

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-60372; File No. S7-16-09)**

**July 23, 2009**

**ORDER GRANTING TEMPORARY EXEMPTIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934 IN CONNECTION WITH REQUEST ON BEHALF OF ICE CLEAR EUROPE LIMITED 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, including actions<sup>1</sup> designed to address concerns related to the market in credit default swaps (“CDS”).<sup>2</sup> The over-the-counter (“OTC”) market for CDS has been a source of concern to us and other financial regulators, and we have recognized that facilitating the establishment of central counterparties (“CCPs”) for CDS can

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<sup>1</sup> See generally Securities Exchange Act Release No. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009) (temporary exemption in connection with CDS clearing by Chicago Mercantile Exchange Inc.), Securities Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009) (temporary exemption in connection with CDS clearing by ICE US Trust LLC), Securities Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (temporary exemption in connection with CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.) and other Commission actions discussed therein.

<sup>2</sup> 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. See Semiannual OTC derivatives statistics at end-December 2008, Bank for International Settlement (“BIS”), available at <http://www.bis.org/statistics/otcder/dt1920a.pdf>.

This growth has coincided with a significant rise in the types and number of entities participating in the CDS market. 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.

play an important role in reducing the counterparty risks inherent in the CDS market, and thereby can help mitigate potential systemic impacts.<sup>3</sup> Thus, taking action to help foster the prompt development of CCPs, including granting conditional exemptions from certain provisions of the federal securities laws, is in the public interest.

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.<sup>4</sup> 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 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 provide a number of benefits, by helping to promote efficiency and reduce risk in the CDS market and among its participants, requiring maintenance of records of CDS transactions that would aid the Commission's efforts to prevent and detect fraud and other abusive market practices, addressing concerns about counterparty risk – through the novation process – by substituting the creditworthiness and liquidity of the CCP for the creditworthiness and liquidity

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<sup>3</sup> See generally actions referenced in note 1, *supra*.

<sup>4</sup> 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.

of the counterparties to a CDS,<sup>5</sup> contributing generally to the goal of market stability, and reducing CDS risks through multilateral netting of trades.<sup>6</sup>

In this context, ICE Clear Europe Limited (“ICE Clear Europe”) has requested that the Commission grant exemptions from certain requirements under the Exchange Act with respect to its proposed activities in clearing and settling certain CDS, as well as the proposed activities of certain other persons, as described below.<sup>7</sup>

Based on the facts presented and the representations made in the request on behalf of ICE Clear Europe,<sup>8</sup> and for the reasons discussed in this Order, the Commission temporarily is exempting, subject to certain conditions, ICE Clear Europe 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 Clear Europe. In addition, the Commission temporarily is exempting ICE Clear Europe and certain members of ICE Clear Europe from the registration requirements of Sections 5 and 6 of the Exchange Act solely in connection with the

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<sup>5</sup> “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 (Nov. 2004) at 66. Through novation, the CCP assumes counterparty risk.

<sup>6</sup> See generally actions referenced in note 1, supra.

<sup>7</sup> See Letter from Abigail Arms, Shearman & Sterling LLP, to Elizabeth M. Murphy, Secretary, Commission, July 23, 2009.

<sup>8</sup> See id. The exemptions we are granting today are based on representations made in the request on behalf of ICE Clear Europe. 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.

calculation of mark-to-market prices for non-excluded CDS cleared by ICE Clear Europe. The Commission's exemptions are temporary and will expire on April 23, 2010.<sup>9</sup>

## II. Discussion

### A. Description of ICE Clear Europe's Proposal

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

#### 1. ICE Clear Europe Organization

ICE Clear Europe is indirectly a wholly-owned subsidiary of the IntercontinentalExchange, Inc. ("ICE").<sup>10</sup> ICE Clear Europe was incorporated in England and Wales on April 19, 2007 as a private limited company under the Companies Act 1985 (as amended, now largely superseded by the Companies Act 2006). ICE Clear Europe is subject to direct supervision by the United Kingdom's Financial Services Authority ("FSA") as a Recognised Clearing House ("RCH").

