

ALSTON & BIRD LLP

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404

202-756-3300
Fax: 202-756-3333
www.alston.com

Paul M. Architzel

Direct Dial: 202-756-3492

E-mail: paul.architzel@alston.com

April 23, 2010

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-6628

Re: Request for Exemptive Relief Under the Securities Exchange Act of 1934
Related to the Central Clearing of Credit Default Swaps

Dear Ms. Murphy:

On July 23, 2009, the U.S. Securities and Exchange Commission (“Commission”) issued an exemptive order in respect of Eurex Clearing AG (“Eurex Clearing”) to perform the functions of a clearing agency (central counterparty) for certain non-excluded Credit Default Swap transactions (“CDS”).¹ Eurex Clearing’s clearance and settlement services for CDS became operational with respect to its clearance and settlement services for CDS shortly thereafter, on July 30, 2009.²

The volume of CDS has grown exponentially in recent years. As a consequence of this growth and the current, unprecedented conditions in the financial markets, including the over-the-counter (“OTC”) markets for CDS, financial regulatory authorities in both the European Union and in the United States have recommended Central Counterparty clearing (“CCP”) as one means of reducing systemic, counterparty and operational risk arising from such transactions.³ It has also been a primary regulatory goal to include customer access to clearing of CDS transactions.⁴

¹ See “Order Granting Temporary 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 Comments,” Securities Exchange Act Release No. 34-60373 (July 23, 2009) (“CDS Exemptive Order”).

² The CDS Exemptive Order issued on July 23, 2009, was temporary in nature and expires on April 23, 2010. As part of the relief requested herein, Eurex Clearing also requests that the term of the Exemptive Order be extended. An extension of the Order will permit buy-side customers to be brought within the clearing architecture while the temporary exemptive relief remains in effect.

³ See, statement of Charlie McCreevy, European Commissioner for Internal Market and Services, Reference MEMO/09/77, welcoming an industry commitment to agree to the central clearing in

At the time that it first became operational, Eurex Clearing's offering in Europe included customer CDS transactions within its CDS clearance and settlement services. However, the Commission's CDS Exemptive Order issued to Eurex Clearing did not make a determination with respect to granting relief in connection with U.S. and non-U.S. customer CDS transactions cleared through U.S. clearing members of Eurex Clearing and CDS transactions by U.S. customers cleared through non-U.S. clearing members of Eurex Clearing. The Commission noted that it was considering certain issues raised by that type of customer clearing activity and that it was "working toward the goal of being able to provide exemptive relief to facilitate the central clearing, by Eurex, of these customer CDS transactions."⁵

Eurex Clearing would like to extend its service offering by making clearing services available to buy-side customers of its U.S. clearing members and to U.S. buy-side customers of its non-U.S. clearing members. This goal is consistent with the undertaking to various regulators of the dealers to make cleared CDS swaps available to their customers by December 15, 2009.

Accordingly, in order to avoid uncertainty and for the reasons set forth below, and based upon the representations and undertakings of Eurex Clearing's July 23, 2009 request for exemptive relief,⁶ which are incorporated by reference herein, as supplemented and modified by the representations and undertakings in this request,⁷ Eurex Clearing requests that the Commission supplement the exemptive relief which it granted to Eurex Clearing and to Clearing Members of Eurex Clearing⁸ to include clearance and settlement services by Eurex Clearing of certain CDS transactions involving the CDS clearing members' ("CCM") buy-side customers.⁹

Europe for certain CDS which are systemically relevant." See also, "The Role of Credit Derivative in the U.S. Economy," Before the U.S. House Agriculture Committee, 110th Cong. 2nd Sess. (2008) (Statement of Erik Sirri, Director of the Division of Trading and Markets, U.S. Securities and Exchange Commission).

⁴ See: <http://www.newyorkfed.org/newsevents/news/markets/2009/ma090602.html>

⁵ CDS Exemptive Order, note 9.

⁶ See Letter from Paul M. Architzel, Alston & Bird, LLP to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, dated July 23, 2009 ("July 23, 2009 Request").

⁷ As provided above, Eurex Clearing incorporates by reference in this letter and affirms the continuing reliability of the representations and undertakings made in its July 23, 2009 Request as though each were set forth herein. Representations in this letter with respect to customer clearing, segregation of customer funds and required trading in connection with obtaining bids to be used in calculation of the daily evaluation price supplement the representations of the July 23, 2009 Request.

⁸ Natural persons are not permitted to become clearing members of Eurex Clearing.

⁹ Eurex Clearing is requesting this exemptive relief in connection with its activities and those of its U.S. CDS Clearing Members, their affiliates and other persons related to clearing of certain CDS transactions. Eurex Clearing's activities and those of its non-U.S. Clearing Members related to the clearance and settlement of CDS transactions between non-U.S. CDS Clearing Members for their own accounts or on behalf of their non-U.S. customers are not within the scope of this request.

Specifically, Eurex Clearing respectfully requests:

(1) for the avoidance of uncertainty, that the U.S. SEC issue a Supplemental Order pursuant to Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”), making clear that the exemption granted by the SEC on July 23, 2009 to Eurex Clearing from the clearing agency registration requirements set forth in Section 17A(b)(a)¹⁰ of the Exchange Act with respect to its performance of the functions of a clearing agency described in this request with respect to certain OTC CDS transactions involving U.S. persons, and in particular in connection with clearing of transactions involving U.S. customers and from any provisions of the Exchange Act governing securities transactions, to the extent otherwise applicable, applies in connection with the activities described in this request;

(2) for the avoidance of uncertainty, that the SEC issue a Supplemental Order pursuant to Section 15(a)(2) of the Exchange Act, exempting any person that may be subject to registration as a U.S. broker-dealer solely as a consequence of their effecting transactions in, or inducing or attempting to induce the purchase or sale of, any CDS transactions to be cleared by Eurex Clearing in respect of transactions described in this request from any requirement under Section 15(a)(1) of the Exchange Act to register as a U.S. broker-dealer and from the reporting and other requirements of the Exchange Act and the rules and regulations thereunder, that apply to a broker or dealer whether or not registered with the Commission or to comply with any provisions of the Exchange Act and the regulations thereunder governing securities transactions;

(3) for the avoidance of uncertainty, that the SEC issue an Order pursuant to Section 36(a)(1) of the Exchange Act exempting Eurex Clearing, its Clearing Members and their affiliates from any requirement that they comply with provisions of the Exchange Act governing securities transactions, to the extent otherwise applicable to Eurex Clearing, its Clearing Members and their affiliates, in connection with the offer, acceptance, execution, clearance, settlement, performance and related activities contemplated or required by the Eurex Clearing Conditions, by the Eurex Clearing Clearing Agreement or by the Eurex Clearing Tri-party Agreement, and contemplated by this request involving CDS transactions submitted (or executed on terms providing for submission) to Eurex Clearing for clearance and settlement; and

(4) that the relief in paragraphs (1), (2) and (3) be subject to Eurex Clearing, and such other persons complying with, and remaining subject to, the provisions of the Exchange Act applicable to security-based swap agreements

¹⁰ We include as part of this exemptive request, relief from the provisions of Exchange Act Section 17A(b)(2) requiring the filing of a Form CA-I in light of the permission granted December 12, 2006, by the German Federal Financial Supervisory Authority (“BaFin”) to Eurex Clearing AG to act as a CCP.

and on the terms of and subject to the conditions upon which this relief is requested.

As detailed in its July 23 letter requesting the CDS Exemptive Order, Eurex Clearing operates under a regulatory regime that provides an appropriate level of protection to market participants using its clearing services, and its robust risk management and operational processes safeguard those market participants and protect against systemic risk to the general markets.

As explained in greater detail below, Eurex Clearing is able to extend the benefits of its clearing offering to the buy-side customers of CCMs. These include significantly enhancing the financial integrity of such transactions and protecting customer collateral in case of the default of the customer's clearing member. Granting the requested supplemental exemptive relief will provide greater certainty with respect to Eurex Clearing's making available its clearing services to U.S. CDS Clearing Members in connection with their transactions with their buy-side customers and to non-U.S. CDS Clearing members in connection with their transactions with their U.S. buy-side customers. This will further the development of CCP clearing protections for market participants. For these reasons, we believe that the requested exemptions are necessary or appropriate in the public interest and consistent with the protection of investors.

Eurex Clearing AG

As described more fully in its letter of July 23, 2009, Eurex Clearing was formed in 1997 to function as the clearinghouse for the Eurex exchanges. Eurex Clearing is a stock corporation (*Aktiengesellschaft*) formed and incorporated under the laws of Germany. Eurex Clearing received permission to act as a CCP from the German Federal Financial Supervisory Authority ("BaFin") on December 12, 2006. Eurex Clearing is supervised by BaFin cooperatively with the Deutsche Bundesbank (the German Federal Bank). In addition, on January 16, 2007, Eurex Clearing was recognized by the U.K. Financial Services Authority ("FSA") as a Recognized Overseas Clearing House ("ROCH"), on the basis that the regulatory framework and oversight of Eurex Clearing in its home jurisdiction was comparable to that of the U.K. FSA. On July 31, 2009, the U.S. Commodity Futures Trading Commission issued an Order under Section 409(b)(3) of the Federal Deposit Insurance Corporation Improvement Act of 1991, enabling Eurex Clearing to act as a Multilateral Clearing Organization thereunder with respect to certain over-the-counter contracts, agreements or transactions. As noted above, Eurex Clearing was granted Exemptive Relief by the Commission on July 23, 2009 in connection with the offering of clearance and settlement services with respect to CDS transactions described in the CDS Exemptive Order.

A complete explanation of the function and operation of Eurex Clearing is included in the Eurex Disclosure Document for Options, which is provided under a no-action of the Commission's Division of Trading & Markets.¹¹

Eurex Clearing's CDS Clearing Services

On July 30, 2009, Eurex Clearing began offering its clearance and settlement service for CDS transactions based on the iTraxx® Europe (Main), iTraxx® HiVol and iTraxx® Europe Crossover CDS Indexes and for CDS transactions based on 17 single name constituents of the iTraxx® Europe (Main) index of the utility sector. The list of index series and maturities and of the specific single name constituents that are available for clearing can be found at:

http://www.eurexclearing.com/markets/creditclear/product_scope_de.html. Further European single names will be added over time to provide full coverage of the iTraxx® benchmark index constituents. As described in its letter of July 23, 2009, Eurex Clearing intends, in response to market demand, to offer clearing services for other indexes and their constituents.

Overview of Existing Clearing Architecture

Customer buy-side access to Eurex Clearing's offering for clearance and settlement services builds upon its existing CDS clearing architecture, which is summarized below. Eurex Clearing establishes the terms of the contracts which are novated by the clearing house in a new chapter, entitled "Clearing of OTC Derivatives Transactions," of its rulebook--the "Clearing Conditions of Eurex Clearing" (hereafter the "Clearing Conditions"). The terms established by the CDS Chapter of the Clearing Conditions are consistent with, and incorporate to the extent possible, the terms most commonly used for CDS transactions in the OTC markets as provided under ISDA® documentation, adhering to European market conventions. Eurex Clearing complies with ISDA® March 2003 Credit Derivative definitions incorporating the March 2009 Determinations Committees and Auction Settlement (Big Bang) Supplement and the latest July 2009 Restructuring (Small Bang) Supplement.

The CDS for which Eurex Clearing offers clearing and settlement services provide for cash settlement as the mandatory settlement mechanism for events of bankruptcy and failure to pay. Eurex Clearing will follow the ISDA® Determination Committee decisions whether a credit event has occurred. The ISDA® Determination Committees will be effective as of April 8, 2009, with implementation of two new ISDA® protocols (Auction Settlement supplement and ISDA® Derivatives Determination Committee). In the event that the ISDA Determination Committee would not assess a potential credit event, Eurex Clearing may facilitate a credit event determination process

¹¹ The Eurex Options Disclosure Document can be found at:
<http://www.eurexchange.com/download/documents/circulars/cf2452007e.pdf>. The Eurex no-action letter can be found at: <http://sec.gov/divisions/marketreg/mr-noaction/eurex072705.htm>.

via its Eurex CDS Determination Committee. In case of restructuring events, which are mainly applicable for European CDS contracts, Eurex Clearing would also follow OTC procedures to the degree possible.

Eurex Clearing requires CDS CCMs to deposit sufficient collateral with Eurex Clearing to cover the calculated risk resulting from the cleared transactions. Prior to novation, Eurex Clearing conducts a pre-risk evaluation and other pre-novation checks. These relate to member and product-specific requirements.¹² If all such pre-novation checks are satisfactory, Eurex Clearing will proceed to novate the contract, replacing the prior bi-laterally negotiated contracts.

