

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63388; File No. S7-06-09)

November 29, 2010

**ORDER EXTENDING TEMPORARY CONDITIONAL EXEMPTIONS UNDER THE
SECURITIES EXCHANGE ACT OF 1934 IN CONNECTION WITH REQUEST OF
CHICAGO MERCANTILE EXCHANGE INC. RELATED TO CENTRAL CLEARING
OF CREDIT DEFAULT SWAPS AND REQUEST FOR COMMENT**

I. Introduction

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

In March 2009, the Commission issued an order providing temporary conditional exemptions to the Chicago Mercantile Exchange Inc. (“CME”), and certain other parties, to permit CME to clear and settle CDS transactions.² In response to CME’s request, the

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

² Securities Exchange Act Release No. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009) (“March 2009 CME Exemptive Order”).

Commission temporarily extended and expanded the exemptions in December 2009 and in March 2010.³ The current exemptions pursuant to the March 2010 CME Exemptive Order are scheduled to expire on November 30, 2010, and CME has requested that the Commission extend the exemptions contained in the March 2010 CME Exemptive Order.⁴

II. Discussion

A. Legislative Developments

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

³ Securities Exchange Act Release Nos. 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009) ("December 2009 CME Exemptive Order"); 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010) ("March 2010 CME Exemptive Order").

⁴ See Letter from Ann K. Shuman, Managing Director and Deputy General Counsel, CME, to Elizabeth Murphy, Secretary, Commission, Nov. 29, 2010 ("November 2010 Request").

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

⁶ See Pub. L. No. 111-203, Preamble.

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

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

Frank Act amends the Exchange Act to require, among other things, that transactions in security-based swaps be cleared through a clearing agency that is registered with the Commission or that is exempt from registration if they are of a type that the Commission determines must be cleared, unless an exception or exemption from mandatory clearing applies.⁹ Furthermore, Title VII of the Dodd-Frank Act provides that a derivatives clearing organization registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act, such as CME, is deemed registered as a clearing agency for the purposes of clearing security-based swaps (“Deemed Registered Provision”).¹⁰ The Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011.¹¹ As a result, CME will no longer need the exemption from registration as a clearing agency under Section 17A of the Exchange Act provided by the March 2010 CME Exemptive Order, and previous orders, to clear security-based swaps after the Deemed Registered Provision becomes effective.

B. CME’s Request for Extension of March 2010 CME Exemptive Order

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

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

¹⁰ See Section 763(b) of the Dodd-Frank Act (adding new Section 17A(l) to the Exchange Act, 15 U.S.C. 78q-1(1)). Under this Deemed Registered Provision, CME will be required to comply with all requirements of the Exchange Act, and the rules thereunder, applicable to registered clearing agencies to the extent it clears security-based swaps after the effective date of the Deemed Registered Provision, including, for example, the obligation to file proposed rule changes under Section 19(b) of the Exchange Act.

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

Exemptive Order.¹² CME's request for an extension of the March 2010 CME Exemptive Order incorporates representations made in the requests preceding the March 2010 CME Exemptive Order, the December 2009 CME Exemptive Order, and the March 2009 CME Exemptive Order,¹³ which are discussed in detail in our earlier CME orders. CME represents that there have been no material changes to the statements made in the previous requests, apart from CME's adoption of substantive rules for the treatment of customer cleared OTC derivatives.¹⁴ Furthermore, CME represents that it will implement policies and procedures designed to ensure compliance with the terms of the Exemptive Orders and conduct an internal review related to its compliance program.

Accordingly, consistent with our findings in the March 2010 CME Exemptive Order, and, in particular, in light of the risk management and systemic benefits in continuing to facilitate CDS clearing by CME until Title VII of the Dodd-Frank Act becomes fully effective, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to extend the exemptive relief granted in the March 2010 CME Exemptive Order until July 16, 2011. Specifically, pursuant to the Commission's authority under Section 36 of the Exchange Act,¹⁵ based on the facts presented and the representations made by CME,¹⁶ the Commission is extending until July 16, 2011, under

¹² See November 2010 Request, supra note 4.

¹³ See id.

¹⁴ See infra note 17. CME also notes that it is evaluating the creation of a separate guaranty fund for its CDS and futures business. See November 2010 Request, supra note 4.

