CCP, spreading credit risk across all participants in the clearing system and more effectively diffusing the risk of a counterparty's default than could be accomplished by bilateral netting alone.

grant exemptions from certain requirements under the Exchange Act with respect to the proposed activities of ICE Trust in clearing and settling certain CDS, as well as the proposed activities of certain other persons, as described below.¹⁴

Based on the facts presented and the representations made in the request on behalf of ICE Trust,¹⁵ and for the reasons discussed in this Order, the Commission temporarily is exempting, subject to certain conditions, ICE Trust from the requirement to register as a clearing agency under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS transactions. The Commission also temporarily is exempting eligible contract participants and others from certain Exchange Act requirements with respect to non-excluded CDS cleared by ICE Trust. In addition, the Commission temporarily is exempting ICE Trust and certain participants of ICE Trust from the registration requirements of Sections 5 and 6 of the Exchange Act solely in connection with the calculation of mark-to-market prices for non-excluded CDS cleared by ICE Trust. The Commission's exemptions are temporary and will expire on December 7, 2009. To facilitate the operation of one or more CCPs for the CDS market, the Commission has also approved interim final temporary rules providing exemptions under the Securities Act of 1933 and the Exchange Act for non-excluded CDS.¹⁶ Finally, the

¹⁴ See Letter from Johnathan Short, InterContinental Exchange, Inc. and Kevin McClear, The Clearing Corporation, to Elizabeth Murphy, Secretary, Commission, February 26, 2009.

¹⁵ See *id.* The exemptions we are granting today are based on representations made in the request on behalf of ICE Trust. We recognize, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if any of these exemptions were to become unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in non-excluded CDS associated with persons subject to those unavailable exemptions would remain unchanged, but no new positions could be established pursuant to the exemptions until all of the underlying representations were again accurate.

¹⁶ See Securities Act Release No. 33-8999 (January 14, 2009).

Commission has provided temporary exemptions in connection with Sections 5 and 6 of the Exchange Act for transactions in non-excluded CDS.¹⁷

II. Discussion

A. Description of ICE Trust’s Proposal

The exemptive request on behalf of ICE Trust describes how the proposed arrangements for central clearing of CDS by ICE Trust would operate, and makes representations about the safeguards associated with those arrangements, as described below:

1. ICE Trust Organization

ICE Trust is organized as a New York State chartered limited liability trust company and has received approval of its application to become a member of the Federal Reserve System. ICE Trust is subject to direct supervision and examination by the New York State Banking Department (“NYSBD”), and, in association with the approval of its application to become a member of the Federal Reserve System, will be subject to direct supervision and examination by the FRB, specifically the Federal Reserve Bank of New York.

2. ICE Trust Central Counterparty Services for CDS

Initially, ICE Trust’s business will be limited to the provision of clearing services for the OTC CDS market. ICE Trust will act as a central counterparty for ICE Trust Participants (as defined below)¹⁸ by assuming, through novation, the obligations of all eligible CDS transactions accepted by it for clearing and collecting margin and other credit support from ICE Trust Participants to collateralize their obligations to ICE Trust. ICE Trust’s trade submission process is designed to ensure that it maintains a matched book of offsetting CDS contracts.

¹⁷ See Securities Exchange Act Release No. 59165 (December 24, 2008).

¹⁸ See note 35, *infra*.

Although CDS are currently bilaterally negotiated and executed, major market participants frequently use the Deriv/SERV service of The Depository Trust & Clearing Corporation (“DTCC”) comparison and confirmation service when documenting their CDS transactions. This service creates electronic records of transaction terms and counterparties. As part of this service, market participants separately submit the terms of a CDS transaction to Deriv/SERV in electronic form. Paired submissions are compared to verify that their terms match in all required respects. If a match is confirmed, the parties receive an electronic confirmation of the submitted transaction. All submitted transactions are recorded in the Deriv/SERV Trade Information Warehouse, which serves as the primary registry for submitted transactions.

ICE Trust will leverage the Deriv/SERV infrastructure in operating its CDS clearing service. Initially, all trades submitted by Participants for clearing through ICE Trust will be recorded in the Deriv/SERV Trade Information Warehouse. ICE Trust will, initially on a weekly basis, obtain from DTCC matched trades that have been recorded in the Deriv/SERV Trade Information Warehouse as having been submitted for clearing through ICE Trust. Within two months of launch, ICE Trust intends to obtain matched trades from DTCC on a daily basis.

Participants may use the facilities of an inter-dealer broker to execute CDS transactions, for example, to access liquidity more rapidly or to maintain pre-execution anonymity and submit such transactions for clearance and settlement to ICE Trust. The inter-dealer brokers do not assume market positions in connection with their intermediation of CDS transactions.

Once a matched CDS contract has been forwarded to, or obtained by, ICE Trust, and has been accepted for clearing by it, ICE Trust will clear the CDS contract by becoming the central counterparty to each party to the trade through novation. Deriv/SERV’s current infrastructure

will help to ensure that ICE Trust maintains a matched book of offsetting CDS contracts. Maintaining a matched offsetting book is essential to managing the credit risk associated with CDS submitted to ICE Trust for clearing.

Under the ICE Trust's current draft rules ("ICE Trust Rules"), each bilateral CDS contract between two ICE Trust Participants that is submitted, and accepted by ICE Trust, for clearing will be "novated." As part of this process, each bilateral CDS contract submitted to ICE Trust will be replaced by two superseding CDS contracts between each of the original parties to the submitted transaction and ICE Trust. Under these new contracts, ICE Trust will act as the counterparty to each of the original parties. As central counterparty to each novated CDS contract, ICE Trust will be able to net offsetting positions on a multilateral basis, even though ICE Trust will have different counterparties with respect to the novated CDS contracts that are being netted.