Customer Clearing

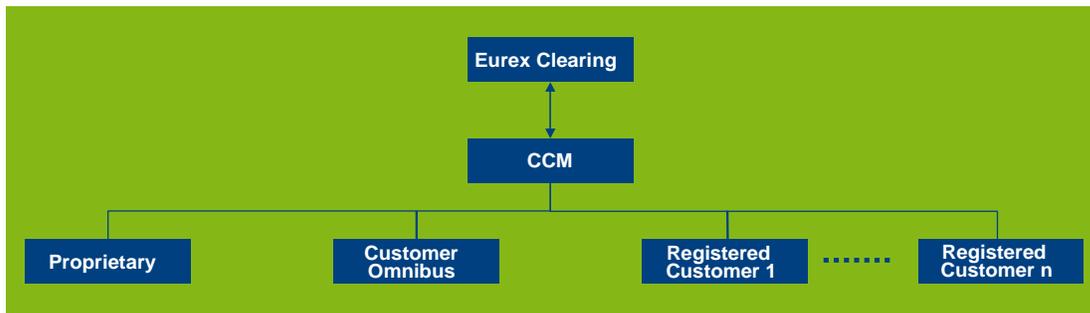
As noted above, customer access to CDS clearing is, to the extent possible, built upon the existing clearing architecture and existing infrastructure providers. Operationally, Eurex Clearing will use third-party confirmation platform providers--such as Markit Wire--to capture bilaterally confirmed deals. Such transactions will be reported by the confirmation platform(s) directly to Eurex Clearing for novation. The cleared contracts will then be recorded in Deriv/SERV's Trade Information Warehouse ("TIW") with Eurex Clearing as the counterparty. These transactions will be accepted by Eurex Clearing on the same day as the contracts were bi-laterally effectuated, with novation on T+1 (provided all novation criteria have been satisfied).¹³

Eurex Clearing's flexible account structure enables CCMs to distinguish their own, proprietary trades from those of their customers. Buy-side customers can be included within the clearing architecture in either of two account categories, enabling CCMs to provide customers with a choice between a dedicated customer account referred to as a "Registered Customer" ("RC") account, or an account in which the positions of all customers are commingled, the "Customer Omnibus Account." In either case, the CCM carries the positions as agent for its customer(s).

Thus, buy-side customers will be able to access Eurex Clearing clearing services either as RCs through the CCM or through the CCM's omnibus customer account. As a functional matter, CCMs will have an account structure that includes the Credit Clearing Member's proprietary account, separate accounts for each "Registered Customer," and an omnibus customer account for all other customers. A diagram of the customer account structure is as follows:

¹² For example, with respect to member checks, the member must not have been suspended. Product-related checks include specific product-related criteria, such as duration to maturity, and position limits, if in effect.

¹³ In addition, Eurex Clearing will continue to novate bi-laterally effectuated transactions that were first recorded in the TIW using the interface with DTCC Deriv/SERV's TIW. Under this alternative, trades designated by the parties to be submitted for clearing will be received over the interface from DTCC and will continue to be novated on a weekly novation cycle.



An RC is required to enter into a Tri-party Agreement among Eurex Clearing, the CCM and the RC, in which the CCM agrees to guarantee the RC's position and the RC agrees to be bound by Eurex Clearing's Clearing Conditions. The positions carried by the CCM in an RC's account are carried in the clearing house's systems on a fully disclosed basis. Thus, an RC's positions are separately booked and separately margined. Moreover, they are separately disclosed on all Eurex Clearing reports, and such reports can be provided by Eurex Clearing directly to the RC, providing the RC with a very high level of transparency. Customers whose positions are carried through the CCM's omnibus clearing account are not required to enter into a Tri-party Agreement with Eurex Clearing. The positions carried in the Customer Omnibus Account are not carried by the clearing house on a fully disclosed basis.

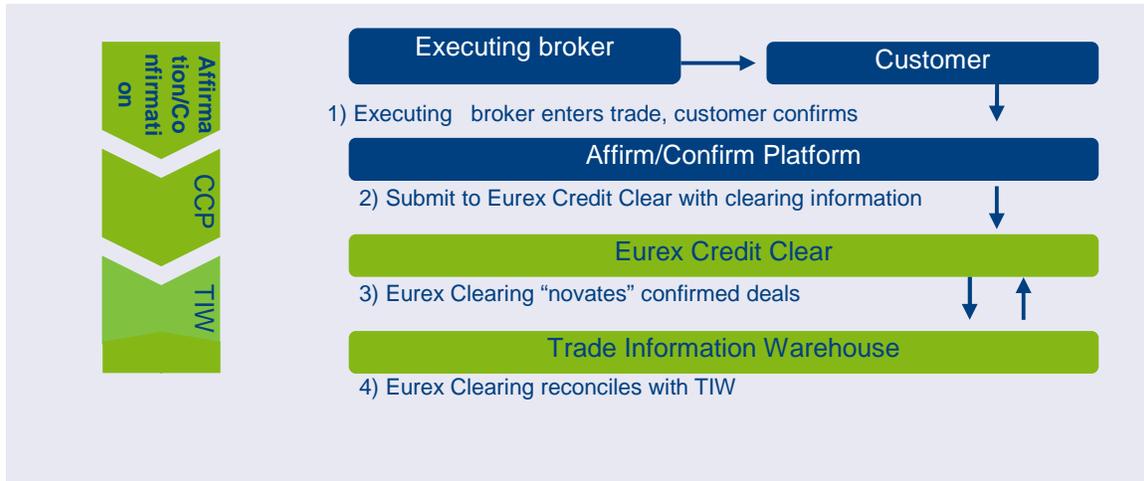
As noted above, the mechanics of customer clearing will make use of existing infrastructure providers. Eurex Clearing expects that transactions will be submitted to Eurex Clearing through one or more third party confirmation platform providers, also referred to as a recognized Matching and Confirmation Service ("MCS"), that will facilitate the matching and confirmation of the trade terms by the parties, as well as the electronic submission of the affirmed trade to Eurex Clearing for clearing.¹⁴

Operationally, Eurex Clearing will establish an interface to MCSs to capture matched and confirmed trades as well as post-trade events.¹⁵ In order for a transaction to be cleared, it must first be processed by an MCS. Only confirmed CDS contracts may be submitted to Eurex Clearing for clearing. Trades designated by the parties to be

¹⁴ Under this approach, for example, when an RC and an executing broker agree to terms of the transaction (including that the transactions should be submitted to Eurex Clearing for clearing), the executing broker will submit the trade terms to the third party confirmation platform provider, which will forward those terms to the RC affirmation. Once the RC has affirmed the trade, the platform will forward those terms, to the CCM designated by the RC for affirmation. Once all three parties have affirmed the transaction, it will be submitted to Eurex for clearing. Eurex Clearing will determine whether to accept or reject the submitted trade in accordance with its risk management policy and procedures.

¹⁵ Eurex Clearing has no rule requiring an executing broker to be a clearing member. Eurex Clearing Conditions permits any execution venue or trade confirmation platform that meets the technical requirements to participate in its clearance and settlement architecture.

submitted for clearing will be received over the interface with an MCS. A diagram of the new confirmation platform or “MCS” process is as follows:



Eurex Clearing also expects that the platform would submit, to the relevant parties, notice of Eurex Clearing’s acceptance or rejection of the trade. Third party confirmation platform providers may provide additional back-office or similar services to CCMs or RCs. Eurex Clearing is currently in negotiations that will enable it to accept transactions from one or more third party confirmation platform provider(s).¹⁶

Following are illustrations of several customer clearing scenarios, including the transaction flow and account keeping for the transactions.

Scenario 1---RC with its Clearing Member

The initial trade is entered into between RC 1 and the Credit Clearing Member A. The trade information will be passed to Eurex Clearing. After novation, Eurex Clearing will record in its account keeping:

Credit Clearing Member A/Prop account to Eurex Clearing
Eurex Clearing to Credit Clearing Member A/RC 1 account.

The original trade will be exited and new trade information booked in TIW as follows:

DTCC Account CCM A to DTCC Account Eurex Clearing
DTCC Account Eurex Clearing to DTCC Account CCM A
DTCC Account CCM A to DTCC Account RC 1.

¹⁶ Eurex Clearing represents that it remains committed to work with reasonably qualified execution venues and trade processing platforms to facilitate functionality for submission of trades by non-member dealers if there is interest in such functionality.

Thus, the customer clearing scenario results in the original trade being replaced in TIW by two trades between Credit Clearing Member A and Eurex Clearing. These two trades between Clearing Member A and Eurex Clearing would be booked as one trade to Clearing Member A's Proprietary Account and one trade to Clearing Member A's RC 1 Account. The trade in TIW reflects a back to back trade between the customer and its CCM.

Scenario 2—RC with a counterparty that is different from its Clearing Member

RC 1 has a clearing relationship with Credit Clearing Member A. The initial trade is entered into between RC 1 and Credit Clearing Member B

The trade information will be passed to Eurex Clearing. After novation, Eurex Clearing will record in its account keeping:

Credit Clearing Member A/RC 1 to Eurex Clearing
Eurex Clearing to Credit Clearing B Prop Account.

The original trade will be exited and new trade information booked in TIW as follows:

DTCC Account CCM A to DTCC Account Eurex Clearing
DTCC Account Eurex Clearing to DTCC Account CCM B
DTCC Account CCM A to DTCC Account RC 1.

Thus, the scenario results in the original trade being replaced in TIW by two trades, one between Credit Clearing Member A and Eurex (booked in Credit Clearing Member A's RC 1 account) and the second between Eurex Clearing and Credit Clearing Member B (booked in Credit Clearing Member B's proprietary account), and a back to back trade reflecting the customer trade with its CCM.

Scenario 3—Two non-CCMs

RC 1 has a clearing relationship with Credit Clearing Member A. RC 2 has a clearing relationship with Credit Clearing Member B. The initial trade is entered into between RC 1 and RC 2.

The trade information will be passed to Eurex Clearing. After novation, Eurex Clearing will record in its account keeping:

Credit Clearing Member A/RC 1 to Eurex Clearing
Eurex Clearing to Credit Clearing Member B/RC 2.

The original trade will be exited and new trade information booked in TIW as follows:

DTCC Account CCM A to DTCC Account Eurex Clearing
DTCC Account Eurex Clearing to DTCC Account CCM B
DTCC Account CCM A to DTCC Account RC 1
DTCC Account CCM B to DTCC Account RC 2.

Thus, the scenario results in the original trade being replaced in the TIW by two trades, one between Credit Clearing Member A and Eurex Clearing and the second between Eurex Clearing and Credit Clearing Member B, and two back-to-back trades reflecting each customer's trade with its respective CCM.¹⁷

These positions would be carried by the CCM as agent for its customers. If two RC's of the same CCM entered into a transaction, the buy-side of the transaction would be carried by the CCM in one RC's account and the sell-side of the transaction would be carried by the CCM in the second RC's account. Eurex Clearing would calculate the margin required separately for each RC and would not net the margin between the two. In this regard it should be noted that access to CDS clearing is available to any party that either is a CCM or that has a relationship with a CCM and that cleared CDS transactions may arise out of CDS transactions between two non-members, as long as each has a relationship to a CCM. There is no Eurex Clearing rule that requires an executing broker to be a CCM.¹⁸

The above mechanics of clearing will be the same for customers carried in the omnibus account as for RCs with the following main difference. Rather than being reflected in Eurex Clearing's system as a separately identified RC, trades for the omnibus clearing account of a CCM will simply be identified as being for the omnibus customer account. The CCM, through its own internal record keeping systems would identify particular contracts with its particular customer. Eurex Clearing would rely upon the CCM's records in the event that it becomes necessary or appropriate for Eurex Clearing to determine the beneficial owner of such positions.

Novation

CDS clearing is achieved through a process of novation, wherein if the novation criteria are met Eurex Clearing is interposed as the universal counterparty to transactions between its Clearing Members. Thus, upon novation, the original CDS transaction will be

¹⁷ This example illustrates the "four-way processing," which enables a non-CCM dealer that has a clearing relationship with a CCM to access Eurex Clearing's clearing services with respect to a CDS contract that the non-CCM dealer enters into with a counterparty that also has a clearing relationship with a different CCM.

