

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61973; File No. S7-16-09)

April 23, 2010

**ORDER EXTENDING TEMPORARY CONDITIONAL EXEMPTIONS UNDER THE
SECURITIES EXCHANGE ACT OF 1934 IN CONNECTION WITH REQUEST ON
BEHALF OF ICE CLEAR EUROPE, LIMITED RELATED TO CENTRAL CLEARING
OF CREDIT DEFAULT SWAPS, AND REQUEST FOR COMMENTS**

I. Introduction

The Securities and Exchange Commission (“Commission”) has taken multiple actions¹ designed to address concerns related to the market in credit default swaps (“CDS”).² The over-

¹ See generally Securities Exchange Act Release No. 60372 (Jul. 23, 2009), 74 FR 37748 (Jul. 29, 2009) (temporary exemptions in connection with CDS clearing by ICE Clear Europe Limited) (“2009 ICE Clear Europe order”); Securities Exchange Act Release No. 60373 (Jul. 23, 2009), 74 FR 37740 (Jul. 29, 2009) and Securities Exchange Act Release No. 61975 (Apr. 23, 2010) (temporary exemptions in connection with CDS clearing by Eurex Clearing AG); Securities Exchange Act Release No. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), Securities Exchange Act Release No. 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009) and Securities Exchange Act Release No. 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 No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), Securities Exchange Act Release No. 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009) and Securities Exchange Act Release No. 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010) (temporary exemptions in connection with CDS clearing by ICE Trust US 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, we have 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 No. 8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009) (initial approval); Securities Act Release No. 9063 (Sep. 14, 2009), 74 FR 47719 (Sep. 17, 2009) (extension until Nov. 30, 2010).

Further, the Commission provided temporary exemptions in connection with Sections 5 and 6 of the Securities Exchange Act of 1934 for transactions in CDS; these exemptions expired on March 24, 2010. See Securities Exchange Act Release No. 59165 (Dec. 24, 2008), 74 FR 133 (Jan. 2, 2009) (initial exemption); Securities Exchange Act Release No. 60718 (Sep. 25, 2009), 74 FR 50862 (Oct. 1, 2009) (extension until Mar. 24, 2010).

² A CDS is a bilateral contract between two parties, known as counterparties. The value of this financial contract is based on underlying obligations of a single entity (“reference entity”) or on a particular security or other debt obligation, or an index of several such entities, securities, or obligations. The obligation of a seller to make payments under a CDS contract is triggered by a default or other credit event as to such entity or entities or such security or securities. Investors may use CDS for a variety of reasons, including to offset or insure against risk in their fixed-income portfolios, to take positions in

the-counter (“OTC”) market for CDS has been a source of particular concern to us and other financial regulators, and we have recognized that facilitating the establishment of central counterparties (“CCPs”) for CDS can play an important role in reducing the counterparty risks inherent in the CDS market, and thus can help mitigate potential systemic impact. We have therefore found that taking action to help foster the prompt development of CCPs, including granting temporary conditional exemptions from certain provisions of the federal securities laws, is in the public interest.³

The Commission’s authority over the OTC market for CDS is limited. Specifically, Section 3A of the Securities Exchange Act of 1934 (“Exchange Act”) limits the Commission’s authority over swap agreements, as defined in Section 206A of the Gramm-Leach-Bliley Act.⁴ For those CDS that are swap agreements, the exclusion from the definition of security in Section 3A of the Exchange Act, and related provisions, will continue to apply. The Commission’s action today does not affect these CDS, and this Order does not apply to them. For those CDS that are not swap agreements (“non-excluded CDS”), the Commission’s action today provides temporary conditional exemptions from certain requirements of the Exchange Act.

bonds or in segments of the debt market as represented by an index, or to take positions on the volatility in credit spreads during times of economic uncertainty.

Growth in the CDS market has coincided with a significant rise in the types and number of entities participating in the CDS market. CDS were initially created to meet the demand of banking institutions looking to hedge and diversify the credit risk attendant to their lending activities. However, financial institutions such as insurance companies, pension funds, securities firms, and hedge funds have entered the CDS market.

³ See generally actions referenced in note 1, *supra*.