As part of the novation process, the terms and conditions governing the CDS bilaterally negotiated by the submitting counterparties will be superseded by the relevant provisions of the ICE Trust Rules applicable to the relevant CDS transaction. Multilateral netting will significantly reduce the outstanding notional amount of each ICE Trust Participant's CDS portfolio. When ICE Trust acts as the central counterparty to all cleared CDS of an ICE Trust Participant, that participant's positions will be netted down to a single exposure to ICE Trust.

3. ICE Trust Risk Management

ICE Trust will mitigate counterparty risk through its margin, guaranty fund, and credit support framework, as set forth in the ICE Trust Rules. ICE Trust's risk management infrastructure and related risk metrics will be structured specifically for the CDS products that

ICE Trust clears. Each ICE Trust Participant's credit support obligations will be governed by a uniform credit support framework and applicable ICE Trust Rules.

ICE Trust represents that it will maintain strict, objectively determined, risk-based margin and guaranty fund requirements, which will be subject to extensive and ongoing regulation and oversight by the FRB and the NYSBD. These requirements will also be consistent with clearing industry practice, Basel II capital adequacy standards, and international standards established for central counterparties as articulated in the Bank for International Settlements / International Organization of Securities Commissions ("IOSCO") CCP Recommendations. The amount of margin and guaranty fund required of each ICE Trust Participant will be continuously adjusted to reflect the size and profile of, and risk associated with, the ICE Trust Participant's cleared CDS transactions (and related market factors).

Pursuant to ICE Trust Rules, each ICE Trust Participant's margin requirement will consist of two components: (1) initial margin, reflecting a risk-based calculation of potential loss on outstanding CDS positions in the event of a significant adverse market movement, and (2) mark-to-market margin, based upon an end-of-day mark-to-market of outstanding positions. Acceptable margin will initially include only cash in specified currencies and G-7 government debt for initial margin and only cash for mark-to-market margin. ICE Trust Participants will be required to cover any end-of-day margin deficit with U.S. dollars by the following morning, and ICE Trust will have the discretion to require and collect additional margin, both at the end of the day and intraday, as it deems necessary.¹⁹

ICE Trust will also maintain a guaranty fund (the "Guaranty Fund") to cover losses arising from an ICE Trust Participant's default on cleared CDS transactions that exceed the

¹⁹ An ICE Trust Participant would be permitted to withdraw mark-to-market margin amounts credited to its account to the extent not required to satisfy its initial margin requirement.

amount of margin held by ICE Trust from the defaulting ICE Trust Participant. Each ICE Trust Participant will be required to contribute a minimum of \$20 million to the Guaranty Fund initially when it becomes an ICE Trust Participant and on an ongoing basis, additional amounts based on its actual and anticipated CDS position exposures. The adequacy of the Guaranty Fund will be monitored daily and the need for additional contributions will be determined on at least a monthly basis, based on the size of ICE Trust Participant exposures within the ICE Trust clearing system. As a result, the Guaranty Fund will grow in proportion to the position risk associated with the aggregate volume of CDS cleared by ICE Trust.

ICE Trust will also establish rules that “mutualize” the risk of an ICE Trust Participant default across all ICE Trust Participants. In the event of an ICE Trust Participant’s default, ICE Trust may look to the margin posted by such participant, such participant’s Guaranty Fund contributions and, if applicable, any recovery from a parent guarantor. In addition, at its discretion, ICE Trust will be authorized to use, to the extent needed, other ICE Trust Participants’ Guaranty Fund contributions to satisfy any obligations of the defaulting ICE Trust Participant; provided that, any recovery from the defaulting ICE Trust Participant, its parent guarantor, if any, or the sale of the defaulting ICE Trust Participant’s positions in ICE Trust will first be used to refund any amounts utilized by ICE Trust from contributions of non-defaulting ICE Trust Participants to the Guaranty Fund.

4. Member Default

Following a default by an ICE Trust Participant, ICE Trust has a number of tools available to it under the ICE Trust Rules to ensure an orderly liquidation and unwinding of the open positions of such defaulting ICE Trust Participant. In the first instance, upon determining that a default has occurred, ICE Trust will have the ability to immediately enter into replacement

CDS transactions with other ICE Trust Participants that are designed to mitigate, to the greatest extent possible, the market risk of the defaulting ICE Trust Participant's open positions. For open positions in which there is no liquid trading market, ICE Trust may enter into covering CDS transactions for which there is a liquid market and that are most closely correlated with such illiquid open positions.

After entering into covering transactions in the open market, if any, ICE Trust will seek to close out any remaining open positions of the defaulting ICE Trust Participant (including any initial covering transactions) by using one or more auctions or other commercially reasonable unwind processes. The ICE Trust Rules will prohibit ICE Trust from entering into any replacement transaction if the price of such transaction would be below the least favorable price that would be reasonable to accept for such replacement transaction. To the extent ICE Trust is not able to enter into the necessary replacement transactions through auctions or open market processes, ICE Trust will be entitled to allocate such replacement transactions to the remaining ICE Trust Participants at the floor price established by ICE Trust.

B. Temporary Conditional Exemptions from Clearing Agency and Exchange Registration Requirements

1. Exemption from Section 17A of the Exchange Act

Section 17A of the Exchange Act sets forth the framework for the regulation and operation of the U.S. clearance and settlement system, including CCPs. Specifically, Section 17A directs the Commission to use its authority to promote enumerated Congressional objectives and to facilitate the development of a national clearance and settlement system for securities transactions. Absent an exemption, a CCP that novates trades of non-excluded CDS that are

securities and generates money and settlement obligations for participants is required to register with the Commission as a clearing agency.

Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.²⁰

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until December 7, 2009 to ICE Trust from Section 17A of the Exchange Act, solely to perform the functions of a clearing agency for Cleared CDS,²¹ subject to the conditions discussed below.