¹⁸ Based on market feedback, Eurex anticipates that, initially, executing brokers will be CCMs. Eurex does not prohibit an executing broker that is not a CCM from having a trade submitted for clearance at Eurex through the CCM.

terminated and replaced through two new CDS transactions. The Clearing Member that acted as buyer under the bilateral transaction will continue to be the buyer by way of novation with Eurex Clearing and the Clearing Member that acted as seller bilaterally will act as the seller under the new legal relationship with Eurex Clearing.

An RC, as a consequence of its agreement with a CCM (and Eurex Clearing), is authorized to initiate the transfer of its marked OTC CDS transactions to be booked at DTCC to Eurex Clearing, for clearance through its CCM. If a bilateral OTC CDS Transaction of a customer of the CCM meets the novation criteria, the Clearing Conditions of Eurex Clearing provide that a CCP Transaction shall be effected thereby between the RC and its CCM and a further, equivalent CCP transaction shall be effected thereby between the CCM and Eurex Clearing.¹⁹ However, the clearing relationship and the clearing house's guarantee extend only between Eurex Clearing and the Credit Clearing Member.

Once the OTC transactions are accepted by Eurex Clearing through novation, Eurex Clearing on an on-going basis conducts post-novation risk management in respect of the position's carried by the CCM. As part of its post-novation risk management services, Eurex Clearing offers a full suite of reports. These reports are available directly to the RC in addition to being supplied to the CCM. The information contained in each report is as follows:

¹⁹ See Eurex Clearing Conditions: Chapter VIII Number 1.2.1 para.1.

<i>Reports</i>	<i>Content</i>
Detailed MTM	Details the Mark-to-Market and accrued premium margin.
Overall Margin	Summarizes all CDS margin components.
OTC Full Inventory	Lists all active deals on the RCs portfolio.
OTC Trade Daily Summary	Contains all trades involved in the weekly clearing cycle.
OTC Clearing Reconciliation	CSV report showing new, terminated, invalid and excluded trades for the current clearing cycle.
OTC Cash	Contains all forecasted coupon and credit event payments.
OTC Trade Event	Contains all trade events that have been accepted for clearing finality.
Netting Forecast	Details trades—and nets where netting may be applied.
Credit Default Event Margin	Details the composition of the Credit Default Event margin.
Daily Margin Summary	Summarizes all margin components with Eurex Clearing.
Calculation Data	Provides relevant valuation data.
Daily Settlement Statement	Compares margin requirements of RCs to collateral deposited for RCs.

These reports enable both the CCM and the RC to better track their positions (and their risk exposure).

Relationship between the Credit Clearing Member and its Customer

As explained above, Eurex Clearing's legal relationship is with its Clearing Members.²⁰ The Clearing Conditions establish the legal framework which governs that relationship. In the Clearing Agreement between Eurex Clearing and the CCM, the member agrees to be bound by the Clearing Conditions. The Tri-party Agreement is an agreement among Eurex Clearing, the CCM and the RC. Under the Tri-party agreement, the CCM agrees to guarantee its own positions vis-à-vis Eurex Clearing (not the positions of the RC vis-à-vis its CCM). In addition, the RC agrees to be bound by, and to adhere

²⁰ As noted in our July 23, 2009 Request, Clearing Members must meet a number of conditions to qualify for a Eurex Clearing license to clear CDS transactions. Among these is the requirement that Credit Clearing Members have at least €1 billion in liable equity capital. Eurex Clearing may permit a bank guarantee and/or collateral in the form of cash or securities to supplement a member's liable equity capital or proprietary funds. See July 23 Request at page 10.

to, the Clearing Conditions. The Tri-party Agreement also restates the principles of liability which apply in respect of the parties to each other (Eurex Clearing, CCM and RC), and sets forth the applicable netting procedures and rights of termination which apply as between the parties.

Because the Tri-party Agreement does not address all issues of the relationship between the CCM and its RC, additional documentation generally will be negotiated between those two parties—the Customer Agreement. In addition, the relationship between the CCM and an omnibus customer would be evidenced through a bi-lateral customer agreement.

Eurex Clearing is not a party to, and has not specified a form of, such bi-lateral agreements between the CCM and its customers. Issues that would be subject to such a bilateral customer agreement between the CCM and its customer would include fees, time deadlines set by the CCM, CCM-set trading limits and the relationship and procedures among the customer, its CCM and any executing broker that “gives-up” a contract to the CCM.

The customer agreement would also control the legal status and process that applies to a CDS transaction that was not accepted for clearing. Generally, CCMs and their customers will have in place ISDA® Master Agreements governing their transactions prior to submission for clearing. The customer agreement would specify the procedures and status of a transaction that was not accepted for clearing. The reason that a transaction might not be accepted for clearance could rest with an executing broker or the CCM. By way of example, if one of the clearing house’s pre-novation checks--such as sufficient initial margin being posted--is not fulfilled, Eurex Clearing would not novate the transaction. The bi-lateral customer agreement in that instance may provide for breakage of the contract along with the economic terms of the breakage.

There is currently on-going an industry-wide initiative to standardize documentation across all dealers and for all CCPs of the various terms that will apply to situations in which a CDS transaction is not accepted for clearing. Eurex Clearing supports and is cooperating in these efforts to achieve uniform standards and documentation with respect to transactions that are not accepted for clearance.

Margin and Customer Collateral

Perhaps the single most important contribution of a CCP to systemic protection (and the protection of the customers of CCMs) is the amelioration of risk through a robust system of margining and the CCP’s mutualisation of counterparty risk. Eurex Clearing maintains adequate financial safeguards to assure no material adverse break in operations would occur in varying market conditions.

Eurex Clearing will require that CDS Clearing Members deposit or pledge sufficient collateral to Eurex Clearing to cover the calculated risk resulting from the cleared transactions.²¹ The Clearing Conditions also require that CCMs collect from their customers' collateral no less than the amount required to meet the margin calculated by Eurex Clearing.²² Prior to novation, Eurex Clearing will conduct a pre-risk evaluation and other pre-novation checks.²³ If such pre-novation checks are satisfactory, Eurex Clearing will proceed to novate the contract, replacing the prior bi-laterally agreed CDS.

An important financial safeguard of Eurex Clearing's buy-side access to its CDS clearance and settlement services is segregation of collateral, including both customer securities and cash. Segregation of customer collateral, as described in greater detail below, will be available as agreed upon between the CCM and its customer. However, segregation of customer assets at Eurex Clearing and as between U.S. CCMs and their customers and U.S. customers and their CCMs will be mandatory. It must be kept in mind that the segregation requirement does not prevent customer losses if the value of the contract that the customer has entered into declines; it does however, create an important systemic protection of keeping customer collateral separate from the proprietary obligations of the CCM in the event of the insolvency of the CCM.

CDS margin system

As explained in our letter of July 23, 2009, the total margin requirement for CDS covers the market risk of the positions held by a clearing member so that, should a member default, the clearing house has, in all but the most extreme market circumstances, sufficient margin to cover default losses to at least the 99% confidence interval without recourse to other financial resources at its disposal.

Eurex Clearing will calculate the amount of the up-front margin required for cleared CDS transactions based upon the overall risk exposure of the Clearing Member. The risk exposure of its cleared CDS transactions will be based upon the following five components, which are discussed in greater detail below:

Margin Components which cover the accumulated gains and losses from yesterday to today:

1. Mark-to-market margin and,
2. Accrued premium margin (which applies only to the protection buyer).

²¹ As explained in greater detail below, this requirement may be met in some instances by the deposit of such collateral directly with Eurex Clearing and in other instances by depositing such collateral with a third-party custodian with a first priority pledge of the collateral to Eurex Clearing.

²² See Clearing Conditions 1.3.1(1)(c).

²³ For example, with respect to member checks, the member must not have been suspended. Product-related checks include specific product-related criteria, such as duration to maturity, and position limits, if in effect.

Margin Components which cover the worse case next day's losses:

1. Next day margin,
2. Liquidity margin, and
3. Credit event margin (which applies only to the protection seller).

Margin is calculated for each CCM in reference to its various accounts. Each CCM has available to it a functional account structure that includes proprietary and agent accounts, which are further divided into an omnibus customer account and accounts for each RC. CCM margins are calculated on a net basis within the proprietary account. Margin for the omnibus customer account is calculated on a net basis. Margin is calculated for each RC by separately netting positions in that account. Then, the net amount for each is added. Thus, the amount of position netting for the determination of margins depends on the customer relationship defined by the CCMs. There is no netting of an RC's account with any other RC's account.

Acceptable Collateral

Under the CDS offering margin in the form of collateral will be transferred to Eurex Clearing at the approved collateral location. Under the Clearing Conditions, the margin may be in cash, securities or book-entry securities acceptable to Eurex Clearing. Eligible collateral is based on the current list of collateral which is approved by Eurex Clearing. Collateral processes and management at Eurex Clearing is automated. Accordingly, only eligible collateral will be accepted by the automated collateral management system. Eligible collateral and applicable haircuts can be found on Eurex Clearing's web site at: http://www.eurexclearing.com/risk/parameters_en.html. All collateral is daily marked to market but specific limits for certain collateral to be transferred may apply.

This is in contrast to the current framework. In general, under the current framework, collateral in the form of securities requires the Clearing Member to deposit its own securities in its pledged securities account at Clearstream or SegmaInterSettle Zurich (SIS), and the Clearing Member must grant a lien in favor of Eurex Clearing on all securities deposited in its pledge account. Once Eurex Clearing has received notice that the securities have been transferred to the pledge account and the lien has been granted to Eurex Clearing, it credits the value or the number of such securities to the collateral clearing account of the Clearing Member. As explained in greater detail below, segregation of customer collateral will modify this existing framework.

Cash margin may be provided in the currencies determined by the Executive Board of Eurex Clearing, currently EUR, CHF, GBP and USD. Securities collateral may be deposited in the form of pledged securities denominated in a number of currencies which include the aforementioned currencies. Margin in EUR is provided by a timely

instruction of the Clearing Member of the respective branch of Deutsche Bundesbank to honor the transfer instructions received from Eurex Clearing with respect to such Clearing Member's account at the branch and to transfer the amounts to the account of Eurex Clearing.

With respect to CDS clearing, cash payments will be settled primarily by using the existing Eurex Clearing cash infrastructure. Euro payments will be settled via the TARGET 2 Cash environment. Other currencies will be settled either through a cash agent network or through direct access to central banks. For all fixed and variable payments as well as payments growing out of credit event settlement, Eurex Clearing will use the DTCC Central Settlement Service.

Segregation of Customer Collateral

As noted above, the customer segregation framework will become effective with buy-side access to Eurex Clearing's CDS clearing offering (and the issuance by the SEC of the requested amended exemptive Order). Segregation of customer collateral will be available to all customers and *required* for all customers of U.S. CCMs and all U.S. customers of non U.S. CCMs. Subject to regulatory permission, Eurex Clearing plans to offer buy-side customers three alternatives for segregation of customer collateral. These are: 1) futures-style segregation; 2) for RCs, individual customer segregation of positions and customer collateral in the form of cash and securities; and, 3) for customers trading through an omnibus account, segregation of customer positions and collateral--initially, cash collateral and subsequently, both cash collateral and securities.²⁴ If securities are a form of collateral permitted for the customer account, the securities, if posted to Eurex Clearing, must be a security that is acceptable to Eurex Clearing. Eurex Clearing currently accepts as cash collateral Euro, U.S. Dollars, Swiss Francs and British Pound Sterling.

It is important to bear in mind that the margin on a CCM's position is determined by Eurex Clearing on a net basis *individually* for each RC. Accordingly, the margin system for RCs is in essence calculated on a gross basis. Specifically, the amount of margin required to be posted by the CCM is additive with respect to each RC and is not netted against positions of the CCM in its proprietary or customer omnibus accounts. Based upon this calculation method, the CCM will be required to post margin with the clearing house in an account separately identified as for the benefit of the particular RC. As discussed above, Eurex Clearing will determine which securities and book-entry securities it will accept in satisfaction of the collateral requirements as well as the pledge value of such securities.

²⁴As discussed in greater detail, *infra*, subsequent to the start of buy-side customer clearing services, Eurex Clearing also plans to permit omnibus customer collateral in the form of cash and securities.

In contrast, margin with respect to the customer omnibus account of a CCM is determined on a net basis with respect to all customers carried within the omnibus account. Thus, as described in greater detail below, the segregation system accounts for both segregation of the collateral required to cover the net omnibus customer position as well as additional (excess) amounts that the customers have deposited with the CCMs.

Each of the three alternatives by which customer collateral is segregated is described in greater detail below.

