

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63390; File No. S7-17-09)

November 29, 2010

ORDER EXTENDING TEMPORARY CONDITIONAL EXEMPTIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934 IN CONNECTION WITH REQUEST ON BEHALF OF EUREX CLEARING AG RELATED TO CENTRAL CLEARING OF CREDIT DEFAULT SWAPS AND REQUEST FOR COMMENT

I. Introduction

The Securities and Exchange Commission (“Commission”) has taken multiple actions designed to help foster the prompt development of credit default swap (“CDS”) central counterparties (“CCP”), including granting temporary conditional exemptions from certain provisions of the federal securities laws.¹

In July 2009, the Commission issued an order providing temporary conditional exemptions to Eurex Clearing AG (“Eurex”), and certain other parties, to permit Eurex to clear and settle CDS transactions.² In response to Eurex’s request, the Commission temporarily

¹ See generally Securities Exchange Act Release Nos. 60372 (Jul. 23, 2009), 74 FR 37748 (Jul. 29, 2009) and 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by ICE Clear Europe Limited); Securities Exchange Act Release Nos. 60373 (Jul. 23, 2009), 74 FR 37740 (Jul. 29, 2009) and 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by Eurex Clearing AG); Securities Exchange Act Release Nos. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009), and 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010) (temporary exemptions in connection with CDS clearing by Chicago Mercantile Exchange Inc.); Securities Exchange Act Release Nos. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009), and 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010) (temporary exemptions in connection with CDS clearing by ICE Trust U.S. LLC); Securities Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (temporary exemptions in connection with CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.); and other Commission actions discussed in several of these orders. In addition, the Commission has issued interim final temporary rules that provide exemptions under the Securities Act of 1933 and the Securities Exchange Act of 1934 for CDS to facilitate the operation of one or more central counterparties for the CDS market. See Securities Act Release Nos. 8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009) (initial approval), 9063 (Sep. 14, 2009), 74 FR 47719 (Sep. 17, 2009) (extension until Nov. 30, 2010), and 9158 (Nov. 30, 2010) (extension until Jul. 16, 2011).

² Securities Exchange Act Release No. 60373 (Jul. 23, 2009), 74 FR 37740 (Jul. 29, 2009) (“July 2009 Eurex Exemptive Order”).

extended and expanded the exemptions in April 2010.³ The current exemptions pursuant to the April 2010 Eurex Exemptive Order are scheduled to expire on November 30, 2010, and Eurex has requested that the Commission extend the exemptions contained in the April 2010 Eurex Exemptive Order.⁴

II. Discussion

A. Legislative Developments

Subsequent to the Commission's issuance of the April 2010 Eurex Exemptive Order, the President signed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") into law.⁵ The Dodd-Frank Act was enacted to, among other purposes, promote the financial stability of the United States by improving accountability and transparency in the financial system.⁶ To this end, the provisions of Title VII of the Dodd-Frank Act provide for the comprehensive regulation of security-based swaps⁷ by the Commission.⁸ The Dodd-Frank Act amends the Exchange Act to require, among other things, that transactions in security-

³ Securities Exchange Act Release No. 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) ("April 2010 Eurex Exemptive Order")

⁴ See Letter from Paul Architzel, Alston & Bird, to Elizabeth Murphy, Secretary, Commission, Nov. 29, 2010 ("November 2010 Request").

⁵ Pub. L. No. 111-203 (July 21, 2010).

⁶ See Pub. L. No. 111-203, Preamble.

⁷ Section 761(a)(6) of the Dodd-Frank Act defines a "security-based swap" as any agreement, contract, or transaction that is a "swap," as defined in Section 1a(47) of the Commodity Exchange Act, 7 U.S.C. 1a(47), that is based on an index that is a narrow-based security index, a single security, or a loan, including any interest therein or on the value thereof; or the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer. See Section 3(a)(68) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78c(a)(68) (as added by Section 761(a)(6) of the Dodd-Frank Act). Section 712(d) of the Dodd-Frank Act provides that the Commission and the Commodity Futures Trading Commission ("CFTC"), in consultation with the Board of Governors of the Federal Reserve System, shall, among other things, jointly further define the terms "swap" and "security-based swap."

⁸ Section 761(a)(2) of the Dodd-Frank Act explicitly includes security-based swaps in the definition of "security" in Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c.

based swaps be cleared through a clearing agency that is registered with the Commission or that is exempt from registration if they are of a type that the Commission determines must be cleared, unless an exception or exemption from mandatory clearing applies.⁹ Specifically, Section 763(b) of the Dodd-Frank Act adds a new Section 17A(g) to the Exchange Act which states: “It shall be unlawful for a clearing agency, unless registered with the Commission, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to a security-based swap.”¹⁰ This new registration provision, along with other general provisions under Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011.¹¹ As a result, the Commission anticipates that Eurex would need to apply and become registered as a clearing agency under Section 17A of the Exchange Act when relevant provisions of the Dodd-Frank Act become effective in order to clear security-based swaps.

B. Eurex’s Request for Extension of April 2010 Eurex Exemptive Order

Eurex seeks an extension of the temporary exemptions of the April 2010 Eurex Exemptive Order under the same terms and conditions contained in the April 2010 Eurex

⁹ See Section 763(a) of the Dodd-Frank Act (adding new Section 3C to the Exchange Act, 15 U.S.C. 78c-2).