Our action today balances the aim of facilitating the prompt establishment of ICE Trust as a CCP for non-excluded CDS transactions – which should help reduce systemic risks during a period of extreme turmoil in the U.S. and global financial markets – with ensuring that important

²⁰ 15 U.S.C. 78mm.

²¹ For purposes of this exemption, and the other exemptions addressed in this Order, “Cleared CDS” means a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to ICE Trust, that is offered only to, purchased only by, and sold only to eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which: (i) the reference entity, the issuer of the reference security, or the reference security is one of the following: (A) an entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available; (B) a foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States; (C) a foreign sovereign debt security; (D) an asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or (E) an asset-backed security issued or guaranteed by the Fannie Mae, Freddie Mac or the Government National Mortgage Association (“Ginnie Mae”); or (ii) the reference index is an index in which 80 percent or more of the index’s weighting is comprised of the entities or securities described in subparagraph (i). As discussed above, the Commission’s action today does not affect CDS that are swap agreements under Section 206A of the Gramm-Leach-Bliley Act. See text at note 10, supra.

elements of Commission oversight are applied to the non-excluded CDS market. In doing so, we are mindful that applying the full scope of the Exchange Act to transactions involving non-excluded CDS could deter the prompt establishment of ICE Trust as a CCP to settle those transactions.

While we are acting so that the prompt establishment of ICE Trust as a CCP for non-excluded CDS will not be delayed by the need to apply the full scope of Exchange Act Section 17A's requirements that govern clearing agencies, the relief we are providing is temporary and conditional. The limited duration of the exemptions will permit the Commission to gain more direct experience with the non-excluded CDS market after ICE Trust becomes operational, giving the Commission the ability to oversee the development of the centrally cleared non-excluded CDS market as it evolves. During the exemptive period, the Commission will closely monitor the impact of the CCPs on the CDS market. In particular, the Commission will seek to assure itself that the CCPs do not act in anticompetitive manner or indirectly facilitate anticompetitive behavior with respect to fees charged to members, the dissemination of market data and the access to clearing services by independent CDS exchanges or CDS trading platforms. The Commission will take that experience into account in future actions.

Moreover, this temporary exemption in part is based on ICE Trust's representation that it meets the standards set forth in the Committee on Payment and Settlement Systems ("CPSS") and IOSCO report entitled: Recommendation for Central Counterparties ("RCCP").²² The RCCP establishes a framework that requires a CCP to have: (i) the ability to facilitate the prompt

²² The RCCP was drafted by a joint task force ("Task Force") composed of representative members of IOSCO and CPSS and published in November 2004. The Task Force consisted of securities regulators and central bankers from 19 countries and the European Union. The U.S. representatives on the Task Force included staff from the Commission, the FRB, and the CFTC.

and accurate clearance and settlement of CDS transactions and to safeguard its users' assets; and (ii) sound risk management, including the ability to appropriately determine and collect clearing fund and monitor its users' trading. This framework is generally consistent with the requirements of Section 17A of the Exchange Act.

In addition, this Order is designed to assure that – as represented in the request on behalf of ICE Trust – information will be available to market participants about the terms of the CDS cleared by ICE Trust, the creditworthiness of ICE Trust or any guarantor, and the clearing and settlement process for the CDS. Moreover, to be within the definition of Cleared CDS for purposes of this exemption (as well as the other exemptions granted through this Order), a CDS may only involve a reference entity, a reference security, an issuer of a reference security, or a reference index that satisfies certain conditions relating to the availability of information about such persons or securities. For non-excluded CDS that are index-based, the definition provides that at least 80 percent of the weighting of the index must be comprised of reference entities, issuers of a reference security, or reference securities that satisfy the information conditions. The definition does not prescribe the type of financial information that must be available nor the location of the particular information, recognizing that eligible contract participants have access to information about reference entities and reference securities through multiple sources. The Commission believes, however, that it is important in the CDS market, as in the market for securities generally, that parties to transactions should have access to financial information that would allow them to appropriately evaluate the risks relating to a particular investment and make more informed investment decisions.²³ Such information availability also will assist ICE Trust

²³ The Commission notes the recommendations of the President's Working Group on Financial Markets regarding the informational needs and due diligence responsibilities of investors. See Policy Statement on Financial Market Developments, The President's Working Group on Financial Markets,

and the buyers and sellers in valuing their Cleared CDS and their counterparty exposures. As a result of the Commission's actions today, the Commission believes that information should be available for market participants to be able to make informed investment decisions, and value and evaluate their Cleared CDS and their counterparty exposures.

This temporary exemption is subject to a number of conditions that are designed to enable Commission staff to monitor ICE Trust's clearance and settlement of CDS transactions and help reduce risk in the CDS market. These conditions require that ICE Trust: (i) make available on its Web site its annual audited financial statements; (ii) preserve records related to the conduct of its Cleared CDS clearance and settlement services for at least five years (in an easily accessible place for the first two years); (iii) provide information relating to its Cleared CDS clearance and settlement services to the Commission and provide access to the Commission to conduct on-site inspections of facilities, records and personnel related to its Cleared CDS clearance and settlement services; (iv) notify the Commission about material disciplinary actions taken against any of its members utilizing its Cleared CDS clearance and settlement services, and about the involuntary termination of the membership of an entity that is utilizing ICE Trust's Cleared CDS clearance and settlement services; (v) provide the Commission with changes to rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services; (vi) provide the Commission with reports prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements²⁴ and its annual audited financial

March 13, 2008, available at:

http://www.treas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf.

²⁴ See Automated Systems of Self-Regulatory Organization, Exchange Act Release No. 27445 (November 16, 1989), File No. S7-29-89, and Automated Systems of Self-Regulatory Organization (II), Exchange Act Release No. 29185 (May 9, 1991), File No. S7-12-19.

statements prepared by independent audit personnel; and (vii) report all significant systems outages to the Commission.