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<sup>9</sup> 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. See Securities Act Release No. 8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009).

Further, the Commission has provided temporary exemptions in connection with Sections 5 and 6 of the Exchange Act for transactions in non-excluded CDS. See Securities Exchange Act Release No. 59165 (Dec. 24, 2008), 74 FR 133 (Jan. 2, 2009).

<sup>10</sup> ICE Clear Europe is owned by IntercontinentalExchange Holdings, which itself is over 99% owned by ICE Netherlands C.V. ICE Netherlands C.V. is owned by ICE Markets, Inc. and by IntercontinentalExchange International Inc., both of which are wholly owned by ICE.

## 2. ICE Clear Europe Central Counterparty Services for CDS

ICE Clear Europe will act as a central counterparty for ICE Clear Europe Clearing Members<sup>11</sup> 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 Clear Europe Clearing Members to collateralize their obligations to ICE Clear Europe. ICE Clear Europe's trade submission process is designed to ensure that it maintains a matched book of offsetting CDS contracts.

ICE Clear Europe will leverage the Deriv/SERV infrastructure in operating its CDS clearing service. Initially, all trades submitted by ICE Clear Europe Clearing Members for clearing through ICE Clear Europe will be recorded in the Deriv/SERV Trade Information Warehouse ("TIW").<sup>12</sup> ICE Clear Europe will, initially on a weekly basis, obtain from DTCC matched trades that have been recorded in the Deriv/SERV TIW as having been submitted for clearing through ICE Clear Europe. Eventually, ICE Clear Europe intends to obtain matched trades from DTCC on a real-time basis.

Members 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 Clear Europe. The inter-dealer brokers do not assume market positions in connection with their intermediation of CDS transactions.

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<sup>11</sup> See note 33, *infra*.

<sup>12</sup> Major market participants frequently use the Deriv/SERV comparison and confirmation service of The Depository Trust & Clearing Corporation ("DTCC") 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.

Once a matched CDS contract has been forwarded to, or obtained by, ICE Clear Europe, and has been accepted for clearing by it, ICE Clear Europe will clear the CDS contract by becoming the central counterparty to each party to the trade. Deriv/SERV's current infrastructure will help to ensure that ICE Clear Europe 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 Clear Europe for clearing.

Under ICE Clear Europe's draft CDS rules and CDS procedures ("ICE Clear Europe Rules"), each bilateral CDS contract between two ICE Clear Europe Clearing Members that is submitted to and accepted by ICE Clear Europe for clearing will be "novated." As part of this process, each bilateral CDS contract submitted to ICE Clear Europe will be replaced by two superseding CDS contracts between each of the original parties to the submitted transaction and ICE Clear Europe on standard terms mandated by ICE Clear Europe. Under these new contracts, ICE Clear Europe will act as the protection buyer to the original protection seller and protection seller to the original protection buyer. As central counterparty to each novated CDS contract, ICE Clear Europe will be able to net offsetting positions on a multilateral basis, even though ICE Clear Europe 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 Clear Europe Rules, the ISDA 2002 Master Agreement, and the Schedule to the ISDA 2002 Master Agreement that is entered into by ICE Clear Europe and each ICE Clear Europe Clearing Member. Multilateral netting will significantly reduce the outstanding notional amount of each ICE Clear Europe Clearing Member's portfolio. When ICE Clear Europe acts as the central

counterparty to all cleared CDS of an ICE Clear Europe Clearing Member, that member's positions will be netted down to a single exposure to ICE Clear Europe.

### 3. ICE Clear Europe Risk Management

ICE Clear Europe will mitigate counterparty risk through a six-tiered waterfall consisting of: (i) membership criteria; (ii) initial margin; (iii) mark-to-market margin; (iv) intraday risk monitoring; (v) guaranty fund; and (vi) a one-time power of assessment. ICE Clear Europe's risk management infrastructure and related risk metrics are structured specifically for the CDS products that ICE Clear Europe clears. Each ICE Clear Europe Clearing Member's credit support obligations will be governed by a uniform credit support framework and applicable ICE Clear Europe Rules.