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

The Commission believes that using well-regulated CCPs to clear transactions in CDS provides a number of benefits by helping to promote efficiency and reduce risk in the CDS market, by contributing to the goal of market stability, and by requiring maintenance of records of CDS transactions that would aid the Commission's efforts to prevent and detect fraud and other abusive market practices.⁵

In the 2009 ICE Clear Europe Order, the Commission provided temporary conditional exemptions to ICE Clear Europe, Limited ("ICE Clear Europe") and certain other parties to permit ICE Clear Europe to clear and settle CDS transactions.⁶ The current exemptions are scheduled to expire on April 23, 2010, and ICE Clear Europe has requested that the Commission extend those exemptions.⁷

⁵ See generally actions referenced in note 1, *supra*.

⁶ For purposes of this Order, "Cleared CDS" means a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to ICE Clear Europe, that is offered only to, purchased only by, and sold only to eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which: (i) the reference entity, the issuer of the reference security, or the reference security is one of the following: (A) an entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available; (B) a foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States; (C) a foreign sovereign debt security; (D) an asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or (E) an asset-backed security issued or guaranteed by the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac") or the Government National Mortgage Association ("Ginnie Mae"); or (ii) the reference index is an index in which 80 percent or more of the index's weighting is comprised of the entities or securities described in subparagraph (i). See definition in paragraph III.(e)(1) of this Order. As discussed above, the Commission's action today does not affect CDS that are swap agreements under Section 206A of the Gramm-Leach-Bliley Act. See text at note 4, *supra*.

⁷ See Letter from Russell Sacks, Shearman & Sterling LLP, to Elizabeth M. Murphy, Secretary, Commission, April 23, 2010 ("April 2010 Request").

Based on the facts presented and the representations made by ICE Clear Europe,⁸ and for the reasons discussed in this Order and subject to certain conditions, the Commission is extending each of the existing exemptions connected with CDS clearing by ICE Clear Europe: the temporary conditional exemption granted to ICE Clear Europe 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 transactions; the temporary conditional exemption of ICE Clear Europe 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 non-excluded CDS cleared by ICE Clear Europe; the temporary conditional exemption of eligible contract participants and others from certain Exchange Act requirements with respect to non-excluded CDS cleared by ICE Clear Europe; and the temporary exemption from certain Exchange Act requirements granted to registered broker-dealers. This extension is temporary, and the exemptions will expire on November 30, 2010.

II. Discussion

In its request for an extension, ICE Clear Europe represents that there have been no material changes to the operations of ICE Clear Europe and the representations in the 2009 ICE

⁸ See *id.* The exemptions we are granting today are based on all of the representations made on behalf of ICE Clear Europe, which incorporate representations made on behalf of ICE Clear Europe as part of the request that preceded our earlier exemptions addressing CDS clearing by ICE Clear Europe. We recognize, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if any of these exemptions were to become unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in non-excluded CDS 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.

Clear Europe Order remain true in all material respects.⁹ These representations are discussed in detail in the 2009 ICE Clear Europe Order.

A. ICE Clear Europe's CDS Clearing Activities to Date

ICE Clear Europe has cleared proprietary CDS transactions of its clearing members since July 2009. As of March 16, 2010, ICE Clear Europe had cleared approximately €1.4 trillion notional amount of CDS contracts based on indices of securities.

In December 2009, ICE Clear Europe commenced clearing CDS contracts based on individual reference entities or securities. As of March 16, ICE Clear Europe had cleared approximately €9 billion notional amount of CDS contracts based on individual reference entities or securities.

B. Extended Temporary Conditional Exemption from Clearing Agency Registration Requirement

On July 23, 2009, in connection with its efforts to facilitate the establishment of one or more central counterparties ("CCP") for Cleared CDS, the Commission issued the 2009 ICE Clear Europe Order, which conditionally exempted ICE Clear Europe from clearing agency registration under Section 17A of the Exchange Act on a temporary basis. Subject to the conditions in the 2009 ICE Clear Europe Order, ICE Clear Europe is permitted to act as a CCP for Cleared CDS by novating trades of non-excluded CDS that are securities and generating money and settlement obligations for participants without having to register with the Commission as a clearing agency. The 2009 ICE Clear Europe Order is effective until April 23, 2010.