In addition, this relief is conditioned on ICE Trust, directly or indirectly, making available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) all end-of-day settlement prices and any other prices with respect to Cleared CDS that ICE Trust may establish to calculate mark-to-market margin requirements for ICE Trust Participants; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by ICE Trust. The Commission believes this is an appropriate condition for ICE Trust's exemption from registration as a clearing agency. In Section 11A of the Exchange Act, Congress found that "[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure . . . the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities."²⁵ The President's Working Group on Financial Markets has stated that increased transparency is a policy objective for the over-the-counter derivatives market,²⁶ which includes the market for CDS. The condition is designed to further this policy objective of both Congress and the President's Working Group by requiring ICE Trust to make useful pricing data available to the public on terms that are fair and reasonable and not unreasonably discriminatory. Congress adopted these standards for the distribution of data in Section 11A. The Commission long has

²⁵ 15 U.S.C. 78k-1(a)(1)(C)(iii). See also 15 U.S.C. 78k-1(a)(1)(D).

²⁶ See President's Working Group on Financial Markets, Policy Objectives for the OTC Derivatives Market (November 14, 2008), available at <http://www.ustreas.gov/press/releases/reports/policyobjectives.pdf> ("Public reporting of prices, trading volumes and aggregate open interest should be required to increase market transparency for participants and the public.").

applied the standards in the specific context of securities market data,²⁷ and it anticipates that ICE Trust will distribute its data on terms that generally are consistent with the application of these standards to securities market data. For example, data distributors generally are required to treat subscribers equally and not grant special access, fees, or other privileges to favored customers of the distributor. Similarly, distributors must make their data feeds reasonably available to data vendors for those subscribers who wish to receive their data indirectly through a vendor rather than directly from the distributor. In addition, a distributor's attempt to tie data products that must be made available to the public with other products or services of the distributor would be inconsistent with the statutory requirements.²⁸ The Commission carefully evaluates any type of discrimination with respect to subscribers and vendors to assess whether there is a reasonable basis for the discrimination given, among other things, the Exchange Act objective of promoting price transparency.²⁹ Moreover, preventing unreasonable discrimination is a practical means to promote fair and reasonable terms for data distribution because distributors are more likely to act appropriately when the terms applicable to the broader public also must apply to any favored classes of customers.³⁰

²⁷ See Exchange Act Release No. 42209 (December 9, 1999), 64 FR 70613, 70621-70623 (December 17, 1999) ("Market Information Concept Release") (discussion of legal standards applicable to market data distribution since Section 11A was adopted in 1975).

²⁸ See Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74793 (December 9, 2008) ("NYSE ArcaBook Order") ("[S]ection 6 and Exchange Act Rule 603(a) require NYSE Arca to distribute the ArcaBook data on terms that are not tied to other products in a way that is unfairly discriminatory or anticompetitive.").

²⁹ See Market Information Concept Release, 64 FR at 70630 ("The most important objectives for the Commission to consider in evaluating fees are to assure (1) the wide availability of market information, (2) the neutrality of fees among markets, vendors, broker-dealers, and users, (3) the quality of market information – its integrity, reliability, and accuracy, and (4) fair competition and equal regulation among markets and broker-dealers.").

³⁰ See NYSE ArcaBook Order, 73 FR at 74794 ("[T]he proposed fees for ArcaBook data will apply equally to all professional subscribers and all non-professional subscribers . . . The fees therefore do not

As a CCP, ICE Trust will collect and process information about CDS transactions, prices, and positions from all of its participants. With this information, a CCP will, among other things, calculate and disseminate current values for open positions for the purpose of setting appropriate margin levels. The availability of such information can improve fairness, efficiency, and competitiveness of the market – all of which enhance investor protection and facilitate capital formation. Moreover, with pricing and valuation information relating to Cleared CDS, market participants would be able to derive information about underlying securities and indexes. This may improve the efficiency and effectiveness of the securities markets by allowing investors to better understand credit conditions generally.

2. Exemption from Sections 5 and 6 of the Exchange Act

ICE Trust represents that, in connection with its clearing and risk management process, it will calculate an end-of-day settlement price for each Cleared CDS in which an ICE Trust Participant has a cleared position, based on prices submitted by ICE Trust Participants. As part of this mark-to-market process, ICE Trust will periodically require ICE Trust Participants to execute certain CDS trades at the applicable end-of-day settlement price. Requiring ICE Trust Participants to trade CDS periodically in this manner is designed to help ensure that such submitted prices reflect each ICE Trust Participant's best assessment of the value of each of its open positions in Cleared CDS on a daily basis, thereby reducing risk by allowing ICE Trust to impose appropriate margin requirements.

Section 5 of the Exchange Act states that "[i]t shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of

unreasonably discriminate among types of subscribers, such as by favoring participants in the NYSE Arca market or penalizing participants in other markets.”).

interstate commerce for the purpose of using any facility of an exchange . . . to effect any transaction in a security, or to report any such transactions, unless such exchange (1) is registered as a national securities exchange under section 6 of [the Exchange Act], or (2) is exempted from such registration . . . by reason of the limited volume of transactions effected on such exchange...."³¹ Section 6 of the Exchange Act sets forth a procedure whereby an exchange³² may register as a national securities exchange.³³ To facilitate the establishment of ICE Trust's end-of-day settlement price process, including the periodically required trading described above, the Commission is exercising its authority under Section 36 of the Exchange Act to temporarily exempt ICE Trust and ICE Trust Participants from Sections 5 and 6 of the Exchange Act and the rules and regulations thereunder in connection with ICE Trust's calculation of mark-to-market prices for open positions in Cleared CDS. This temporary exemption is subject to the following conditions:

First, ICE Trust must report the following information with respect to the calculation of mark-to-market prices for Cleared CDS to the Commission within 30 days of the end of each quarter, and preserve such reports during the life of the enterprise and of any successor enterprise:

- The total dollar volume of transactions executed during the quarter, broken down by reference entity, security, or index; and

³¹ 15 U.S.C. 78e.