Futures-style segregation²⁵

First, for those CCMs that are registered U.S. futures commission merchants (“FCMs”) the segregation scheme under section 4d of the Commodity Exchange Act and rules thereunder would apply subject to certain regulatory approvals. Section 4d of the Commodity Exchange Act and the rules thereunder provide for a comprehensive, well-regarded, and time-tested system of segregation of customer funds. This scheme of segregation of customer funds has proven itself over time to be a robust system for the protection of customers.

The segregation scheme under the Commodity Exchange Act and rules thereunder require the clearing organization and FCMs to hold customer funds in segregation, separate from the clearing organization’s and the FCM’s own proprietary funds, respectively.²⁶ This customer segregation framework provides that customer funds be separately recorded and accounted for, requires that the clearing organization and the FCM, respectively, obtain an acknowledgement from the depository that the funds deposited are customer funds, and prohibits the clearing organization and FCMs from using such funds for its own proprietary operations.²⁷ In addition, a clearing organization is recognized as an appropriate depository of customer funds.²⁸

The availability of futures-style segregation under Section 4d of the Commodity Exchange Act is subject to the issuance by the Commodity Futures Trading Commission (“CFTC”) of an Order permitting customer money, securities and property received in connection with margining cleared CDS transactions to be included within the Section 4d segregated amounts.²⁹ Under the rules implementing Section 4d of the Commodity

²⁵ Futures -style segregation as discussed *infra* will not be included in the initial offering of buy-side clearing services. Eurex Clearing will request that the SEC amend the exemptive order that Eurex Clearing is requesting herein prior to Eurex Clearing’s inclusion of futures-style segregation as part of its buy-side clearing services.

²⁶ See CFTC Rule 1.20(b), 17 C.F.R. §1.20(b)..

²⁷ See Section 4d of the Commodity Exchange Act, 7 U.S.C. 6d.

²⁸ See CFTC Rule 1.20, 17 C.F.R. §1.20.

²⁹ Eurex Clearing has not yet requested the CFTC to issue a section 4d Order but anticipates submitting such a request in the future. Until issuance of such an order, FCMs with immediate effect could operate as CCMs but would be required to include such customer funds within the category of unregulated funds. In

Exchange Act, Eurex Clearing would be required to segregate customer collateral from its proprietary funds and it may not commingle Section 4d and non-Section 4d property or customer funds. It may, however, commingle within one account all segregated customer collateral. By way of example, this would require Eurex Clearing to deposit all customer margin that it receives from its CCMs which is in the form of cash and that is subject to Section 4d of the Commodity Exchange Act in an account at a bank or trust company under an account name which clearly identifies the funds as customer funds of Eurex Clearing and to obtain an appropriate acknowledgement from the bank or trust company that the funds are being held in accordance with the provisions of the Commodity Exchange Act.³⁰ It also would require Eurex Clearing to hold customer collateral in the form of securities in a separate securities account under an account name which clearly identifies the account as for the benefit of Eurex Clearing's customers. In this regard, it should be noted that only the amount required to margin the customer account is forwarded by the FCM to Eurex Clearing. In the case of RCs, this is calculated separately for each RC, which results in a gross margin requirement. In the case of omnibus customers, the amount is calculated on a net basis with respect to the omnibus customers. All customer funds and property that is not forwarded to the clearing house is required to be held in segregation by the FCM.

An FCM is required to meet the same segregation conditions as the clearing organization with respect to customer funds and property that it receives from, or for, the customer. Such funds may, however, be used by the FCM as margin for customer positions with the clearing organization. All customer assets not forwarded to the clearing house must be held in segregation by the FCM. Accordingly, the FCM would forward to Eurex Clearing only so much of customer funds as is necessary to meet the Eurex Clearing margin requirements in respect of the customer's positions and would retain all other customer cash and property at a "good segregation" location in an account name that identifies the account as being customer funds. As noted above, customer funds may be held in an omnibus customer account but segregated funds may not be commingled with non-segregated funds.

Customer funds may be invested by the clearing organization and FCMs in instruments enumerated under CFTC Rule 1.25.

this instance, FCMs would be required to provide for segregation of such funds using the contractual segregation regime which will apply to non- FCM CCMs.

Eurex Clearing is also aware that the CFTC has proposed amending its rules to create a sixth and separate "account class" applicable to the bankruptcy of a futures commission merchant for positions in over-the-counter derivatives cleared by a derivatives clearing organization (and the money, securities, and property margining, guaranteeing, and securing such positions). *See* "Account Class," 74 *Fed. Reg.* 40794 (August 13, 2009). Promulgation of a CFTC rule with respect to a separate account class for over-the-counter derivatives may make moot the need for a Section 4d Order, in which case FCMs would be required to operate under the statutory segregation scheme as soon as all required regulatory permissions are in place.

³⁰ CFTC Rule 1.20, 17 C.F.R. §1.20.

In the absence of the issuance of a Section 4d Order by the CFTC or its promulgation of a new account class for over-the-counter derivatives, Eurex Clearing may determine to require CCMs that are U.S. FCMs to segregate customer assets under the provisions of CFTC Rule 30.7.³¹ CFTC Rule 30.7 requires that an FCM maintain in a separate account the money, securities and property of its foreign futures and options customers in an amount sufficient to cover or satisfy the obligations relating to such foreign futures or options contracts. This amount is denominated under CFTC Rule 30.7 as the foreign futures or options “secured amount.” The foreign futures or options secured amount may not be commingled with the FCM’s proprietary funds.

Under CFTC Rule 30.7(b) an FCM may deposit, together with the secured amount required under CFTC Rule 30.7, the money, securities or property required to be held in a separate account for or on behalf of customers pursuant to a rule of any self-regulatory organization authorized in the jurisdiction in which the depository or the customer is located.³² Eurex Clearing would adopt a Clearing Condition requiring U.S. FCMs (in the absence of the issuance by the CFTC of a Section 4d Order) to deposit all money, securities and property received by the FCM Clearing Member to margin, guarantee, or secure the clearance and settlement of CDS transactions and accruing to such customer as the result of such transactions together with the foreign futures and foreign options secured amount of the FCM’s customers. As a result, the customer money, securities and property that margins or accrues from CDS transactions would be required to be segregated from the FCM’s proprietary assets in a secured amount account under the conditions specified by CFTC Rule 30.7.³³

CFTC Rule 30.7 requires that the customers’ secured amount (which, as explained above, includes under the Eurex Clearing Conditions customer funds, securities and property related to CDS transactions) be maintained under an account name that clearly identifies it as a customer secured amount account. The secured amount account must be kept with any of the following depositories: (i) a bank or trust company located in the United States; (ii) a bank or trust company located outside the United States that has in excess of \$1 billion of regulatory capital or whose commercial paper or long-term debt instrument or, if a part of a holding company system, its holding company’s commercial paper or long-term debt instrument, is rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization; (iii) another U.S. FCM; (iv) a derivatives clearing organization; (v) a member of any foreign board of trade; or (vi) such member or clearing organization’s designated depositories.³⁴

Under this requirement, each FCM must also obtain and retain in its files an acknowledgment by the depository that it was informed that the money, securities or

³¹ See, note 27, *supra*.

³² 17 C.F.R. §30.7(b).

³³ Eurex Clearing will also provide under its Clearing Conditions that FCMs inform their customers with respect to possible uncertainty of the operation of CFTC Rule 30.7 in an insolvency proceeding.

³⁴ 17 C.F.R. §30.7(c)(1).

property are held for or on behalf of foreign futures and foreign options customers and are being held in accordance with the provisions of CFTC Rule 30.7. FCMs are prohibited by CFTC Rule 30.7 from commingling the customer secured amount funds with customer money, securities or property segregated under Section 4d of the Commodity Exchange Act. FCMs are permitted under CFTC Rule 30.7 to invest customer secured amounts, and on a daily basis must compute the total amount of money, securities and property required to be on deposit in its customer secured amount account(s).

Individual segregation for RCs

Under this individual segregation framework, pursuant to the Tri-party Agreement among Eurex Clearing, the CCM and an RC, the RC for the purpose of margining its CDS positions, will deliver collateral which is in the form of securities directly to Eurex Clearing transferring title thereto. The collateral of each RC will be maintained in a separate "RC Margin Collateral Account." Eurex Clearing will give the customer a pledge for the return of an amount equivalent to the net value of the securities after the customer's obligations have been satisfied therefrom in the event of the insolvency of the CCM. In practice, in the event of a CCM insolvency, and assuming the CCM's obligations to Eurex Clearing with respect to the RC's positions have been satisfied, an amount equivalent to the net value of the securities after the customer's obligations have been satisfied would be returned directly to the RC. The collateral subject to this arrangement will be held by Eurex Clearing in a separate Custody Account and will not be subject to any use, thus limiting rehypothecation of the securities by either the CCM or Eurex Clearing.

CCMs may require their customers to deposit collateral in an amount in excess of the collateral required by Eurex Clearing to margin the customer's position ("Excess Customer Collateral"). Such Excess Customer Collateral may be, and for U.S. CCMs and for the U.S. customers of CCMs will be *required* to be, deposited by the RC with Eurex Clearing in the "RC Margin Collateral Account." Eurex Clearing would exercise its primary security interest over only so much of the deposited collateral as is required to satisfy Eurex Clearing's margin requirement. That is, the excess amount would be kept in the RC's margin account but would not be required to be used for margin purposes at the time.

Eurex Clearing may also permit, in response to market demand, as an alternative to the RC depositing such Excess Customer Collateral with Eurex Clearing, for the RC and its CCM to agree bi-laterally that the RC will deposit such Excess Customer Collateral with an independent third-party custodian.³⁵ Under this alternative, the independent third party custodian must be a separately organized legal entity from the CCM and must provide a written acknowledgement that it will hold the securities

³⁵ This segregation alternative follows the broad template of SEC Rule 15c3-3.

separately from the assets of others, and explicitly for the benefit of the RC of the Credit Clearing Member.³⁶ The third-party custodian must have over \$1 billion in regulatory capital.

In addition to securities, an RC, for the purpose of margining its CDS positions, may also deliver cash collateral to Eurex Clearing. Pursuant to the Tri-party Agreement, cash will be deposited by the RC into a dedicated Trust Account of the CCM at an independent third-party bank which has over \$1 billion in regulatory capital. Only customer funds may be held in the Trust Account; the CCM may not commingle its own funds with those of its customers. All cash deposited by the RC in the Trust Account will be forwarded immediately to Eurex Clearing. Cash deposits are subject to the same pledge back from Eurex Clearing to the RC for the return of the net value of the cash collateral. Eurex Clearing would not hold a security interest in cash deposited in excess of the amount required as margin.

As with non-cash collateral, Eurex Clearing through its Clearing Conditions and the Tri-party Agreement, in response to market demand, may permit the RC and its CCM to agree bi-laterally that Excess Customer Collateral in the form of cash, rather than being immediately forwarded to Eurex Clearing, be maintained in a separate Trust Account with a bank or trust company that is not affiliated with the CCM, and which has over \$1 billion in regulatory capital.

All RC customer cash which is deposited by the CCM with Eurex Clearing is separately booked and recorded in Eurex Clearing's accounts as customer funds. Depending upon the currency, Eurex Clearing may deposit such funds directly with a national central bank, or in a bank or trust company. Deposits by Eurex Clearing of Euro are made directly to the central bank of Germany, the Deutsche Bundesbank³⁷ and deposits of Swiss Francs are made to the Swiss National Bank. Deposits of U.S. Dollars are made in an account at a (U.S.) bank with over \$1 billion in regulatory capital and deposits of British Pound Sterling to a U.K. bank with over \$1 billion in regulatory capital. The Eurex Clearing account is a separate account under an account name that clearly identifies the account as for or on behalf of Eurex Clearing customers. Eurex Clearing invests the funds in these accounts under its Investment Guidelines.

The Eurex Clearing Investment Guideline permits Eurex Clearing to invest customer funds only in instruments which are similarly conservative to those instruments in which customer funds may be invested under CFTC Rule 1.25, 17 C.F.R. 1.25, with the distinction that the CFTC Rule 1.25 list of investments is focused on investments available in the U.S. domestic market.³⁸ Eurex Clearing's Investment Guideline provides

³⁶ In the U.S. this would be in a special custodial securities account under UCC Section 9-106.

³⁷ The account is named the Eurex Clearing AG's RTGS Account at Deutsche Bundesbank This is an account within the payment module of the Euro System - the so called TARGET2 system.