⁹ See April 2010 Request, supra note 7.

In the 2009 ICE Clear Europe Order, the Commission recognized the need to facilitate the prompt establishment of ICE Clear Europe as a CCP for CDS transactions. The Commission also recognized the need to ensure that important elements of Section 17A of the Exchange Act,¹⁰ which sets forth the framework for the regulation and operation of the U.S. clearance and settlement system for securities, apply to the non-excluded CDS market. Accordingly, the temporary exemption in the 2009 ICE Clear Europe Order were subject to a number of conditions designed to enable Commission staff to monitor ICE Clear Europe's clearance and settlement of CDS transactions.¹¹ Moreover, the temporary exemption in the 2009 ICE Clear Europe Order in part was based on ICE Clear Europe's representation that it met the standards set forth in the Committee on Payment and Settlement Systems ("CPSS") and International Organization of Securities Commissions ("IOSCO") report entitled: Recommendations for Central Counterparties ("RCCP").¹² The RCCP establishes a framework that requires a CCP to have: (i) the ability to facilitate the prompt and accurate clearance and settlement of CDS transactions and to safeguard its users' assets; and (ii) sound risk management, including the ability to appropriately determine and collect clearing fund and monitor its users' trading. This framework is generally consistent with the requirements of Section 17A of the Exchange Act.

The Commission believes that continuing to facilitate the central clearing of CDS transactions through a temporary conditional exemption from Section 17A will continue to provide important risk management and systemic benefits by avoiding an interruption in those

¹⁰ 15 U.S.C. 78q-1.

¹¹ See Securities Exchange Act Release No. 60372 (Jul. 23, 2009), 74 FR 37748 (Jul. 29, 2009)

¹² The RCCP was drafted by a joint task force ("Task Force") composed of representative members of IOSCO and CPSS and published in November 2004. The Task Force consisted of securities regulators and central bankers from 19 countries and the European Union. The U.S. representatives on the Task Force included staff from the Commission, the Federal Reserve Board, and the Commodity Futures Trading Commission.

CCP clearance and settlement services. Any interruption in CCP clearance and settlement services for CDS transactions would eliminate in the future the benefits ICE Clear Europe provides to the non-excluded CDS market. Accordingly, and consistent with our findings in the 2009 ICE Clear Europe Order and for the reasons described herein, we find pursuant to Section 36 of the Exchange Act¹³ that it is necessary and appropriate in the public interest and is consistent with the protection of investors for the Commission to extend, through November 30, 2010, the relief provided from the clearing agency registration requirements of Section 17A by the 2009 ICE Clear Europe Order.

Our action today balances the aim of facilitating ICE Clear Europe's continued service as a CCP for non-excluded CDS transactions with ensuring that important elements of Commission oversight are applied to the non-excluded CDS market. The temporary conditional exemptions will permit the Commission to continue to develop direct experience with the non-excluded CDS market. During the extended exemptive period, the Commission will continue to monitor closely the impact of the CCPs on the CDS market. In particular, the Commission will seek to assure itself that ICE Clear Europe does not act in an anticompetitive manner or indirectly facilitate anticompetitive behavior with respect to fees charged to members, and the dissemination of market data.

This temporary conditional extension of the 2009 ICE Clear Europe Order also is designed to assure that – as ICE Clear Europe has represented – information will continue to be available to market participants about the terms of the CDS cleared by ICE Clear Europe, the

¹³ 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 or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

creditworthiness of ICE Clear Europe or any guarantor, and the clearance and settlement process for CDS.¹⁴ The Commission believes continued operation of ICE Clear Europe consistent with the conditions of this Order will facilitate the availability to market participants of information that should enable them to make better informed investment decisions and better value and evaluate their Cleared CDS and counterparty exposures relative to a market for CDS that is not centrally cleared.