³² Section 3(a)(1) of the Exchange Act, 15 U.S.C. 78c(a)(1), defines "exchange." Rule 3b-16 under the Exchange Act, 17 CFR 240.3b-16, defines certain terms used in the statutory definition of exchange. See Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (adopting Rule 3b-16 in addition to Regulation ATS).

³³ 15 U.S.C. 78f. Section 6 of the Exchange Act also sets forth various requirements to which a national securities exchange is subject.

- The total unit volume and/or notional amount executed during the quarter, broken down by reference entity, security, or index.

Reporting of this information will assist the Commission in carrying out its responsibility to supervise and regulate the securities markets.

Second, ICE Trust must establish adequate safeguards and procedures to protect participants' confidential trading information. Such safeguards and procedures shall include: (a) limiting access to the confidential trading information of participants to those employees of ICE Trust who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (b) implementing standards controlling employees of ICE Trust trading for their own accounts. ICE Trust must adopt and implement adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed. This condition is designed to prevent any misuse of ICE Trust Participant trading information that may be available to ICE Trust in connection with the daily marking-to-market process of open positions in Cleared CDS. This should strengthen confidence in ICE Trust as a CCP for CDS, promoting participation.

Third, ICE Trust must comply with the conditions to the temporary exemption from registration as a clearing agency granted in this Order. As set forth above, this Order is designed to facilitate the prompt establishment of ICE Trust as a CCP for non-excluded CDS. ICE Trust has represented that, to enhance the reliability of end-of-day settlement prices submitted as part of the daily mark-to-market process, it must require periodic trading of Cleared CDS positions by ICE Participants whose submitted end-of-day prices lock or cross. The Commission's temporary exemption from Sections 5 and 6 of the Exchange Act is based on ICE Trust's representation that the end-of-day settlement pricing process, including the periodically required

trading is integral to its risk management. Accordingly, as a condition to ICE Trust's temporary exemption from Sections 5 and 6 of the Exchange Act, ICE trust must comply with the conditions to the temporary exemption from Section 17A of the Exchange Act in this Order.

The Commission is also exempting each ICE Trust Participant from the prohibition in Section 5 of the Exchange Act to the extent that such ICE Trust Participant uses any facility of ICE Trust to effect any transaction in Cleared CDS, or to report any such transaction, in connection with ICE Trust's calculation of mark-to-market prices for open positions in Cleared CDS. Absent an exemption, Section 5 would prohibit any ICE Trust Participant that is a broker or dealer from effecting transactions in Cleared CDS on ICE Trust, which will rely on this order for an exemption from exchange registration. The Commission believes that exempting ICE Trust Participants from the restriction in Section 5 is necessary and appropriate in the public interest and is consistent with the protection of investors because it will facilitate their use of ICE Trust's CCP for Cleared CDS, which for the reasons noted in this Order the Commission believes to be beneficial. Without also exempting ICE Trust Participants from this Section 5 requirement, the Commission's temporary exemption of ICE Trust from Sections 5 and 6 of the Exchange Act would be ineffective, because ICE Trust Participants that are brokers or dealers would not be permitted to effect transactions on ICE Trust in connection with the end-of-day settlement price process.

C. Temporary General Exemption for ICE Trust, Certain ICE Trust Participants, and Certain Eligible Contract Participants

Applying the full panoply of Exchange Act requirements to participants in transactions in non-excluded CDS likely would deter some participants from using CCPs to clear CDS transactions. At the same time, it is important that the antifraud provisions of the Exchange Act

apply to transactions in non-excluded CDS; indeed, OTC transactions subject to individual negotiation that qualify as security-based swap agreements already are subject to these antifraud provisions.³⁴

We thus believe that it is appropriate in the public interest and consistent with the protection of investors temporarily to apply substantially the same framework to transactions by market participants in non-excluded CDS that applies to transactions in security-based swap agreements. Applying substantially the same set of requirements to participants in transactions in non-excluded CDS as apply to participants in OTC CDS transactions will avoid deterring market participants from promptly using CCPs, which would detract from the potential benefits of central clearing.

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until December 7, 2009 from certain requirements under the Exchange Act. This temporary exemption applies to ICE Trust, any ICE Trust

³⁴ While Section 3A of the Exchange Act excludes “swap agreements” from the definition of “security,” certain antifraud and insider trading provisions under the Exchange Act explicitly apply to security-based swap agreements. See (a) paragraphs (2) through (5) of Section 9(a), 15 U.S.C. 78i(a), prohibiting the manipulation of security prices; (b) Section 10(b), 15 U.S.C. 78j(b), and underlying rules prohibiting fraud, manipulation or insider trading (but not prophylactic reporting or recordkeeping requirements); (c) Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices; (d) Sections 16(a) and (b), 15 U.S.C. 78p(a) and (b), which address disclosure by directors, officers and principal stockholders, and short-swing trading by those persons, and rules with respect to reporting requirements under Section 16(a); (e) Section 20(d), 15 U.S.C. 78t(d), providing for antifraud liability in connection with certain derivative transactions; and (f) Section 21A(a)(1), 15 U.S.C. 78u-1(a)(1), related to the Commission’s authority to impose civil penalties for insider trading violations.

“Security-based swap agreement” is defined in Section 206B of the Gramm-Leach-Bliley Act as a swap agreement in which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein.