¹⁰ While Title VII of the Dodd-Frank Act provides that certain entities that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act are deemed registered as a clearing agency for the purposes of clearing security-based swaps (“Deemed Registered Provision”), Eurex would not qualify for the Deemed Registered Provision. See Section 763(b) of the Dodd-Frank Act (adding new Section 17A(l) to the Exchange Act, 15 U.S.C. 78q-1(1)). A clearing agency must be a depository institution that cleared swaps as a multilateral clearing organization or a derivative clearing organization that cleared swaps pursuant to an exemption from registration as a clearing agency. *Id.* Since Eurex is not a depository institution and is not a derivative clearing organization, it does not qualify for the Deemed Registered Provision.

¹¹ Section 774 of the Dodd-Frank Act states, “[u]nless otherwise provided, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle.”

Exemptive Order.¹² Eurex's request for an extension of the April 2010 Eurex Exemptive Order incorporates the representations made in its request preceding the April 2010 Eurex Exemptive Order and its request preceding the July 2009 Eurex Exemptive Order.¹³ These representations are discussed in detail in our earlier Eurex orders. Eurex represents that these representations remain valid.¹⁴

Accordingly, consistent with our findings in the April 2010 Eurex Exemptive Order, and, in particular, in light of the risk management and systemic benefits in continuing to facilitate CDS clearing by Eurex until Title VII of the Dodd-Frank Act becomes fully effective, 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 extend the exemptive relief granted in the April 2010 Eurex Exemptive Order until July 16, 2011. Specifically, pursuant to the Commission's authority under Section 36 of the Exchange Act,¹⁵ based on the facts presented and the representations made by Eurex,¹⁶ the Commission is extending until July 16, 2011, under

¹² See November 2010 Request, supra note 4.

¹³ See id.

¹⁴ In the April 2010 Eurex Exemptive Order, the Commission described Eurex's proposed activity to clear CDS transactions of its members' customers. Under this proposed activity, Eurex intended to provide customer clearing capability for: (i) customers that would enter into a tri-party agreement with Eurex and the clearing member, in which the clearing member agrees to guarantee the customer's position and the customer agrees to be bound by Eurex's Clearing Conditions ("Registered Customer") and (ii) customers that do not enter into such an agreement. Eurex indicated in its November 2010 Request that it now intends to provide customer clearing capability only for Registered Customers under the exemptive relief.

¹⁵ 15 U.S.C. 78mm. Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class of 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.

¹⁶ See November 2010 Request, supra note 4. The exemptions we are granting today are based on all of the representations made by Eurex in its request, which incorporate representations made by Eurex in its request for relief granted in the April 2010 Eurex Exemptive Order and its request for relief granted in the July 2009 Eurex Exemptive Order. We recognize, however, that there could be legal uncertainty in

the same terms and conditions in the April 2010 Eurex Exemptive Order, each of the existing exemptions connected with CDS clearing by Eurex, which include: the temporary conditional exemption granted to Eurex from clearing agency registration under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS; the temporary conditional exemption of Eurex and certain of its clearing members 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 certain non-excluded CDS cleared by Eurex; the temporary conditional exemption of Eurex and certain eligible contract participants from certain Exchange Act requirements with respect to certain non-excluded CDS cleared by Eurex; the temporary conditional exemption of Eurex clearing members and certain others from broker-dealer registration requirements and related requirements in connection with CDS clearing by Eurex (including clearing of customer CDS transactions); and the temporary conditional exemption from certain Exchange Act requirements granted to registered broker-dealers with respect to certain non-excluded CDS.¹⁷

C. Solicitation of Comments

When we granted the April 2010 Eurex Exemptive Order, we requested comment on all aspects of the exemptions. We received no comments in response this request.

In connection with this Order extending exemptions granted in connection with CDS clearing by Eurex, we reiterate our request for comments on all aspects of the exemptions.

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 (as defined in the April 2010 Eurex Exemptive Order) that previously had been cleared pursuant to the exemptions would remain unchanged, but no new positions could be established pursuant to the exemptions until all of the underlying representations were again accurate.

¹⁷ See April 2010 Eurex Exemptive Order, supra note 4.

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 S7-17-09 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 Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-17-09. 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 website (<http://www.sec.gov/rules/other.shtml>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 am and 3 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 July 16, 2011, the following exemptions connected with CDS clearing by Eurex contained in the

April 2010 Eurex Exemptive Order are extended: (i) the temporary conditional exemption granted to Eurex from clearing agency registration under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS; (ii) the temporary conditional exemption of Eurex and certain of its clearing members 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 certain non-excluded CDS cleared by Eurex; (iii) the temporary conditional exemption of Eurex and certain eligible contract participants from certain Exchange Act requirements with respect to certain non-excluded CDS cleared by Eurex; (iv) the temporary conditional exemption of Eurex clearing members and certain others from broker-dealer registration requirements and related requirements in connection with CDS clearing by Eurex (including clearing of customer CDS transactions); and (v) the temporary conditional exemption from certain Exchange Act requirements granted to registered broker-dealers with respect to certain non-excluded CDS.

By the Commission.

Elizabeth M. Murphy
Secretary