ICE Clear Europe will maintain strict, objectively determined, risk-based margin and guaranty fund requirements,<sup>13</sup> which will be consistent with clearing industry practice and international standards established for central counterparties as articulated in the Committee on Payment and Settlement Systems/International Organization of Securities Commissions ("CPSS-IOSCO") Recommendations for Central Counterparties ("RCCP").<sup>14</sup> These requirements will

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<sup>13</sup> ICE Clear Europe takes collateral, including margin and guaranty fund contributions and non-cash collateral, by way of a "title transfer financial collateral arrangement" for purposes of the Directive 2002/47/EC on Financial Collateral Arrangements ("Financial Collateral Regulations"). This is different from applicable U.S. law, which mandates that a clearinghouse receive pledged collateral. This collateral structure results in ICE Clear Europe having an unencumbered property right in all collateral provided to it, subject only to an obligation to return excess collateral or such collateral as remains unexpended following a closeout on a default. The Financial Collateral Regulations also provide for the effectiveness of financial collateral arrangements and close-out netting provisions under English law notwithstanding an insolvency of the counterparty.

<sup>14</sup> 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 Federal Reserve Board of Governors, and the Commodity Futures Trading Commission.

also be subject to ongoing regulation and oversight by the FSA. The amount of margin and guaranty fund required of each ICE Clear Europe Clearing Member will be continuously monitored and periodically adjusted as required to reflect the size and profile of, and risk associated with, the ICE Clear Europe Clearing Member's cleared CDS transactions (and related market factors).

Each ICE Clear Europe Clearing Member's margin requirement will consist of two components: (i) initial margin, reflecting a risk-based calculation of potential loss on outstanding CDS positions in the event of a significant adverse market movement; and (ii) mark-to-market margin, based upon an end-of-day mark-to-market of outstanding positions. At any time when a requirement for initial margin falls due and insufficient permitted cover is held, the ICE Clear Europe Clearing Member must initially transfer cash. Thereafter, an ICE Clear Europe Clearing Member may substitute such cash margin with other permitted cover by delivery of the replacement permitted cover to ICE Clear Europe.<sup>15</sup> Mark-to-market margin payments, however, may be made by ICE Clear Europe or an ICE Clear Europe Clearing Member only in cash. ICE Clear Europe Clearing Members will be required to cover any end-of-day margin deficit with Euros (or such other currency as may be permitted under the proposed CDS finance procedures) by the following morning, and ICE Clear Europe will have the discretion to require and collect additional margin, both at the end of the day and intraday, as it deems necessary.<sup>16</sup>

ICE Clear Europe will also maintain a guaranty fund in respect of ICE Clear Europe Clearing Members (the "CDS Guaranty Fund") to cover losses arising from an ICE Clear

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<sup>15</sup> The full list of permitted cover is set out in ICE Clear Europe circulars. The most recent circular in this respect is available at: [https://www.theice.com/publicdocs/clear\\_europe/circulars/C09015\\_att.pdf](https://www.theice.com/publicdocs/clear_europe/circulars/C09015_att.pdf).

<sup>16</sup> An ICE Clear Europe Clearing Member 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.



Clearing Member's default on cleared CDS transactions that exceed the amount of margin held by ICE Clear Europe from the defaulting ICE Clear Europe Clearing Member. Each ICE Clear Europe Clearing Member will be required to contribute a minimum of 15 million Euros to the CDS Guaranty Fund initially when it becomes a Clearing Member and additional amounts based on its actual and anticipated CDS position exposures plus such other amount as ICE Clear Europe at its discretion determines is necessary based on projected clearing activity. The adequacy of the total amount of the CDS Guaranty Fund will be monitored daily, and if ICE Clear Europe determines the total amount in the CDS Guaranty Fund is to change, ICE Clear Europe Clearing Members will be given notice and will be required to deposit their new contribution prior to the opening of business on the next business day. As a result, the CDS Guaranty Fund will grow in proportion to the position risk associated with the aggregate volume of CDS cleared by ICE Clear Europe.