Participant³⁵ which is not a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof), and any eligible contract participants³⁶ other than: eligible contract participants that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling or holding Cleared CDS positions for other persons;³⁷ eligible contract participants that are self-regulatory organizations; or eligible contract participants that are registered brokers or dealers.³⁸

Under this temporary exemption, and solely with respect to Cleared CDS, these persons generally are exempt from provisions of the Exchange Act and the rules and regulations thereunder that do not apply to security-based swap agreements. Those persons thus would still be subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements.³⁹ In addition, all provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such

³⁵ For purposes of this Order, an "ICE Trust Participant" means any participant in ICE Trust that submits Cleared CDS to ICE Trust for clearance and settlement exclusively (i) for its own account or (ii) for the account of an affiliate that controls, is controlled by, or is under common control with the participant in ICE Trust. In general, this exemption does not apply to any ICE Trust Participant that is registered with the Commission as a broker-dealer. A separate temporary exemption addresses the Cleared CDS activities of registered broker-dealers. See Part II.D., *infra*.

³⁶ This exemption in general applies to eligible contract participants, as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order, other than persons that are eligible contract participants under paragraph (C) of that section.

³⁷ For these purposes, and for the purpose of the definition of "Cleared CDS," the terms "purchasing" and "selling" mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing the rights or obligations under, a Cleared CDS, as the context may require. This is consistent with the meaning of the terms "purchase" or "sale" under the Exchange Act in the context of security-based swap agreements. See Exchange Act Section 3A(b)(4).

³⁸ A separate temporary exemption addresses the Cleared CDS activities of registered broker-dealers. See Part II.D., *infra*. Solely for purposes of this Order, a registered broker-dealer, or a broker or dealer registered under Section 15(b) of the Exchange Act, does not refer to someone that would otherwise be required to register as a broker or dealer solely as a result of activities in Cleared CDS in compliance with this Order.

³⁹ See note 34, *supra*.

provisions would remain applicable.⁴⁰ In this way, the temporary exemption would apply the same Exchange Act requirements in connection with non-excluded CDS as apply in connection with OTC credit default swaps.

This temporary exemption, however, does not extend to Sections 5 and 6 of the Exchange Act.⁴¹ The Commission separately issued a conditional exemption from these provisions to all broker-dealers and exchanges.⁴² This temporary exemption also does not extend to Section 17A of the Exchange Act; instead, ICE Trust is exempt from registration as a clearing agency under the conditions discussed above. In addition, this exemption does not apply to Exchange Act Sections 12, 13, 14, 15(d), and 16;⁴³ eligible contract participants and other persons instead should refer to the interim final temporary rules issued by the Commission. Finally, this temporary exemption does not extend to the Commission's administrative proceeding authority under Sections 15(b)(4) and (b)(6),⁴⁴ or to certain provisions related to government securities.⁴⁵

⁴⁰ Thus, for example, the Commission retains the ability to investigate potential violations and bring enforcement actions in the federal courts and administrative proceedings, and to seek the full panoply of remedies available in such cases.

⁴¹ This Order includes a separate temporary exemption regarding the mark-to-market process of ICE Trust, discussed above.

⁴² See note 17, *supra*. A national securities exchange that effects transactions in Cleared CDS would continue to be required to comply with all requirements under the Exchange Act applicable to such transactions. A national securities exchange could form subsidiaries or affiliates that operate exchanges exempt under that order. Any subsidiary or affiliate of a registered exchange could not integrate, or otherwise link, the exempt CDS exchange with the registered exchange including the premises or property of such exchange for effecting or reporting a transaction without being considered a "facility of the exchange." See Section 3(a)(2), 15 U.S.C.78c(a)(2).

⁴³ 15 U.S.C. 78l, 78m, 78n, 78o(d), 78p.

⁴⁴ Exchange Act Sections 15(b)(4) and 15(b)(6), 15 U.S.C. 78o(b)(4) and (b)(6), grant the Commission authority to take action against broker-dealers and associated persons in certain situations. Accordingly, while this exemption generally extends to persons that act as inter-dealer brokers in the market for Cleared CDS and do not hold funds or securities for others, such inter-dealer brokers may be subject to actions under Sections 15(b)(4) and (b)(6) of the Exchange Act.

In addition, such inter-dealer brokers may be subject to actions under Exchange Act Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices. As noted above, Section 15(c)(1) explicitly applies to security-based swap agreements. Sections

D. Temporary General Exemption for Certain Registered Broker-Dealers

The temporary exemptions addressed above – with regard to ICE Trust, certain ICE Trust Participants, and certain eligible contract participants – are not available to persons that are registered as broker-dealers with the Commission (other than those that are notice registered pursuant to Section 15(b)(11)).⁴⁶ The Exchange Act and its underlying rules and regulations require broker-dealers to comply with a number of obligations that are important to protecting investors and promoting market integrity. We are mindful of the need to avoid creating disincentives to the prompt use of CCPs, and we recognize that the factors discussed above suggest that the full panoply of Exchange Act requirements should not immediately be applied to registered broker-dealers that engage in transactions involving Cleared CDS. At the same time, we also are sensitive to the critical importance of certain broker-dealer requirements to promoting market integrity and protecting customers (including those broker-dealer customers that are not involved with CDS transactions).

This calls for balancing the facilitation of the development and prompt implementation of CCPs with the preservation of certain key investor protections. Pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until December 7, 2009 from certain Exchange Act requirements. Consistent with

15(b)(4), 15(b)(6) and 15(c)(1), of course, would not apply to persons subject to this exemption who do not act as broker-dealers or associated persons of broker-dealers.

⁴⁵ This exemption specifically does not extend to the Exchange Act provisions applicable to government securities, as set forth in Section 15C, 15 U.S.C. 78o-5, and its underlying rules and regulations; nor does the exemption extend to related definitions found at paragraphs (42) through (45) of Section 3(a), 15 U.S.C. 78c(a). The Commission does not have authority under Section 36 to issue exemptions in connection with those provisions. See Exchange Act Section 36(b), 15 U.S.C. 78mm(b).