³⁸ Specifically, CFTC Rule 1.25 permits segregated customer funds to be invested in (i) U.S. government securities; (ii) the general obligations of any State or of any political subdivision thereof (municipal

that as a general matter, placements are to be made on a secured basis to the largest possible extent. Reverse repo are the preferred investment vehicle. Securities accepted as collateral should be issued or guaranteed by central or regional governments, agencies, multilateral development banks and similar institutions. Such investments must in principle be eligible for risk mitigation purposes according to § 155 sentence 1 No. 3 – 6 of the German “Solvabilitätsverordnung” (SolvV). Eligible securities are required to an external credit rating of at least AA- (S&P / Fitch) / Aa3 (Moody’s). Securities issued by the placement counterparty or an affiliated company of the counterparty are not eligible.

Where there is an insufficient amount of secured money market investments available, Eurex Clearing may invest in unsecured money market placements. It may also invest in unsecured money market investments where a reverse repo trade is cancelled by the counterparty and a new reverse repo trade is no longer feasible, cash is received at a time where a secured placement is no longer feasible or a secure and timely unwinding of a secured placement cannot be assured.

Segregation of omnibus customer collateral

The arrangement for segregation of customer collateral held in an omnibus customer account by the CCM necessarily differs in several respects from the arrangement applicable to individually segregated RCs. These differences arise because the collateral of the various customers in the omnibus customer account is commingled and because the collateral for omnibus customer positions is required to be posted to Eurex Clearing by the CCM on a net basis.

Initial framework

There are several significant differences in the segregation framework which applies to omnibus customers from that which applies to RCs. Initially, Eurex Clearing will only accept cash collateral in the amount required to margin the omnibus customer positions. Omnibus customers will transfer legal title to the CCM, which in turn is obligated immediately to deposit the cash received with Eurex Clearing. Eurex Clearing will hold a primary pledge with respect to the cash deposited as omnibus net margin.

The Clearing Conditions require that U.S. CCMs and CCMs in respect of their U.S. customers grant back to an independent collateral agent for the benefit of the omnibus customers, pro-rata as their interests appeared, a security interest in the

securities); (iii) government sponsored enterprise securities; (iv) bank certificates of deposit; (v) commercial paper; (vi) corporate notes or bonds; (vii) general obligations of a sovereign nation; and (viii) Interests in money market mutual funds. CFTC Rule 1.25 further permits a futures commission merchant or derivatives clearing organization to buy and sell the foregoing permitted investments pursuant to agreements for resale or repurchase of the instruments.

commingled customer collateral on deposit with the third party custodian³⁹ or a similar security interest to their omnibus customers as provided under the national law of the jurisdiction in which the CCM is organized.⁴⁰ U.S. CCMs which are unable to comply with the requirement to grant back to an independent collateral agent for the benefit of the omnibus customers would not be able to carry customer positions or collateral on an omnibus basis. A CCM which is unable to comply with the requirement to grant its omnibus customers similar protections under the national law where it is organized would not be able to carry U.S. customer positions or collateral on an omnibus basis.⁴¹

Excess collateral collected by the CCM must be held at a third party custodian or depository. Although the CCM is required to collect margin from its omnibus customers to cover the obligations of each, it only is required to forward to the clearing house as margin an amount representing the net exposure of the CCM's omnibus customer account. This amount of collateral (only in the form of cash) is required to be forwarded to Eurex Clearing. Under the Clearing Conditions, the CCM is required to deposit the difference between these two amounts, along with any additional cash or non-cash collateral that the CCM may collect from the customer and any increase realized from the customer's position, as soon as possible in a third party custodian or depository. The third-party custodian or depository may not be an affiliate of the CCM and must have \$1 billion in regulatory capital. The Clearing Conditions further require that the account be a separate account under an account name that clearly identifies the account as customer collateral.

As discussed above, the only customer (cash) collateral on deposit with Eurex Clearing in respect of omnibus customers would be separately booked and recorded. As noted above, if the funds are in the form of U.S. Dollars, they would be deposited in a U.S. Bank with \$1 billion in regulatory capital in a separate account under an account name that clearly identifies the account as for the benefit of Eurex Clearing's customers with an appropriate acknowledgement by the bank. Also as noted above, British Pound Sterling would be deposited in a U.K. bank subject to the same conditions as apply to U.S. banks. Euro would be deposited in the Eurex Clearing Cash Account with the Deutsche Bundesbank and Swiss Francs would be deposited in the Eurex Clearing Cash

³⁹ In the case of the default or insolvency of the CCM, such funds would include the net omnibus customer margin previously forwarded to Eurex Clearing that has been returned by Eurex Clearing to the third party custodian following the satisfaction of claims arising from the close-out netting of the positions. *See* page 28, *infra*.

⁴⁰ For example, for U.S. CCMs, that security interest would be perfected under section 9-104 and/or 9-106 of the Uniform Commercial Code through a control agreement entered into by the CCM and the independent collateral agent. The control agreement would provide that in the case of the default of the CCM to Eurex Clearing or of the CCM's insolvency, the independent collateral agent may exercise its control over the collateral in the commingled customer special account.

⁴¹ Of course, not being able to carry omnibus customer positions does not prohibit a CCM from carrying the positions of RCs, if the CCM is able to comply with the requirements that apply to segregation of customer funds and property of RCs.

Account with the Swiss National Bank. Cash collateral deposited with Eurex Clearing is subject to investment under investment guidelines of Eurex Clearing.

In the event of the insolvency of the CCM, these funds would be available to satisfy a shortfall caused by another customer trading through the omnibus account, but only after all available assets of the CCM had been exhausted. The difference between the net margin deposited at Eurex Clearing and the gross amount collected by the CCM and the excess margin collected by the CCM would be on deposit with the third party custodian or depository and would not be subject to a claim of Eurex Clearing. Thus, the risk of a shortfall originating from the omnibus customer account is mutualized among the customers of the same CCM, but only to the extent of the net margin deposited to Eurex Clearing.

Subsequent framework

Eurex Clearing anticipates that in the near future it will accept both cash and securities as collateral in respect of a CCM's omnibus customer account. Under this segregation framework, Eurex Clearing will require that the omnibus customer transfer all collateral required by the CCM as security for the customer's account directly into a Trust Account at a third party custodian. The third-party custodian must be independent of the CCM, have \$1 billion in regulatory capital, be a bank, a central securities depository or other securities custodian accepted by Eurex Clearing. The omnibus customer account must be clearly identified as the CCM's omnibus customer account and for which the bank or securities depository provides an acknowledgement that the collateral deposited are customer funds or collateral held for or on behalf of the CCM's omnibus customers. Thus, the entire amount of collateral deposited by omnibus customers will be subject to segregation at a bank or securities depository which is independent of the CCM.

The CCM will allocate the omnibus customer collateral on deposit with the third party bank or securities custodian between the Segregated Customer Custody Account and the amount necessary to secure the CCM's net obligation in respect of its omnibus customers to Eurex Clearing –the Omnibus Customer Margin Account. The sum of these two trust accounts for the omnibus customers of a CCM will account for all of the collateral paid by the omnibus customers to the CCM.

The CCM will grant a first priority pledge in favor of Eurex Clearing over the Omnibus Customer Margin Account. The CCM will be obliged to notify the third party custodian of the pledge agreement in favor of Eurex Clearing. As applicable, daily variation margin payments to or from Eurex Clearing and the CCM in respect of the CCM's omnibus customer positions will result in an adjustment between the amounts in the Segregated Customer Custody Account and the Omnibus Customer Margin Account held at the third- party custodian. Any interest or distributions received on the segregated Omnibus Customer Margin Account will be paid to the CCM.

The Clearing Conditions further require that each CCM ensure that under the regulatory, insolvency and any other laws applicable to such CCM each omnibus customer is, in the insolvency of the CCM, entitled to segregate any cash amounts or assets deposited by that customer from the CCM's insolvency estate. By way of example, U.S. CCMs could meet that requirement by granting back to an independent collateral agent for the benefit of the omnibus customers, pro-rata as their interests appeared, a security interest in the commingled customer funds. The security interest would be perfected under section 9-104 and/or 9-106 of the Uniform Commercial Code through a control agreement entered into by the CCM and the independent collateral agent. The control agreement would provide that in the case of the default of the CCM to Eurex Clearing or of the CCM's insolvency, the independent collateral agent may exercise its control over the collateral in the commingled customer account on deposit with the third party custodian.

As detailed above, there will be two segregated omnibus customer collateral accounts at the third-party depository or custodian for each CCM with omnibus customers—one for excess omnibus customer funds and one for the required net omnibus customer margin. In the event of the insolvency of the CCM, only the Omnibus Customer Margin Account over which Eurex Clearing has a first priority pledge would be available to satisfy a shortfall caused by another customer trading through the omnibus account, but only after all available assets of the CCM had been exhausted. The collateral in the Segregated Customer Custody Account would not be subject to a claim of Eurex Clearing. Thus, the risk of a shortfall originating from the omnibus customer account is mutualized among the customers of the same CCM, but only to the extent of the net margin over which Eurex Clearing has a first priority pledge. Thus, even in the event of the insolvency of the CCM arising from a shortfall in the omnibus account, the excess omnibus customer collateral would be available for distribution to the omnibus customers.

Eurex Clearing's depositories

As discussed above, the collateral transferred to Eurex Clearing for the purpose of margining CDS positions is deposited with the global securities custodians, Clearstream Banking Frankfurt and Sega Inter settle ("SIS"). Collateral covering a CCM's obligations to Eurex Clearing would be deposited in an account at either Clearstream (Frankfurt) or SIS.

Clearstream, which is a wholly owned subsidiary of Deutsche Börse⁴² is a central securities depository (CSD) and global custodian for over 300,000 domestic and internationally traded bonds, equities and investment funds. Its global network extends

⁴² Clearstream International was formed in January 2000 through the merger of Cedel International and Deutsche Börse Clearing.

across 45 markets and it settles more than 250,000 transactions daily. Clearstream Banking Frankfurt (CBF) offers its customers custody services for their securities positions in collective safe custody, either kept directly with CBF or through CBF, in accordance with Section 5 of the German Securities Deposit Act.

SIS is also a CSD and global custodian. It is a licensed bank under Swiss law and is supervised by the Swiss Financial Market Supervisory Authority. SIS is the hub for all securities movements in Switzerland, offering a full range of securities safe custody and custody services. Collective safe custody enables SIS to ensure the complete immobilization of the securities. This is the basic precondition for secure and rapid settlement without physical movement of securities.

Operation of margin pays and collects

The following illustrates the payment and collection of margin and mark-to-market (variation) margin. By way of example, if Customer A of the CCM who has bought a CDS contract decides, along with his counterparty, to clear the contract, Customer A and his counterparty will each instruct DTCC to present the contract to Eurex Clearing for novation. One of the novation criteria is that the initial margin on the contracts is paid at the time of novation. Accordingly, in order for the novation to occur, the CCM must post with Eurex Clearing the full amount of the initial margin for the positions.

The CDS margining system at Eurex Clearing establishes different margin components which results in one Initial Margin amount. This is the amount of margin that must be paid at the time of the novation of the contract. This amount will be deposited by the customer to its CCM and transferred by the CCM to Eurex Clearing. Any excess amounts of collateral required by the CCM from the RC would be transferred to Eurex Clearing or deposited in an independent depository that meets appropriate standards.

As a general matter, losses and gains caused by the relative change in value of the contract are reflected in the mark-to-market margin which is calculated on a daily basis. Mark-to-market (variation) margin, however, will not result in a daily flow of cash. Rather, the variation margin is calculated as a debit against the deposited collateral or as a credit to the customer's collateral account. Accordingly, if the value of the contract changes adverse to RC A, the CCM will be required to post additional margin with the clearing house.⁴³ RC B, however, will have a more valuable position. RC B's account will be credited with the amount of the mark-to-market (variation) margin. As in the options market, this value will be used like a premium, which reduces the overall margin amount. If RC B wished to withdraw excess collateral due to this credit, he would be able to do so. If he did not withdraw this amount, then it simply increases the amount of

⁴³ If there is excess margin in the RC's account, the additional amount of required margin would simply be a debit against the excess margin.

excess collateral on deposit in his account. Eurex Clearing anticipates that it will in the future enhance this framework for pays and collects of daily mark-to-market margin by providing for cash flows of such amounts.