This temporary extension of the 2009 ICE Clear Europe Order is subject to a number of conditions that are designed to enable Commission staff to continue to monitor ICE Clear Europe's clearance and settlement of CDS transactions and help reduce risk in the CDS market. These conditions require that ICE Clear Europe: (i) make available on its Web site its annual audited financial statements; (ii) preserve records related to the conduct of its Cleared CDS clearance and settlement services for at least five years (in an easily accessible place for the first two years); (iii) supply information relating to its Cleared CDS clearance and settlement services to the Commission and provide access to the Commission to conduct on-site inspections of facilities, records and personnel related to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission and provide access to the Commission to conduct on-site inspections of facilities, records, and personnel related to its Cleared CDS clearance and settlement services, subject to cooperation with the FSA and upon terms and conditions agreed between the FSA and the Commission; (iv) notify the Commission about material disciplinary actions taken against any of its members utilizing its Cleared CDS

¹⁴ The Commission believes that it is important in the CDS market, as in the market for securities generally, that parties to transactions should have access to financial information that would allow them to evaluate appropriately the risks relating to a particular investment and make more informed investment decisions. See generally Policy Statement on Financial Market Developments, The President's Working Group on Financial Markets, March 13, 2008, available at: http://www.treas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf.

clearance and settlement services, and about the involuntary termination of the membership of an entity that is utilizing ICE Clear Europe's Cleared CDS clearance and settlement services; (v) notify the Commission not less than one day prior to effectiveness or implementation of changes to rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services, or, in exigent circumstances, as promptly as reasonably practicable under the circumstances; (vi) provide the Commission with reports prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements¹⁵ and its annual audited financial statements prepared by independent audit personnel; and (vii) provide notice to the Commission regarding the suspension of services or inability to operate facilities in connection with Cleared CDS clearance and settlement services at the same time it provides notice to the FSA.

In addition, this temporary extension of the 2009 ICE Clear Europe Order is conditioned on ICE Clear Europe, directly or indirectly, making available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) all end-of-day settlement prices and any other prices with respect to Cleared CDS that ICE Clear Europe may establish to calculate mark-to-market margin requirements for ICE Clear Europe Clearing Members; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by ICE Clear Europe.¹⁶

¹⁵ See Automated Systems of Self-Regulatory Organizations, Exchange Act Release No. 27445 (November 16, 1989), File No. S7-29-89, and Automated Systems of Self-Regulatory Organizations (II), Exchange Act Release No. 29185 (May 9, 1991), File No. S7-12-91.

¹⁶ As a CCP, ICE Clear Europe collects and processes information about CDS transactions, prices, and positions. Public availability of such information can improve fairness, efficiency, and competitiveness in the market. Moreover, with pricing and valuation information relating to Cleared CDS, market participants would be able to derive information about underlying securities and indices, potentially improving the efficiency and effectiveness of the securities markets.

C. Extended Temporary Conditional Exemption from Exchange Registration Requirements

When we initially provided exemptions in connection with CDS clearing by ICE Clear Europe, we granted a temporary conditional exemption to ICE Clear Europe from the requirements of Sections 5 and 6 of the Exchange Act, and the rules and regulations thereunder, in connection with ICE Clear Europe's calculation of mark-to-market prices for open positions in Cleared CDS. We also temporarily exempted ICE Clear Europe participants from the prohibitions of Section 5 to the extent that they use ICE Clear Europe to effect or report any transaction in Cleared CDS in connection with ICE Clear Europe's calculation of mark-to-market prices for open positions in Cleared CDS. Section 5 of the Exchange Act contains certain restrictions relating to the registration of national securities exchanges,¹⁷ while Section 6 provides the procedures for registering as a national securities exchange.¹⁸

We granted these temporary exemptions to facilitate the establishment of ICE Clear Europe's end-of-day settlement price process. ICE Clear Europe had represented that in connection with its clearing and risk management process it would calculate an end-of-day settlement price for each Cleared CDS in which an ICE Clear Europe participant has a cleared position, based on prices submitted by the participants. As part of this mark-to-market process, ICE Clear Europe has periodically required its clearing members to execute certain CDS trades

¹⁷ In particular, Section 5 states:

It shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange . . . to effect any transaction in a security, or to report any such transactions, unless such exchange (1) is registered as a national securities exchange under section 6 of [the Exchange Act], or (2) is exempted from such registration . . . by reason of the limited volume of transactions effected on such exchange

15 U.S.C. 78e.

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

at the price at which certain quotations of the clearing members lock or cross. ICE Clear Europe represents that it continues to periodically require clearing members to execute certain CDS trades in this manner.