ICE Clear Europe will also establish rules that "mutualize" the risk of an ICE Clear Europe Clearing Member default across all such clearing members.<sup>17</sup> In the event of an ICE Clear Europe Clearing Member's default, ICE Clear Europe may look to the margin posted by such ICE Clear Europe Clearing Members, such a ICE Clear Europe Clearing Member's CDS Guaranty Fund contributions and, if applicable, any recovery from a parent guarantor. In addition, at its discretion, ICE Clear Europe will be authorized to use, to the extent needed, other

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<sup>17</sup> In the event of a default of an ICE Clear Europe Clearing Member, only the CDS Guaranty Fund will be available to cover losses from the default. In the event of a default of an energy-only clearing member, only the Energy Guaranty Fund will be available to cover losses from the default. In the event of a default of a ICE Clear Europe Clearing Member that is active in both CDS and energy contracts, the Clearing Member's margin and guaranty fund are available to cover any loss, but the CDS Guaranty Fund deposits of the non-defaulting ICE Clear Europe Clearing Members can only be applied against losses in CDS contracts, and the Energy Guaranty Fund deposits of the non-defaulting Energy Clearing Members can only be applied against losses in energy contracts.

ICE Clear Europe Clearing Members' CDS Guaranty Fund contributions to satisfy any obligations of the defaulting ICE Clear Europe Clearing Member.

In the event that the total CDS Guaranty Fund is exhausted, remaining ICE Clear Europe Clearing Members will be obligated to contribute additional amounts to the CDS Guaranty Fund based on a one-time limited power of assessment. The amount of the assessment will be up to, but will not exceed,<sup>18</sup> each ICE Clear Europe Clearing Member's CDS Guaranty Fund obligation immediately prior to the default.

#### 4. Member Default

Following a default by an ICE Clear Europe Clearing Member, ICE Clear Europe has a number of tools available to it under the ICE Clear Europe Rules to ensure an orderly liquidation and unwinding of the open positions of such defaulting ICE Clear Europe Clearing Member. In the first instance, upon determining that a default has occurred, ICE Clear Europe will have the ability to immediately enter into replacement CDS transactions with other ICE Clear Europe Clearing Members that are designed to mitigate, to the greatest extent possible, the market risk of the defaulting clearing member's open positions. ICE Clear Europe can also seek to sell or transfer positions to other ICE Clear Europe clearing members. For open positions in which there is no liquid trading market, ICE Clear Europe 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 Clear Europe will seek to close out any remaining open positions of the defaulting ICE Clear Europe Clearing

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<sup>18</sup> An ICE Clear Europe Clearing Member can limit the amount of its assessment to an amount equal to such clearing member's guaranty fund contribution immediately prior to the relevant default only by contributing such amount and terminating its membership from ICE Clear Europe, with the withdrawal effective three months after notice.

Member by using one or more auctions or other commercially reasonable unwind processes. ICE Clear Europe may close out its position through auctions, open market processes, or by allocating replacement transactions to non-defaulting ICE Clear Europe Clearing Members at the floor price established by ICE Clear Europe.

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.<sup>19</sup>

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 **[insert date nine months from the date of this**

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<sup>19</sup> 15 U.S.C. 78mm.

**Order]** to ICE Clear Europe from Section 17A of the Exchange Act, solely to perform the functions of a clearing agency for Cleared CDS,<sup>20</sup> subject to the conditions discussed below.

Our action today balances the aim of facilitating the prompt establishment of ICE Clear Europe as a CCP for non-excluded CDS transactions – which should help reduce systemic risks – with ensuring that important 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 Clear Europe as a CCP to settle those transactions.