¹⁵ 15 U.S.C. 78mm. Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class of classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

¹⁶ See November 2010 Request, supra note 4. The exemptions we are granting today are based on

the same terms and conditions in the March 2010 CME Exemptive Order, each of the existing exemptions connected with CDS clearing by CME, which include: the temporary conditional exemption granted to CME from clearing agency registration under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS; the temporary conditional exemption of CME and certain of its clearing members from the registration requirements of Sections 5 and 6 of the Exchange Act solely in connection with the calculation of mark-to-market prices for certain non-excluded CDS cleared by CME; the temporary conditional exemption of CME and certain eligible contract participants from certain Exchange Act requirements with respect to certain non-excluded CDS cleared by CME; the temporary conditional exemption of certain CME clearing members that receive customer collateral in connection with certain non-excluded CDS cleared by CME from certain Exchange Act requirements;¹⁷ and the temporary conditional exemption from certain Exchange Act requirements granted to registered broker-dealers with respect to certain non-excluded CDS.¹⁸

all of the representations made by CME in its request, which incorporate representations made by CME in its requests for relief in connection with the March 2010 CME Exemptive Order, the December 2009 CME Exemptive Order, and the March 2009 CME Exemptive Order. We recognize, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if any of these exemptions were to become unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in non-excluded CDS (as defined in the March 2010 CME Exemptive Order) that previously had been cleared pursuant to the exemptions would remain unchanged, but no new positions could be established pursuant to the exemptions until all of the underlying representations were again accurate.

¹⁷ The March 2010 CME Exemptive Order required CME clearing members relying on this exemption to hold customer collateral in one of three types of accounts: (i) in an account established pursuant to Section 4d of the Commodity Exchange Act; (ii) in the absence of a 4d Order from the CFTC, in an account that is part of a separate account class, specified by CFTC Bankruptcy Rules (see 17 CFR 190.01 et seq.), established for a futures commission merchant (“FCM”) to hold its customers’ positions and collateral in cleared OTC derivatives; or (iii) if both of those alternatives are not available, in an account established in accordance with CFTC Rule 30.7 (with additional disclosures to be made to the customer). The CFTC has taken final action on proposed rules to establish a new account class that is applicable to positions in “Cleared OTC Derivatives,” which became effective on May 6, 2010. See 75 FR 17297 (Apr. 6, 2010). On October 4, 2010, CME implemented rules with substantive requirements for the treatment of customer cleared OTC derivatives, and as of that date all CME cleared customer CDS

C. Solicitation of Comments

When we granted the March 2010 CME Exemptive Order, we requested comment on all aspects of the exemptions. We received one comment in response to this request, the content of which is outside of the scope of the Commission's jurisdiction.¹⁹

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

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/other.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-06-09 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov/>). Follow the instructions for submitting comments.

Paper comments:

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

positions and related collateral previously held in CFTC Rule 30.7 accounts are required to be held in "cleared OTC Derivatives Customer Sequestered Accounts." Given these developments, the terms of the March 2010 CME Exemptive Order, and this Order, require customer collateral to be held in an account established pursuant to a 4d Order or an account that is part of a separate account class established for an FCM to hold its customers' positions and collateral in Cleared OTC Derivatives.

¹⁸ See March 2010 CME Exemptive Order, *supra* note 3.

¹⁹ See Comment from Richard Gaib, Apr. 5, 2010, commenting on the farm credit system.

All submissions should refer to File Number S7-06-09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. We will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/other.shtml>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

III. Conclusion

IT IS HEREBY ORDERED, pursuant to Section 36(a) of the Exchange Act, that, until July 16, 2011, the following exemptions connected with CDS clearing by CME contained in the March 2010 CME Exemptive Order are extended: (i) the temporary conditional exemption granted to CME from clearing agency registration under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS; (ii) the temporary conditional exemption of CME and certain of its clearing members from the registration requirements of Sections 5 and 6 of the Exchange Act solely in connection with the calculation of mark-to-market prices for certain non-excluded CDS cleared by CME; (iii) the temporary conditional exemption of CME and certain eligible contract participants from certain Exchange Act requirements with respect to certain non-excluded CDS cleared by CME; (iv) the temporary conditional exemption of certain CME clearing members that receive customer collateral in connection with certain non-excluded CDS cleared by CME from certain Exchange Act

requirements; and (v) the temporary conditional exemption from certain Exchange Act requirements granted to registered broker-dealers with respect to certain non-excluded CDS.

By the Commission.

Elizabeth M. Murphy
Secretary