It should be emphasized that sections 1.8.3, 1.8.4, 1.8.5 and 1.8.6 of the Clearing Conditions require CCMs to segregate all funds accruing from their customer's positions in addition to all funds received from their customers to margin their positions. Thus, the Clearing Conditions require that all mark-to-market (variation) margin that accrues to the customer must be segregated by the CCM and that the CCM must segregate any funds paid to the CCM by Eurex Clearing on behalf of the CCM's customers as soon as possible. Thus, in all circumstances, the mark-to-market (variation) margin on customer positions will be segregated for the benefit of the customer.

Compliance

Eurex Clearing will include in its Clearing Conditions the requirement that each CCM submit to Eurex Clearing an annual audit report compiled by independent audit personnel which examines compliance of the CCM with the segregation requirements.

In addition, Eurex Clearing may at any time demand that a CCM provide evidence of its compliance with these segregation requirements and may commission an independent auditor, at the expense of the CCM, for the purpose of investigating compliance with these requirements.⁴⁴

Portability of Positions and Collateral

Under the above-described legal and functional architecture an RC would be able to instruct that both his positions and the collateral in the separately identified collateral account be moved to another CCM with the approval of all involved parties. Similarly, a customer whose position is carried in an omnibus account could be moved to another CCM with the approval of all involved parties. The omnibus customer's collateral would be held by an independent depository. Of course, movement of either the RC's or of the omnibus customer's collateral is subject to a release by Eurex Clearing, the primary security holder, and a release by the CCM with respect to any outstanding obligations of the customer to the CCM.

In the case of a default by the CCM, short of the filing of a formal insolvency proceeding, the security agreements would provide that title to the collateral would be re-transferred to the RC, enabling the collateral to be ported to a new CCM with the cooperation of the affected entities.⁴⁵

⁴⁴ See Clearing Conditions 2.3

⁴⁵ With respect to the alternative framework, Eurex Clearing would not release the customer's pledge of the collateral, but rather the subordinate lien holder would be substituted.

With respect to the customer omnibus accounts, upon the default of the CCM (but prior to commencement of insolvency proceedings) Eurex Clearing would be able to ascertain the beneficial owner of positions with the cooperation of the CCM. With the agreement of all parties those positions could be ported as well. Although margining of the omnibus customer collateral is on a net basis, under the framework, the additional and excess amounts of customer margin are on deposit with a third-party depository, making it possible to move the collateral with the omnibus positions, as well.

It is our current understanding that in the case of the insolvency of the CCM, §104 of the German Insolvency Code would likely require that the positions of the CCM with Eurex Clearing (but not the positions of the RC or omnibus customer with its CCM) be liquidated. However, in this regard it should be noted that in liquidating these positions, Eurex Clearing would maintain the separately identified nature of the RC's cleared positions. If there were any shortfall in connection with liquidation of the individual RC positions, Eurex Clearing as holding the primary security interest, would have the right to use the collateral in the CCM's RC account to satisfy the shortfall.

The collateral remaining in the account after satisfaction of the CCM's obligations to Eurex Clearing would be releasable, if the CCM were an FCM, to the bankruptcy Trustee to be returned to customers as provided under the Commodity Exchange Act and rules thereunder, and if the CCM were not an FCM, to the RC or an insolvency the independent collateral agent, respectively, by virtue of its secondary lien with respect to the collateral, enabling the RC and the omnibus customer (on a pro-rata basis) to use that collateral in reestablishing its positions with another CCM, if it so chose.

Waterfall in the Event of Default

Following a default by a CCM, Eurex Clearing would follow a procedure to help ensure an orderly liquidation and unwinding of the open positions of the defaulting member. The measures that Eurex Clearing may take in response to a default of a CCM are specific to the CDS clearing facility. In the event of a default by a CCM, under the CDS Chapter, the Clearing Member is required to close its existing cleared CDS transactions (and to notify its customers, if any, so that they can transfer their transactions to another CDS Clearing Member). If the CCM does not close or transfer CCP transactions within an appropriate time, Eurex Clearing can close the positions on behalf of the defaulting member. If Eurex Clearing is unable to close the CCP transactions within a reasonable period, Eurex Clearing may use a voluntary auction process to liquidate the defaulter's position as a whole or in meaningful amounts to the non-defaulting CDS Clearing Members. Finally, Eurex Clearing may assign the remaining positions to the non-defaulting CDS Clearing Members pro rata.

Each CCM must pledge margin collateral as required by Eurex Clearing's margin calculation. That calculation is based on a dynamic valuation model relating to the

clearing member's risk exposure to cleared CDS contracts. Margins are set so as to cover any scenario of consecutive credit events of n reference entities a day, and the default of the Clearing Member. In the unlikely event that this margin is insufficient to cover the default, the clearing house would deploy the following layered defenses sequentially. For clarity, the defenses are described using three different scenarios: 1) the shortfall is in the CCM's proprietary account; 2) the shortfall is in an RC's account; and, 3) the shortfall is in the omnibus account (caused by one or more omnibus customers of the same CCM).

The layered defenses are :

Shortfall in the CCM's proprietary account

- Transfer non-defaulting customer positions
- Proprietary position close-out
- Voluntary auction of proprietary positions
- Transfer of remaining positions
- Proprietary collateral liquidation
- Standard lines of defense
 - Clearing fund contribution of defaulting CCM
 - Reserves of Eurex Clearing
 - Clearing fund contribution of all Members, with CCM required to replenish once their contribution
 - Liable equity of Eurex Clearing

Under these defenses, in the event of a shortfall in the proprietary account, no customer collateral will be used to cover a shortfall in the proprietary account.

Shortfall in an individually segregated RC's account

- Transfer of non-defaulting customer positions
- Simultaneously, but separately, close out proprietary positions, close out RC's position
- Voluntary auction of proprietary positions, voluntary auction of RC's position
- Transfer of remaining proprietary positions; transfer of remaining RC's positions
- Liquidation of proprietary collateral; liquidation of RC collateral
- Any resulting surplus from liquidation of RC's collateral returned to RC, any resulting shortfall from RC's collateral liquidation combined with shortfall or surplus of liquidation of proprietary collateral
- Standard lines of defense
 - Clearing fund contribution of defaulting CCM
 - Reserves of Eurex Clearing

- Clearing fund contribution of all Members, with CCM required to replenish once their contribution
- Liable equity of Eurex Clearing

Under these defenses, in the event of a shortfall in an RC's account, no other customer collateral will be used to cover the shortfall.

Shortfall in the omnibus account

- Transfer of non-defaulting customer positions
- Simultaneously, but separately, close out proprietary positions, close out omnibus position
- Voluntary auction of proprietary positions, voluntary auction of omnibus position
- Transfer of remaining proprietary positions; transfer of remaining omnibus positions
- Liquidation of proprietary collateral and clearing fund contribution of defaulting CCM ; realization of omnibus (cash) collateral
- Any resulting surplus from liquidation of omnibus collateral returned, any resulting shortfall combined with shortfall or surplus of liquidation of proprietary collateral
- Standard lines of defense
 - Reserves of Eurex Clearing
 - Clearing fund contribution of all Members, with CCM required to replenish once their contribution
 - Liable equity of Eurex Clearing

Under these defenses, in the event of a shortfall in the omnibus account, the other customers in the omnibus account share in any shortfall, but only to the amount of the net omnibus collateral. Any amount in excess of the net collateral obligation is held in the third party depository. The individually segregated collateral of RC's will never be used to cover any shortfall caused by any other customer.

Insolvency Regime

German conflict of insolvency law rules would require the application of German law to the exercise by Eurex Clearing of its rights and obligations in an insolvency of the clearing house itself or one of the members of the "settlement system" of which Eurex Clearing is a part.⁴⁶ Eurex Clearing is a payment and securities settlement system under the European Finality Directive and has been notified to the European Commission as such. Eurex Clearing, therefore, enjoys certain protections in an insolvency proceeding. Specifically, Section 166 of the German Insolvency Code provides protection against a

⁴⁶ See section 340 of the German Insolvency Act.

German insolvency administrator realizing funds that are property pledged or transferred to a participant in a system within the meaning of Paragraph 16 of the German Banking Act, such as Eurex Clearing, to secure claims relating to the system. In addition, German law, following EU directives, provides for the finality of certain types of transactions. Accordingly, challenges are not permitted with respect to transactions made as part of a financial collateral arrangement containing an obligation to provide financial collateral and to restore the value of such collateral provided as margin. Based upon provisions of the German Insolvency Code, Eurex Clearing would respond to the insolvency of a CCM by applying the insolvency law of Germany.⁴⁷

If a CCM becomes insolvent, the applicable German insolvency regime would apply in respect of Eurex Clearing's rights and obligations in such an insolvency and Eurex Clearing's Clearing Conditions would determine the process. That process is specified in chapter I section 8.2.⁴⁸ A liquidation under German law involving a CCM will invoke the statutory rules applicable to the termination and liquidation of financial transactions under master agreements. This is because the Eurex Clearing Agreement includes and has been interpreted as a master netting agreement. As set forth in §104(2) and (3) of the German Insolvency Code, these provisions provide that with respect to delivery of financial assets with a market or exchange price, including the collateral supporting such contracts, the agreement may be terminated only in full, with respect to all of the outstanding transactions between the CCM and Eurex Clearing.

However, as explained above, in the first instance, in the case of a default of a CCM,⁴⁹ Eurex Clearing, under its Clearing Conditions, with the agreement of the involved parties, would seek to move the customers' positions with its CCM and the collateral in the RC's account or, to the extent possible, the omnibus customer collateral from the defaulting CCM, to other CCMs. Failing that, Eurex Clearing would proceed to act in accordance with the steps outlined above in the waterfall of actions in an insolvency.

German conflict of insolvency law rules are silent with respect to which law governs with respect to the insolvency rights and obligations of non-clearing members,

⁴⁷ It should be noted that U.S. law is quite liberal in respect of finding that the U.S. Bankruptcy Code should apply. The U.S. Bankruptcy Code purports to grant jurisdiction to U.S. bankruptcy courts whenever a person has property in the U.S. It should be noted, in this regard, that the U.S. Bankruptcy Code would likely recognize the contractual right of Eurex Clearing to liquidate, terminate, or accelerate an executory commodities contract or forward contract, as well as to receive margin payments from a trustee in bankruptcy, and that these rights shall not be stayed, avoided or limited by any provision of the bankruptcy code.

⁴⁸ This section of the Clearing Conditions specifies the procedure for calculation of difference claim for terminated non-performed transactions.

⁴⁹ Section 7.1 of the Eurex Clearing Clearing Conditions defines a "default" as the failure of a Clearing Member to provide margin as demanded by Eurex Clearing or to fulfill any other obligation to Eurex clearing arising under the Clearing Conditions.

such as U.S. RCs.⁵⁰ However, German law would point to the application of U.S. bankruptcy law as the applicable insolvency law in relation to the effects of insolvency proceedings on rights and obligations of Eurex Clearing in respect of such persons. In this regard, a U.S. Bankruptcy Court would likely find that Eurex Clearing has all of the contractual rights and protections provided in the Bankruptcy Code to liquidate, terminate or accelerate swap agreements, to realize against the collateral, and to offset or net out any termination value, payment amount or other transfer obligation arising under the swap agreements.⁵¹ Eurex Clearing would exercise these contractual rights, recognized in the Bankruptcy Code, in the manner provided in its Clearing Conditions and as outlined in the waterfall of actions discussed above.

The application of U.S. law would differ from the general provisions noted above in the case of the failure of a U.S. bank. In that case, the Federal Deposit Insurance Corporation (“FDIC”) exercises authority as the bank’s receiver or conservator. Section 11 of the Federal Deposit Insurance Act generally covers the rights and duties of the bank receiver and of third parties.⁵²

When the FDIC becomes the receiver for a failed bank, the FDIC has the power to repudiate any contract to which the bank is a party if the FDIC determines that the contract is “burdensome” and that repudiation “will promote the orderly administration of” the bank’s affairs.⁵³ If a contract is repudiated, the third party to the contract is entitled to “actual damages” (e.g., out-of-pocket expenses) but not to consequential or similar damages such as lost profits.

However, if a contract is a “qualified financial contract” (“QFC”), the FDIC’s ability to repudiate the contracts and its financial obligations with respect to the contracts change. The FDIC may not pick and choose which QFCs with a particular party to repudiate; the agency may only repudiate all or none of the QFCs with a given third party.⁵⁴

The term “qualified financial contract” includes several different types of bank contracts with securities or other firms, including primary dealers, broker-dealers, investors, and others. The definition includes a “swap,” which Section 11(e)(8)(vi) defines to include:

- (I) any agreement, including the terms and conditions incorporated by reference in any such agreement, which is an interest rate swap, option, future, or forward

⁵⁰Section 340 (3) of the German Insolvency Act.