While we are acting so that the prompt establishment of ICE Clear Europe 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 continue to gain more direct experience with the non-excluded CDS market after ICE Clear Europe 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

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<sup>20</sup> 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 Clear Europe, 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 Federal National Mortgage Association (“Fannie Mae”), the Federal Home Loan Mortgage Corporation (“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 note 4, supra. The Commission’s action today also does not affect activities in CDS that are outside the jurisdiction of the United States.

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 an 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 Clear Europe's representation that it meets the standards set forth in the CPSS-IOSCO RCCP report. The RCCP establishes a framework that requires a CCP to have: (i) the ability to facilitate the prompt 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 Clear Europe – information will be available to market participants about the terms of the CDS cleared by ICE Clear Europe, the creditworthiness of ICE Clear Europe 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 or 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.<sup>21</sup> Such information availability also will assist ICE Clear Europe 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 Clear Europe's clearance and settlement of CDS transactions and help reduce risk in the CDS market. These conditions require that ICE Clear Europe: (i) make available on its Web site its annual audited financial statements; (ii) preserve records of all activities 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) supply information relating to its Cleared CDS clearance and settlement services as may be reasonably requested by 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, subject to cooperation with the FSA and upon terms and conditions agreed

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<sup>21</sup> 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, Mar. 13, 2008, available at: [http://www.ustreas.gov/press/releases/reports/pwgpolicystatemktturmoil\\_03122008.pdf](http://www.ustreas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf).

between the FSA and the Commission; (iv) notify the Commission about material disciplinary actions taken against any of its members using its Cleared CDS clearance and settlement services, and about the involuntary termination of the membership of an entity that is using ICE Clear Europe's Cleared CDS clearance and settlement services; (v) notify the Commission not less than one day prior to implementation or effectiveness of changes to rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services, or, in exigent circumstances, as promptly as reasonably practicable under the circumstances; (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 Statements<sup>22</sup> and its annual audited financial statements prepared by independent audit personnel; and (vii) provide notice to the Commission regarding the suspension of services or inability to operate facilities in connection with Cleared CDS clearance and settlement services at the same time it provides notice to the FSA.

In addition, this relief is conditioned on ICE Clear Europe, 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 Clear Europe may establish to calculate mark-to-market margin requirements for ICE Clear Europe Clearing Members; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by ICE Clear Europe. The Commission believes this is an appropriate condition for ICE Clear Europe'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

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<sup>22</sup> See Automated Systems of Self-Regulatory Organizations, Securities Exchange Act Release No. 27445 (Nov. 16, 1989), 54 FR 48703 (Nov. 24, 1989), and Automated Systems of Self-Regulatory Organizations, Securities Exchange Act Release No. 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991).

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."<sup>23</sup> The President's Working Group on Financial Markets has stated that increased transparency is a policy objective for the over-the-counter derivatives market,<sup>24</sup> 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 Clear Europe 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 applied the standards in the specific context of securities market data,<sup>25</sup> and it anticipates that ICE Clear Europe 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

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<sup>23</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii). See also 15 U.S.C. 78k-1(a)(1)(D).

<sup>24</sup> See President's Working Group on Financial Markets, Policy Objectives for the OTC Derivatives Market (Nov. 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."). See also Department of the Treasury, Financial Regulatory Reform: A New Foundation, available at [http://www.financialstability.gov/docs/regs/FinalReport\\_web.pdf](http://www.financialstability.gov/docs/regs/FinalReport_web.pdf), at p.48 ("[m]arket efficiency and price transparency should be improved in derivatives markets . . . by requiring development of a system for timely reporting of trades and prompt dissemination of prices and other trade information.").

<sup>25</sup> See Securities Exchange Act Release No. 42209 (Dec. 9, 1999), 64 FR 70613, 70621-70623 (Dec. 17, 1999) ("Market Information Concept Release") (discussion of legal standards applicable to market data distribution since Section 11A was adopted in 1975).



requirements.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

As a CCP, ICE Clear Europe 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.

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<sup>26</sup> See Securities Exchange Act Release No. 59039 (Dec. 2, 2008), 73 FR 74770, 74793 (Dec. 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.”).