⁴⁶ Exchange Act Section 15(b)(11) provides for notice registration of certain persons that effect transactions in security futures products. 15 U.S.C. 78o(b)(11).

the temporary exemptions discussed above, and solely with respect to Cleared CDS, we are exempting registered broker-dealers in general from provisions of the Exchange Act and its underlying rules and regulations that do not apply to security-based swap agreements. As above, we are not excluding registered broker-dealers from Exchange Act provisions that explicitly apply in connection with security-based swap agreements or from related enforcement authority provisions.⁴⁷ As above, and for similar reasons, we are not exempting registered broker-dealers from: Sections 5, 6, 12(a) and (g), 13, 14, 15(b)(4), 15(b)(6), 15(d), 16 and 17A of the Exchange Act.⁴⁸

Further we are not exempting registered broker-dealers from the following additional provisions under the Exchange Act: (1) Section 7(c),⁴⁹ which addresses the unlawful extension of credit by broker-dealers; (2) Section 15(c)(3),⁵⁰ which addresses the use of unlawful or manipulative devices by broker-dealers; (3) Section 17(a),⁵¹ regarding broker-dealer obligations to make, keep and furnish information; (4) Section 17(b),⁵² regarding broker-dealer records subject to examination; (5) Regulation T,⁵³ a Federal Reserve Board regulation regarding

⁴⁷ See notes 34 and 40, *supra*. As noted above, broker-dealers also would be subject to Section 15(c)(1) of the Exchange Act, which prohibits brokers and dealers from using manipulative or deceptive devices, because that provision explicitly applies in connection with security-based swap agreements. In addition, to the extent the Exchange Act and any rule or regulation thereunder imposes any other requirement on a broker-dealer with respect to security-based swap agreements (e.g., requirements under Rule 17h-1T to maintain and preserve written policies, procedures, or systems concerning the broker or dealer's trading positions and risks, such as policies relating to restrictions or limitations on trading financial instruments or products), these requirements would continue to apply to broker-dealers' activities with respect to Cleared CDS.

⁴⁸ We also are not exempting those members from provisions related to government securities, as discussed above.

⁴⁹ 15 U.S.C. 78g(c).

⁵⁰ 15 U.S.C. 78o(c)(3).

⁵¹ 15 U.S.C. 78q(a).

⁵² 15 U.S.C. 78q(b).

⁵³ 12 CFR 220.1 *et seq.*

extension of credit by broker-dealers; (6) Exchange Act Rule 15c3-1, regarding broker-dealer net capital; (7) Exchange Act Rule 15c3-3, regarding broker-dealer reserves and custody of securities; (8) Exchange Act Rules 17a-3 through 17a-5, regarding records to be made and preserved by broker-dealers and reports to be made by broker-dealers; and (9) Exchange Act Rule 17a-13, regarding quarterly security counts to be made by certain exchange members and broker-dealers.⁵⁴ Registered broker-dealers should comply with these provisions in connection with their activities involving non-excluded CDS because these provisions are especially important to helping protect customer funds and securities, ensure proper credit practices and safeguard against fraud and abuse.⁵⁵

E. Solicitation of Comments

The Commission intends to monitor closely the development of the CDS market and intends to determine to what extent, if any, additional regulatory action may be necessary. For example, as circumstances warrant, certain conditions could be added, altered, or eliminated. Moreover, because these exemptions are temporary, the Commission will in the future consider whether they should be extended or allowed to expire. The Commission believes it would be prudent to solicit public comment on its action today, and on what action it should take with respect to the CDS market in the future. The Commission is soliciting public comment on all aspects of these exemptions, including:

⁵⁴ Solely for purposes of this exemption, in addition to the general requirements under the referenced Exchange Act sections, registered broker-dealers shall only be subject to the enumerated rules under the referenced Exchange Act sections.

⁵⁵ Indeed, Congress directed the Commission to promulgate broker-dealer financial responsibility rules, including rules regarding custody, the use of customer securities and the use of customers' deposits or credit balances, and regarding establishment of minimum financial requirements.

1. Whether the length of this temporary exemption (until December 7, 2009) is appropriate. If not, what should the appropriate duration be?
2. Whether the conditions to these exemptions are appropriate. Why or why not? Should other conditions apply? Are any of the present conditions to the exemptions provided in this Order unnecessary? If so, please specify and explain why such conditions are not needed.
3. Whether ICE Trust ultimately should be required to register as a clearing agency under the Exchange Act. Why or why not?

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/other.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-05-09 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov/>). Follow the instructions for submitting comments.

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 S7-05-09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. We will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/other.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549,

on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

III. Conclusion

IT IS HEREBY ORDERED, pursuant to Section 36(a) of the Exchange Act, that, until December 7, 2009:

(a) Exemption from Section 17A of the Exchange Act.

ICE US Trust LLC (“ICE Trust”) shall be exempt from Section 17A of the Exchange Act solely to perform the functions of a clearing agency for Cleared CDS (as defined in paragraph (e)(1) of this Order), subject to the following conditions:

(1) ICE Trust shall make available on its Web site its annual audited financial statements.

(2) ICE Trust shall keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it relating to its Cleared CDS clearance and settlement services. These records shall be kept for at least five years and for the first two years shall be held in an easily accessible place.

(3) ICE Trust shall supply information and periodic reports relating to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission, and shall provide access to the Commission to conduct on-site inspections of all facilities (including automated systems and systems environment), records, and personnel related to ICE Trust’s Cleared CDS clearance and settlement services.

(4) ICE Trust shall notify the Commission, on a monthly basis, of any material disciplinary actions taken against any of its members utilizing its Cleared CDS clearance and settlement services, including the denial of services, fines, or penalties. ICE Trust shall notify the Commission promptly when ICE Trust involuntarily terminates the membership of an entity that is utilizing ICE Trust's Cleared CDS clearance and settlement services. Both notifications shall describe the facts and circumstances that led to the ICE Trust's disciplinary action.