⁵¹ Sections 362(b)(17) and 560 of the U.S. Bankruptcy Code.

⁵² As explained above, German law would point to the application of U.S. law regarding the effects of insolvency proceedings on rights and obligations of Eurex Clearing in respect of a U.S. clearing member’s customers.

⁵³ See 12 U.S.C. § 1821(e)(1).

⁵⁴ See 12 U.S.C. § 1821(e)(11).

agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange precious metals or other commodity agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; weather swap, option, future, or forward agreement; an emissions swap, option, future, or forward agreement; or an inflation swap, option, future, or forward agreement;

(II) any agreement or transaction that is similar to any other agreement or transaction referred to in this clause and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or other derivatives markets (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, future, option or spot transaction on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;⁵⁵

Although the statutory definition does not reference “credit default swaps” explicitly, the definitional provision in (II) includes “swap...on... quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence,” a provision the encompasses credit default swaps. Further, FDIC regulations relating to QFCs recognize a “credit default swap” as a form of a QFC.⁵⁶

The FDIC has the authority to transfer all assets or liabilities of a particular counterparty of the failed institution to another financial institution, or to transfer none.⁵⁷ In making such a transfer of assets or liabilities which includes a QFC, the receiver must also transfer “all property securing or any other credit enhancement of any contract . . . or any claim.”⁵⁸

Under the contemplated clearing architecture, an original credit default swap is novated by Eurex Clearing so that Eurex Clearing interposes itself as counterparty to the original bi-lateral credit default swap, replacing that contract with two cleared credit default swaps, the terms of which are established by the Eurex Clearing Conditions. The

⁵⁵ 12 U.S.C. § 1821(e)(8)(D)(vi)(I).

⁵⁶ See 12 C.F.R. part 371 App. A, §A.

⁵⁷ See 12 U.S.C. § 1821(e)(9).

⁵⁸ See 12 U.S.C. § 1821(e)(9).

cleared contract is secured and supported through the credit enhancement mechanism of the clearing house's margin requirements. These are supported through the Clearing Agreements between Eurex Clearing and its Credit Clearing Members and the Tri-party Agreements among Eurex Clearing, its Credit Clearing Members and Registered Customers. Credit Clearing Members are required under the SEC's conditional Exemptive Order to segregate funds and securities of U.S. persons related to the cleared credit default swaps in separate accounts apart from the other assets of the CCM. Accordingly, the collateral placed initially with a CCM and then transferred to a segregated account should be treated as part of a "qualified financial contract" under Section 11(e)(8) of the Federal Deposit Insurance Act. Because these funds secure a QFC, in case of a default by a bank acting as a Credit Clearing Member, the funds should be transferred by the receiver along with the contracts that they secure.⁵⁹

Depending upon the facts and circumstances of the individual case, the FDIC might decide not to transfer the positions, but to repudiate or liquidate the contracts. If the FDIC decided to repudiate all contracts between Eurex Clearing and the failed bank-CCM, Eurex Clearing would liquidate the positions, reducing the positions to cash and would then return the collateral to the bank-CCM subject to any out-of-pocket losses Eurex Clearing experienced as a consequence of liquidating the positions. The customer segregated amount should not be considered to be part of the failed bank's estate, and would be subject to the customer segregation protections discussed above.

Daily Evaluation Prices

As a consequence of further discussions with potential market participants, Eurex Clearing has determined to alter its procedures for determining daily settlement prices that will be used in marking positions to market. Under this revised procedure, Eurex Clearing will calculate a daily mark-to-market price based upon end of day prices submitted by CCMs. This process will become effective with a minimum number of participating members. The price quotation system will make use of the existing infrastructure that Eurex Clearing has in place with Markit, LLC.

Under the procedure for determining settlement prices, Eurex Clearing will independently rank the bid and ask prices provided by the CCMs through Markit, LLC by highest bid and lowest ask. Those bids or ask prices that are outside of the maximum applicable Bid/Ask range around the Provisional Price are excluded. The mark-to-market price will be determined by pairing any locking or crossing bid/ask prices to reveal the first non-crossed, non-locked bid/offer pair. If such ranking does not result in any crossed orders or locked interests, then the mark-to-market price will be the mid-point of that range. Eurex Clearing reserves the right in its discretion to deviate from this procedure where the best interest of the market so warrants.

⁵⁹ *Id.* The receiver would have notice of the security interest of the clearing customers and would take subject to such security interest under UCC Sections 8-302, 8-303, 9-315(a)(1) and 9-331.

In order to ensure the reliability of the process, CCMs whose prices lock or cross will randomly be required to execute transactions. In order to calculate the execution price the order of the crossed or locked asks will be reversed, the mid of the then matching pairs will determine the execution prices. Such trading will be required on a limited basis, being no more than three days in any 30 day period and limited to no greater than 10% of Eurex Clearing's market data requirements. The market data requirements are defined by the open positions held by Eurex Clearing and the data points required for the respective instrument. .

Insofar as the nature of this forced trading mechanism is quite limited and only for the purpose of establishing the reliability of the settlement price procedure, we request that this process be exempt from the exchange registration requirements of sections 5 and 6 of the Exchange Act. In making this request, Eurex Clearing makes the following representations:

1. Eurex Clearing will 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 volume of transactions expressed in the currency of the underlying instrument 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.
2. Eurex Clearing will establish and maintain adequate safeguards and procedures to protect participants' confidential trading information. Such safeguards and procedures shall include:
 - a. limiting access to the confidential trading information of participants to those employees of Eurex Clearing who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and
 - b. establishing and maintaining standards controlling employees of Eurex Clearing trading for their own accounts. Eurex Clearing will establish and maintain oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed.
3. Eurex Clearing will comply with the conditions to the temporary exemption from registration as a clearing agency which is granted in response to this request.

Books and Records

A number of German statutory provisions require the keeping of books and records relating to the clearing operations of Eurex Clearing and to its business operations. A fundamental principle of the Banking Act is that supervised entities must maintain complete books and records of their activities and keep them open to

supervisory authorities. Specifically, section 25a(1)3 of the Banking Act provides that a licensed institution, such as a CCP, must “ensure that the records of executed business transactions permit full and unbroken supervision” by BaFin. That section further provides that the requisite records must be retained for six years. It further explicitly preserves the applicability of section 257(3) and (5) of the German Commercial Code (“HGB”).

The retention of the provisions of the HGB is significant because the HGB and German General Fiscal Law (*Abgabenordnung*, "AO"), which also applies, provide additional, explicit requirements with respect to the audit trail/recordkeeping requirements. Section 257 HGB provides that Eurex Clearing has the duty to keep business books, inventories, and annual financial statements at least ten years and business letters at least six years.

These Acts also apply specifically with respect to electronic recordkeeping systems. These Acts require the keeping of clear and complete audit trails of all uses of information technology systems and to reconcile (where appropriate) the audit trails with equivalent information held by system users and other interested parties. These principles are included within German generally accepted accounting principles. In order to comply with these accounting principles, the IT based records system must ensure the following functionalities:

- documentation of the originating records,
- journal function (complete recording of transactions), and
- accounting function (logical recording of accounting records).

Eurex Clearing’s business practices, procedures and rules with respect to the retention of documents are memorialized in written policies⁶⁰ and are compliant with the German statutory requirements. Its compliance with those provisions and with its internal written policies Eurex Clearing is audited regularly by its external auditors.

Most important, individual position and account record keeping will be kept by Eurex Clearing as a voluntarily service at the RC level. Positions and collateral will be individually traceable to each RC sub-account of the CCM account. Records of collateral are kept on a fully traceable basis on an individual ISDN basis.

⁶⁰ Section 3.4 of the Policy on Retention of Documents provides that documents or information may be kept in micrographs or on IT supported media provided that the reproduction or recording of the original document or information at the origin of the recording is faithful, long lasting, readable and reproducible. The types of information and details of transactions which are recorded include daily positions, margins and deliveries of the Clearing Member.

Information Sharing

Eurex Clearing is authorized under its Clearing Conditions to share information as provided in the Clearing Conditions with responsible domestic or foreign supervisory authorities that are subject to confidentiality requirements with respect to such information.⁶¹

Moreover, the Commission and BaFin have entered into a number of Memoranda of Understanding (“MOU”) which will facilitate the Commission carrying out its oversight responsibilities under the conditions of the requested exemptions. Specifically, on October 17, 1997, BaFin’s predecessor agency, the Bundesaufsichtsamt für den Wertpapierhandel and the Commission entered into an agreement, entitled, “Memorandum of Understanding on Mutual Assistance and the Exchange of Information” which provides for the sharing of information and cooperation between the two regulatory authorities primarily in the context of enforcement investigations. In addition, both the Commission and BaFin are signatories to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (“IOSCO MOU”). The IOSCO MOU also covers information-sharing primarily in the context of enforcement investigations.

The Commission and BaFin on April 26, 2007, entered into a wide-ranging bilateral MOU related to cooperation and information-sharing with respect to market oversight and the supervision of financial services firms. This MOU, entitled, “Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight and the Supervision of Financial Services Firms” (“2007 MOU”), is “a comprehensive arrangement to facilitate their (SEC and BaFin’s) supervision of internationally active firms and their oversight of markets.”⁶² The MOU is a statement of intent to consult, cooperate and exchange information in connection with the oversight of Firms that conduct financial service business in the United States and Germany.⁶³ The 2007 MOU defines “Firm” as a person that conducts “securities processing” or a “banking business.” As noted above, Eurex Clearing is treated under the Banking Act as conducting a banking business.

⁶¹ Part 10 Section 10.1 of the Clearing Conditions of Eurex Clearing reads as follows:

(1) Eurex Clearing AG treats all data and information which relate to its Clearing Members, Non-Clearing Members and Link Clearing Houses confidentially. Eurex Clearing AG shall be authorized – within the provisions it is subject to - to transfer data and information to responsible supervisory authorities or other authorized third parties domestic or abroad which are subject to non-disclosure regulations comparable to those of Eurex Clearing AG.

Customer-related information may only be passed on by Eurex Clearing AG if they are already publicly available or if they are legally required or if the Clearing Member, Non-Clearing Member or the Link Clearing House has agreed to it.

⁶² See, <http://sec.gov/news/press/2007/2007-76.htm>.

⁶³ See, 2007 MOU, Article 2, Paragraph 13, http://sec.gov/about/offices/oia/oia_bilateral/germany_regcoop.pdf

The 2007 MOU broadly relates to cooperation by the regulatory authorities with respect to entities that conduct business in the U.S. and Germany and is designed to complement the earlier-enforcement related MOUs. It should be noted that Article, 2, Paragraph 15 of the 2007 MOU specifically provides that the MOU does not limit the right of either regulatory authority to conduct on-site visits, which includes any routine sweep or for-cause regulatory visit or inspection of the books, records and premises of a Firm, in the territory of the other.⁶⁴ Article 4 of the 2007 MOU specifically provides that the Commission may conduct on-site visits of dually regulated entities and establishes procedures for the conduct of such on-site visits. These include the notification by the inspecting authority to the Host Authority of its intent to conduct an on-site visit and the intent of the authorities to cooperate in the conduct of the on-site visit, including the ability of the Host authority to accompany the inspecting Authority during the on-site visit. Based on the 2007 MOU and the procedures that it establishes for sharing of information, cooperation and conduct of on-site visitation, Eurex Clearing will be able to comply fully with all information and oversight conditions of the exemptions.⁶⁵

In this regard, and in light of the importance of robust arrangements between regulators for the sharing of information, Eurex Clearing represents that before offering CDS clearing and settlement services to U.S. customers of non-U.S. Credit Clearing Members, it will adopt a requirement that will prohibit a member from directly or indirectly submitting, or permitting a non-U.S. clearing member to clear a position for a U.S. customer (when the member receives or holds funds or securities of U.S. persons for the purpose of purchasing, selling, clearing, settling, or holding that CDS position), unless the non-U.S. clearing member, in connection with such CDS activities, is regulated or supervised by a regulatory authority which is, or which is in a jurisdiction which is: (a) a signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, (b) a signatory to a bilateral arrangement with the Commission for enforcement cooperation, or (c) a financial regulatory authority in Ireland or Sweden.

⁶⁴ Paragraph 15 provides that:

This MOU does not limit an Authority to taking solely those measures described herein in fulfillment of its supervisory functions. In particular, this MOU does not affect any right of any Authority to communicate with, conduct an On-Site Visit of, or obtain information or documents from, any Person subject to its jurisdiction that is located in the territory of the other Authority.