<sup>27</sup> 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.”).

<sup>28</sup> 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 unreasonably discriminate among types of subscribers, such as by favoring participants in the NYSE Arca market or penalizing participants in other markets.”).

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

ICE Clear Europe 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 Clear Europe Clearing Member has a cleared position, based on prices submitted by ICE Clear Europe Clearing Members. As part of this mark-to-market process, ICE Clear Europe will periodically require ICE Clear Europe Clearing Members to execute certain CDS trades at the applicable end-of-day settlement price. Requiring ICE Clear Europe Clearing Members to trade CDS periodically in this manner is designed to help ensure that such submitted prices reflect each ICE Clear Europe Clearing Member'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 Clear Europe 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 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...."<sup>29</sup> Section 6 of the Exchange Act sets forth a procedure whereby an exchange<sup>30</sup> may register as a national securities exchange.<sup>31</sup> To facilitate the establishment of ICE Clear

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<sup>29</sup> 15 U.S.C. 78e.

<sup>30</sup> 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 Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (Dec. 22, 1998) (adopting Rule 3b-16 in addition to Regulation ATS).

<sup>31</sup> 15 U.S.C. 78f. Section 6 of the Exchange Act also sets forth various requirements to which a national securities exchange is subject.

Europe'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 Clear Europe and ICE Clear Europe Clearing Members from Sections 5 and 6 of the Exchange Act and the rules and regulations thereunder in connection with ICE Clear Europe's calculation of mark-to-market prices for open positions in Cleared CDS.

This temporary exemption is subject to the following conditions:

First, ICE Clear Europe 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
- 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 Clear Europe must establish adequate safeguards and procedures to protect members' confidential trading information. Such safeguards and procedures shall include: (i) limiting access to the confidential trading information of members to those employees of ICE Clear Europe who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (ii) implementing standards controlling employees of ICE Clear Europe trading for their own accounts. ICE Clear Europe 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 Clear

Europe Clearing Members' trading information that may be available to ICE Clear Europe in connection with the daily marking-to-market process of open positions in Cleared CDS. This should strengthen confidence in ICE Clear Europe as a CCP for CDS, promoting participation.

Third, ICE Clear Europe 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 Clear Europe as a CCP for non-excluded CDS. ICE Clear Europe 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 Clear Europe Clearing Members 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 Clear Europe'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 Clear Europe's temporary exemption from Sections 5 and 6 of the Exchange Act, ICE Clear Europe must comply with the conditions to the temporary exemption from Section 17A of the Exchange Act in this Order.

The Commission is also temporarily exempting each ICE Clear Europe Clearing Member from the prohibition in Section 5 of the Exchange Act to the extent that such ICE Clear Europe Clearing Member uses any facility of ICE Clear Europe to effect any transaction in Cleared CDS, or to report any such transaction, in connection with ICE Clear Europe's calculation of mark-to-market prices for open positions in Cleared CDS. Absent an exemption, Section 5 would prohibit any ICE Clear Europe Clearing Member that is a broker or dealer from effecting transactions in Cleared CDS on ICE Clear Europe, which will rely on this Order for an exemption from exchange registration. The Commission believes that temporarily exempting ICE Clear Europe Clearing Members 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 Clear Europe's CCP for Cleared CDS, which for the reasons noted in this Order the Commission believes to be beneficial. Without also temporarily exempting ICE Clear Europe Clearing Members from this Section 5 requirement, the Commission's temporary exemption of ICE Clear Europe from Sections 5 and 6 of the Exchange Act would be ineffective, because ICE Clear Europe Clearing Members that are brokers or dealers would not be permitted to effect transactions on ICE Clear Europe in connection with the end-of-day settlement price process.

C. Temporary General Exemption for ICE Clear Europe, ICE Clear Europe Clearing Members, 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.<sup>32</sup>

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<sup>32</sup> 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.

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 April 23, 2010, from certain requirements under the Exchange Act. This temporary exemption applies to ICE Clear Europe, any ICE Clear Europe Clearing Member<sup>33</sup> 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 participants<sup>34</sup> other than: eligible contract participants that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling or holding Cleared

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“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.