(5) ICE Trust notify the Commission of all changes to rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services, including its fee schedule and changes to risk management practices, the day before effectiveness or implementation of such rule changes or, in exigent circumstances, as promptly as reasonably practicable under the circumstances. All such rule changes will be posted on ICE Trust's Web site. Such notifications will not be deemed rule filings that require Commission approval.

(6) ICE Trust shall provide the Commission with reports prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements. ICE Trust shall provide the Commission with (beginning in its first year of operation) its annual audited financial statements prepared by independent audit personnel.

(7) ICE Trust shall report all significant systems outages to the Commission. If it appears that the outage may extend for 30 minutes or longer, ICE Trust shall report the systems outage immediately. If it appears that the outage will be resolved in less than 30

minutes, ICE Trust shall report the systems outage within a reasonable time after the outage has been resolved.

(8) ICE Trust, directly or indirectly, shall make available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) all end-of-day settlement prices and any other prices with respect to Cleared CDS that ICE Trust may establish to calculate mark-to-market margin requirements for ICE Trust Participants; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by ICE Trust.

(b) Exemption from Sections 5 and 6 of the Exchange Act

(1) ICE Trust shall be exempt from the requirements of Sections 5 and 6 of the Exchange Act and the rules and regulations thereunder in connection with its calculation of mark-to-market prices for open positions in Cleared CDS, subject to the following conditions:

(i) ICE Trust shall report the following information with respect to the calculation of mark-to-market prices for Cleared CDS to the Commission within 30 days of the end of each quarter, and preserve such reports during the life of the enterprise and of any successor enterprise:

(A) The total dollar volume of transactions executed during the quarter, broken down by reference entity, security, or index; and

(B) The total unit volume and/or notional amount executed during the quarter, broken down by reference entity, security, or index;

(ii) ICE Trust shall establish adequate safeguards and procedures to protect participants' confidential trading information. Such safeguards and

procedures shall include: (A) limiting access to the confidential trading information of participants to those employees of ICE Trust who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (B) implementing standards controlling employees of ICE Trust trading for their own accounts. ICE Trust must adopt and implement adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed; and

(iii) ICE Trust shall satisfy the conditions of the temporary exemption from Section 17A of the Exchange Act set forth in paragraphs (a)(1) – (8) of this Order.

(2) Any ICE Trust Participant shall be exempt from the requirements of Section 5 of the Exchange Act to the extent such ICE Trust Participant uses any facility of ICE Trust to effect any transaction in Cleared CDS, or to report any such transaction, in connection with ICE Trust's clearance and risk management process for Cleared CDS.

(c) Exemption for ICE Trust, certain ICE Trust Participants, and certain eligible contract participants.

(1) Persons eligible. The exemption in paragraph (c)(2) is available to:

(i) ICE Trust;

(ii) Any ICE Trust Participant (as defined in paragraph (e)(2) of this Order), which is not a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof); and

(iii) Any eligible contract participant (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a

person that is an eligible contract participant under paragraph (C) of that section)), other than: (A) an eligible contract participant that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons; (B) an eligible contract participant that is a self-regulatory organization, as that term is defined in Section 3(a)(26) of the Exchange Act; or (C) a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof).

(2) Scope of exemption.

(i) In general. Such persons generally shall, solely with respect to Cleared CDS, be exempt from the provisions of the Exchange Act and the rules and regulations thereunder that do not apply in connection with security-based swap agreements. Accordingly, under this exemption, those persons would remain subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements (i.e., paragraphs (2) through (5) of Section 9(a), Section 10(b), Section 15(c)(1), paragraphs (a) and (b) of Section 16, Section 20(d) and Section 21A(a)(1) and the rules thereunder that explicitly are applicable to security-based swap agreements). All provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions also remain applicable.

(ii) Exclusions from exemption. The exemption in paragraph (c)(2)(i), however, does not extend to the following provisions under the Exchange Act:

- (A) Paragraphs (42), (43), (44), and (45) of Section 3(a);
- (B) Section 5;

- (C) Section 6;
- (D) Section 12 and the rules and regulations thereunder;
- (E) Section 13 and the rules and regulations thereunder;
- (F) Section 14 and the rules and regulations thereunder;
- (G) Paragraphs (4) and (6) of Section 15(b);
- (H) Section 15(d) and the rules and regulations thereunder;
- (I) Section 15C and the rules and regulations thereunder;
- (J) Section 16 and the rules and regulations thereunder; and
- (K) Section 17A (other than as provided in paragraph (a)).

(d) Exemption for certain registered broker-dealers.

A broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof) shall be exempt from the provisions of the Exchange Act and the rules and regulations thereunder specified in paragraph (c)(2), solely with respect to Cleared CDS, except:

- (1) Section 7(c);
- (2) Section 15(c)(3);
- (3) Section 17(a);
- (4) Section 17(b);
- (5) Regulation T, 12 CFR 200.1 et seq.;
- (6) Rule 15c3-1;
- (7) Rule 15c3-3;
- (8) Rule 17a-3;
- (9) Rule 17a-4;

(10) Rule 17a-5; and

(11) Rule 17a-13.

(e) Definitions.

For purposes of this Order:

(1) “Cleared CDS” shall mean a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to ICE Trust, that is offered only to, purchased only by, and sold only to eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which:

(i) the reference entity, the issuer of the reference security, or the reference security is one of the following:

(A) an entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available;

(B) a foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States;

(C) a foreign sovereign debt security;

(D) an asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or

(E) an asset-backed security issued or guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae; or

(ii) the reference index is an index in which 80 percent or more of the index's weighting is comprised of the entities or securities described in subparagraph (i).

(2) "ICE Trust Participant" shall mean any participant in ICE Trust that submits Cleared CDS to ICE Trust for clearance and settlement exclusively (i) for its own account or (ii) for the account of an affiliate that controls, is controlled by, or is under common control with the participant in ICE Trust.

By the Commission.

Elizabeth M. Murphy
Secretary