⁶⁵ Eurex Clearing bases this requested relief on a number of conditions, which are detailed *infra*. One of the conditions relates to the conduct of examinations of Eurex Clearing by the Commission. Eurex Clearing understands that the Commission's inspections shall be subject to cooperation with BaFin and upon terms and conditions agreed to between the Commission and BaFin in the bilateral MOU related to cooperation and information-sharing. "Memorandum of Understanding Concerning Consultation, Cooperation, and the Exchange of Information Related to Market Oversight and the Supervision of Financial Services Firms," April 26, 2007.

Public Interest

The Commission and its staff have recognized both the important purposes served by CDS as well as the risks that CDS pose systemically to financial stability.⁶⁶ Accordingly, along with the other members of the President's Working Group on Financial Markets, the SEC has supported the establishment of central counterparty services for CDS, reasoning that a CCP for CDS "could be an important step in reducing the counterparty risks inherent in the CDS market, and thereby help mitigate potential systemic impacts."⁶⁷

Eurex Clearing believes that CCP services for CDS contracts will address concerns relating to CDS trading that have been raised in respect of counterparty risk, lack of transparency regarding exposures and the sufficiency of risk coverage and operational weaknesses. Eurex Clearing believes that a CCP will ameliorate these risks.

First, clearing of OTC CDS contracts by a CCP will reduce risk. The specific risks of CDS contracts with contingent liabilities that arise only upon the default of the contract's reference entity and the dual risks of a default of the reference entity and the subsequent default of the protection writer before settlement, require an independent, neutral and strongly collateralized CCP with a proven risk management capability.

Specifically, as a central counterparty to each novated CDS contract, Eurex Clearing will be able to net offsetting positions on a multilateral basis. Multilateral netting will significantly reduce the outstanding notional amount of each CDS Clearing Member's portfolio.

Moreover, and perhaps most critically, a CCP provides post-default backing, and by mutualising potential counterparty default risk, central counterparty clearing will ameliorate one of the most glaring systemic risks raised by the current market turmoil. Mutualising counterparty risk results in enhanced certainty with respect to legal enforceability and lines of defence in case of a default by a clearing member.

Importantly, the inclusion of buy-side participants within the clearing architecture will provide critically important protections to customers. These protections apply irrespective of whether the customer is in direct privity with the clearing house. Some of these benefits include:

- Registered Customers can have a direct DTCC account and send the trades directly to Eurex Clearing in agreement with its respective CCM

⁶⁶ To Review the Role of Credit Derivatives in the U.S. Economy: Hearing before the House Committee on Agriculture, 110th Cong, 2d Sess. (November 20, 2008)(statement of Erik Sirri, Director of Trading and Markets, U.S. Securities and Exchange Commission, at p 1 and 2).

⁶⁷ *Id.* at p. 3.

- Positions of Registered Customers are separately booked, margined and shown in all Eurex Clearing reports
- Central Counterparty Clearing is a stabilizing element providing effective risk management services, improving transparency and enhancing operational efficiency.

Most critically, the inclusion of U.S. customers within the clearing paradigm offers them the opportunity and ability to transfer their positions in the event of a clearing member default (short of, or prior to, insolvency). Eurex Clearing can transfer customer positions with the consent of the sending and receiving clearing members. These transfers can be effectuated quickly, and recently, in connection with the demise of Lehman Brothers International (Europe), have been done recently on a broad scale within a week.

In addition, the collateral supporting those customer positions will be located in separately identifiable accounts transferred to Eurex Clearing by the clearing member or with an independent depository. As a consequence, in the event of a clearing member default (short of, or prior to its insolvency) the collateral would be available for re-transfer to the customer and the ability of the customer to move the collateral to a new clearing member in support of its ported positions. This is the case irrespective of whether the customer is in privity with the clearing house.

Alternatively, in the event of an insolvency of the clearing member, and following liquidation of the position and any deductions necessary to make whole the clearing house for its losses on the associated positions, the customer, as a consequence of its security interest, would have the right to the retransfer and return of the collateral in its separately identified collateral account, or in the case of an omnibus customer of a U.S. CCM, the right to the return of the commingled customer collateral to an independent collateral agent. This will be a significant improvement over current arrangements in the non-cleared markets and in clearing architecture that does not include customers.

Moreover, clearing of OTC CDS contracts by a CCP will increase the transparency of position risk. Valuation of the risk of the netted positions is made by the CCP, an independent and market neutral party. The CCP requires that this risk be collateralized under a fully transparent and robust framework. Registered customers will benefit by receiving directly from the CCP various reports relating to their position exposures and the associated risks. This added transparency will be a particular benefit to customers.

Finally, central counterparty clearing benefits customers by addressing the current operational weaknesses of the non-cleared markets through standardized, straight-through processing. In this regard, multilateral netting of transactions reduces the complexity of

back office processes and the number of fails and the CCP will simplify trade assignments.

Eurex Clearing believes that offering clearing services for CDS contracts, which have a proven track record with respect to listed derivatives, will bring significant benefits to the OTC market in CDS transactions and, with the inclusion of customers in this architecture will be a significant benefit to them, reducing systemic risk, providing customers with greater financial safeguards with respect to counterparty credit risk and by increasing transparency and market integrity.

Eurex Clearing believes that this request to amend the existing Commission Order in respect of the offer of CDS clearance and settlement services is necessary or appropriate in the public interest and is consistent with the protection of investors. Accordingly, Eurex Clearing requests that for the foregoing reasons, the Commission, pursuant to Section 36 of the Exchange Act, exercise its authority to grant a conditional exemption with respect to customers of U.S. Eurex Clearing Members and of non-U.S. Eurex Clearing Members that receive or hold funds or securities of U.S. persons for the purpose of purchasing, selling, clearing, settling, or holding CDS positions. Eurex Clearing believes that such an amendatory order will provide U.S. participants legal certainty under the Exchange Act with respect to such clearing and settlement services that Eurex Clearing will offer for such instruments. Eurex Clearing further believes that amendment of the temporary exemption would enable the Commission to monitor the inclusion of customers within Eurex Clearing's clearing and settlement services and to coordinate with BaFin with respect to Eurex Clearing's clearing and settlement services to such participants.

Conditions for Exemptive Relief

Eurex Clearing bases its request for exemptive relief on the following representations:

1. Eurex Clearing meets, and will continue to meet on an on-going basis the conditions of the "Order Granting Temporary 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 Comments," Securities Exchange Act Release No. 34-60373 (July 23, 2009).
2. Eurex Clearing will make available to all U.S. customers and all customers of U.S. Eurex Credit Clearing Members information regarding the terms of the CDS cleared by Eurex Clearing, the creditworthiness of Eurex Clearing, and the clearing and settlement process for CDS clearing by Eurex Clearing, subject only to such limitation and protections as may be imposed under applicable privacy or similar laws.
3. Eurex Clearing only considers for membership entities located in jurisdictions with regulatory arrangements it deems satisfactory regarding: (i) supervision of investment activity; (ii) information sharing and cooperation between the

- supervisory authority of the jurisdiction concerned and Eurex Clearing and/or BaFin and (iii) capital adequacy, liquidity, and segregation of customers' funds and securities (and related books and records provisions).
4. Before offering CDS clearance and settlement services to U.S. customers of non-U.S. Eurex Clearing Members, Eurex Clearing will adopt a requirement that will prohibit a member from directly or indirectly submitting, or permitting such a customer to submit, a CDS transaction for clearing when the member receives or holds funds or securities of U.S. persons for the purpose of purchasing, selling, clearing, settling, or holding that CDS position, unless the member, in connection with such CDS activities, is supervised or regulated by a regulatory authority which is, or which is in a jurisdiction which is: (i) a regulator located signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, (ii) a signatory to a bilateral arrangement with the Commission for enforcement cooperation, or (iii) a financial regulatory authority in Ireland or Sweden.
 5. To the extent that the clearing member of Eurex Clearing receives or holds funds or securities of U.S. persons for the purpose of purchasing, selling, clearing, settling, or holding Cleared Index CDS positions, the U.S. persons shall not be natural persons.
 6. To the extent that a U.S. Clearing Member receives securities from a customer or a non-U.S. Clearing Member receives securities from a U.S. customer for the purpose of purchasing, selling, clearing, settling, or holding cleared CDS positions, Eurex Clearing shall require that 1) where applicable, such clearing member receive and hold such funds in segregation pursuant to the requirements of Section 4d of the Commodity Exchange Act and rules thereunder; or 2) where such provisions do not apply to the clearing member, that the clearing member receive such securities through the transfer of title and grant Eurex Clearing a primary security interest in such securities and the individual customer, or an independent collateral agent in respect of an omnibus customer account, a subordinate security interest in such collateral, and Eurex Clearing shall segregate such positions and collateral of such U.S. persons from the clearing member's own positions and assets; and that the clearing member keep such records as will fully, accurately and completely account for such customer funds .

Conclusion

Based on the foregoing, we respectfully request that:

- (1) for the avoidance of uncertainty, that the U.S. SEC issue a Supplemental Order pursuant to Section 36 of the Securities Exchange Act of 1934 ("Exchange Act"), making clear that the exemption granted by the SEC on July 23, 2009 to Eurex Clearing from the clearing agency registration requirements set forth in Section 17A(b)(a) of the Exchange Act with respect to its performance of the functions of a clearing agency

described in this request with respect to certain OTC CDS transactions involving U.S. Clearing Members and non-U.S. Clearing Members acting in connection with clearing of transactions involving U.S. customers and from any provisions of the Exchange Act governing securities transactions, to the extent otherwise applicable, applies in connection with the activities described in this request;

(2) for the avoidance of uncertainty, that the SEC issue a Supplemental Order pursuant to Section 15(a)(2) of the Exchange Act, exempting any person that may be subject to registration as a U.S. broker-dealer solely as a consequence of their effecting transactions in, or inducing or attempting to induce the purchase or sale of, any CDS transactions to be cleared by Eurex Clearing in respect of transactions described in this request from any requirement under Section 15(a)(1) of the Exchange Act to register as a U.S. broker-dealer and from the reporting and other requirements of the Exchange Act and the rules and regulations thereunder, that apply to a broker or dealer whether or not registered with the Commission or to comply with any provisions of the Exchange Act and the regulations thereunder governing securities transactions;

(3) for the avoidance of uncertainty, that the SEC issue an Order pursuant to Section 36(a)(1) of the Exchange Act exempting Eurex Clearing, its Clearing Members and their affiliates from any requirement that they comply with provisions of the Exchange Act governing securities transactions, to the extent otherwise applicable to Eurex Clearing, its Clearing Members and their affiliates, in connection with the offer, acceptance, execution, clearance, settlement, performance and related activities contemplated or required by the Eurex Clearing Conditions, by the Eurex Clearing Clearing Agreement or by the Eurex Clearing Tri-party Agreement, and contemplated by this request involving CDS transactions submitted (or executed on terms providing for submission) to Eurex Clearing for clearance and settlement; and

(4) that the relief in paragraphs (1), (2) and (3) be subject to Eurex Clearing, and such other persons complying with, and remaining subject to, the provisions of the Exchange Act applicable to security-based swap agreements, and on the terms of and subject to the conditions upon which this relief is requested.

As discussed above, international regulatory authorities support central counterparty clearing of credit default swaps as an important step in addressing systemic risk and ameliorating one of the underlying factors in the current economic crises. Eurex Clearing has robust risk management and operational processes. Eurex Clearing is supervised by regulators applying a regulatory regime that meets accepted international

Elizabeth M. Murphy

April 23, 2010

Page 44

standards and that provides an appropriate level of protection to market participants. Eurex Clearing operates in compliance with that regulatory framework, which offers to market participants financial and regulatory protections that are comparable to those provided by the Exchange Act. For these reasons, Eurex Clearing believes that granting the requested relief would be in the public interest and is consistent with the protection of investor.

* * * * *

If you have any questions or require additional information concerning this request, please contact Dr. Ekkehard Jaskulla, Director Legal Affairs, Section Markets and Regulatory of Eurex at 011-49-69-2101-5133, or the undersigned at (202) 756-3492.

Respectfully submitted,



Paul M. Architzel

Cc: Hon. Mary Schapiro
Hon. Kathleen L. Casey
Hon. Elisse B. Walter
Hon. Troy A Paredes
Hon. Luis A. Aguilar
James Brigagliano
Daniel Gallagher
James Eastman
Elizabeth King
Dr. Thomas Book
Mr. Christoph Kraus
Dr. Ekkehard Jaskulla