<sup>33</sup> For purposes of this Order, an “ICE Clear Europe Clearing Member” means any clearing member of ICE Clear Europe that submits Cleared CDS to ICE Clear Europe 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 clearing member of ICE Clear Europe. In general, this exemption does not apply to any ICE Clear Europe Clearing Member 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.

<sup>34</sup> 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.

CDS positions for other persons;<sup>35</sup> eligible contract participants that are self-regulatory organizations; or eligible contract participants that are registered brokers or dealers.<sup>36</sup>

Under this temporary exemption, and solely with respect to Cleared CDS, these persons generally are exempt from the 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.<sup>37</sup> In addition, all provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions would remain applicable.<sup>38</sup> 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.

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<sup>35</sup> Solely for purposes of this requirement, an eligible contract participant would not be viewed as receiving or holding funds or securities for purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons, if the other persons involved in the transaction would not be considered "customers" of the eligible contract participant under the analysis used for determining whether certain persons would be considered "customers" of a broker-dealer under Exchange Act Rule 15c3-3(a)(1). 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).

<sup>36</sup> 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.

<sup>37</sup> See note 32, supra.

<sup>38</sup> 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.

This temporary exemption, however, does not extend to Sections 5 and 6 of the Exchange Act.<sup>39</sup> The Commission separately issued a conditional exemption from these provisions to all broker-dealers and exchanges.<sup>40</sup> This temporary exemption also does not extend to Section 17A of the Exchange Act; instead, ICE Clear Europe is exempt from registration as a clearing agency under the conditions discussed above. In addition, this temporary exemption does not apply to Exchange Act Sections 12, 13, 14, 15(d), and 16;<sup>41</sup> 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),<sup>42</sup> or to certain provisions related to government securities.<sup>43</sup>

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<sup>39</sup> This Order includes a separate temporary exemption regarding the mark-to-market process of ICE Clear Europe, discussed above.

<sup>40</sup> See note 9, *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).

<sup>41</sup> 15 U.S.C. 78l, 78m, 78n, 78o(d), 78p.

<sup>42</sup> 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 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.

<sup>43</sup> 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).



D. Temporary General Exemption for Certain Registered Broker-Dealers

The temporary exemptions addressed above – with regard to ICE Clear Europe, certain ICE Clear Europe Clearing Members, 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)).<sup>44</sup> 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 April 23, 2010, from certain Exchange Act requirements.

Consistent with the temporary exemptions discussed above, and solely with respect to Cleared CDS, we are temporarily exempting registered broker-dealers in general from the 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

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<sup>44</sup> 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).

provisions that explicitly apply in connection with security-based swap agreements or from related enforcement authority provisions.<sup>45</sup> 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.<sup>46</sup>

Further we are not exempting registered broker-dealers from the following additional provisions under the Exchange Act: (i) Section 7(c),<sup>47</sup> which addresses the unlawful extension of credit by broker-dealers; (ii) Section 15(c)(3),<sup>48</sup> which addresses the use of unlawful or manipulative devices by broker-dealers; (iii) Section 17(a),<sup>49</sup> regarding broker-dealer obligations to make, keep and furnish information; (iv) Section 17(b),<sup>50</sup> regarding broker-dealer records subject to examination; (v) Regulation T,<sup>51</sup> a Federal Reserve Board regulation regarding extension of credit by broker-dealers; (vi) Exchange Act Rule 15c3-1, regarding broker-dealer net capital; (vii) Exchange Act Rule 15c3-3, regarding broker-dealer reserves and custody of securities; (viii) 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 (ix) Exchange Act

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<sup>45</sup> See notes 32 and 38, *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.

<sup>46</sup> We also are not exempting those members from provisions related to government securities, as discussed above.

<sup>47</sup> 15 U.S.C. 78g(c).

<sup>48</sup> 15 U.S.C. 78o(c)(3).

<sup>49</sup> 15 U.S.C. 78q(a).

<sup>50</sup> 15 U.S.C. 78q(b).

<sup>51</sup> 12 CFR 220.1 *et seq.*

Rule 17a-13, regarding quarterly security counts to be made by certain exchange members and broker-dealers.<sup>52</sup> 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.<sup>53</sup>

E. Solicitation of Comments

The Commission is continuing 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 temporary exemptions, including:

1. Whether the length of this temporary exemption (until April 23, 2010) is appropriate. If not, what should the appropriate duration be?
2. Whether the conditions to these temporary exemptions are appropriate. Why or why not? Should other conditions apply? Are any of the present conditions to the

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<sup>52</sup> 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.

<sup>53</sup> 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.

temporary exemptions provided in this Order unnecessary? If so, please specify and explain why such conditions are not needed.

3. Whether ICE Clear Europe 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](mailto:rule-comments@sec.gov). Please include File Number S7-16-09 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-16-09. 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 April 23, 2010:

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

ICE Clear Europe Limited (“ICE Clear Europe”) 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 Clear Europe shall make available on its Web site its annual audited financial statements.

(2) ICE Clear Europe 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 Clear Europe shall supply information and periodic reports relating to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission and, subject to cooperation with the FSA and upon such terms and conditions as may be agreed between the FSA and the Commission, 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 Clear Europe’s Cleared CDS clearance and settlement services.

(4) ICE Clear Europe shall notify the Commission, on a monthly basis, of any material disciplinary actions taken against any of its members using its Cleared CDS clearance and settlement services, including the denial of services, fines, or penalties. ICE Clear Europe shall notify the Commission promptly when ICE Clear Europe terminates on an involuntary basis the membership of an entity that is using ICE Clear Europe’s Cleared CDS clearance and settlement services. Both notifications shall

describe the facts and circumstances that led to the ICE Clear Europe's disciplinary action.

(5) ICE Clear Europe shall notify the Commission of all changes to its 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, not less than one day prior to effectiveness or implementation of such changes or, in exigent circumstances, as promptly as reasonably practicable under the circumstances. If ICE Clear Europe gives notice to, or seeks approval from, the FSA regarding any other changes to its rules regarding its Cleared CDS clearance and settlement services, ICE Clear Europe will also provide notice to the Commission. All such rule changes will be posted on ICE Clear Europe's Web site. Such notifications will not be deemed rule filings that require Commission approval.

(6) ICE Clear Europe shall provide the Commission with reports prepared by independent audit personnel concerning its Cleared CDS clearance and settlement services that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements. ICE Clear Europe shall provide the Commission with annual audited financial statements for ICE Clear Europe prepared by independent audit personnel.

(7) ICE Clear Europe shall notify the Commission at the same time it notifies the FSA in accordance with FSA REC 3.15 and FSA REC 3.16 regarding the suspension of services or inability to operate its facilities in connection with its Cleared CDS clearance and settlement services.

(8) ICE Clear Europe, 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 Clear Europe may establish to calculate mark-to-market margin requirements for ICE Clear Europe Clearing Members; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by ICE Clear Europe.

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

(1) ICE Clear Europe 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 Clear Europe 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 Clear Europe shall establish adequate safeguards and procedures to protect members' confidential trading information. Such safeguards and procedures shall include: (A) limiting access to the confidential trading information of members to those employees of ICE Clear Europe 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 Clear Europe trading for their own accounts. ICE Clear Europe must adopt

and implement adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed; and

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

(c) Exemption for ICE Clear Europe, ICE Clear Europe Clearing Members, and certain eligible contract participants.

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

(i) ICE Clear Europe;

(ii) Any ICE Clear Europe Clearing Member (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 Clear Europe, 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 Clear Europe Clearing Member" shall mean any clearing member of ICE Clear Europe that submits Cleared CDS to ICE Clear Europe 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 clearing member of ICE Clear Europe.

By the Commission.

Elizabeth M. Murphy  
Secretary