As discussed above, we have found in general that it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to facilitate continued CDS clearing by ICE Clear Europe. Consistent with that finding – and in reliance on ICE Europe’s representation that the end-of-day settlement pricing process, including the periodically required trading, is integral to its risk management – we further find that it is necessary or appropriate in the public interest, and is consistent with the protection of investors that we exercise our authority under Section 36 of the Exchange Act to extend, through November 30, 2010, ICE Clear Europe’s temporary exemption from Sections 5 and 6 of the Exchange Act in connection with its calculation of mark-to-market prices for open positions in Cleared CDS, and ICE Clear Europe’s clearing members’ temporary exemption from Section 5 with respect to such trading activity.

The temporary exemption for ICE Clear Europe will continue to be subject to three conditions. First, ICE Clear Europe must report the following information with respect to its calculation of mark-to-market prices for Cleared CDS to the Commission within 30 days of the end of each quarter, and preserve such reports during the life of the enterprise and of any successor enterprise:

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

Second, ICE Clear Europe must 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 ICE Clear Europe 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 ICE Clear Europe trading for their own accounts. ICE Clear Europe must establish and maintain adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed.¹⁹

Third, ICE Clear Europe must comply with the conditions to the temporary exemption from Section 17A of the Exchange Act in this Order, given that this exemption is granted in the context of our goal of continuing to facilitate ICE Clear Europe's ability to act as a CCP for non-excluded CDS, and given ICE Clear Europe's representation that the end-of-day settlement pricing process, including the periodically required trading, will enhance the reliability of the submitted end-of-day prices.

The Commission also is continuing to temporarily exempt each ICE Clear Europe clearing member, through November 30, 2010, from the prohibition in Section 5 of the Exchange Act to the extent that such ICE Clear Europe clearing member uses any facility of ICE Clear Europe to effect any transaction in Cleared CDS, or to report any such transaction, in connection with ICE Clear Europe calculation of mark-to-market prices for open positions in Cleared CDS. Absent an exemption, Section 5 would prohibit any ICE Clear Europe clearing member that is a broker or dealer from effecting transactions in Cleared CDS on ICE Clear Europe, which will

¹⁹ We are making a technical modification to this condition to provide that ICE Clear Europe must "establish and maintain" the applicable safeguards and procedures (in lieu of the current exemption's use of terminology such as "adopt and implement") to reflect the fact that ICE Clear Europe already is relying on this settlement pricing process.

rely on this Order for an exemption from exchange registration. The Commission believes that temporarily exempting ICE Clear Europe clearing members from the restriction in Section 5 is necessary and appropriate in the public interest and is consistent with the protection of investors because it will facilitate their use of ICE Clear Europe's CCP for Cleared CDS, which for the reasons set forth in this Order the Commission believes to be beneficial. Without also temporarily exempting ICE Clear Europe clearing members from this Section 5 requirement, the Commission's temporary exemption of ICE Clear Europe from Sections 5 and 6 of the Exchange Act would be ineffective, because ICE Clear Europe clearing members that are brokers or dealers would not be permitted to effect transactions on ICE Clear Europe in connection with the end-of-day settlement price process.

D. Extended and Revised Temporary Conditional General Exemption for ICE Clear Europe and Certain Eligible Contract Participants

As we recognized when we initially provided temporary exemptions in connection with CDS clearing by ICE Clear Europe, applying the full panoply of Exchange Act requirements to participants in transactions in non-excluded CDS likely would deter some participants from using CCPs to clear CDS transactions. We also recognized that it is important that the antifraud provisions of the Exchange Act apply to transactions in non-excluded CDS, particularly given that OTC transactions subject to individual negotiation that qualify as security-based swap agreements already are subject to those provisions.²⁰

²⁰ While Section 3A of the Exchange Act excludes "swap agreements" from the definition of "security," certain antifraud and insider trading provisions under the Exchange Act explicitly apply to security-based swap agreements. See (a) paragraphs (2) through (5) of Section 9(a), 15 U.S.C. 78i(a), prohibiting the manipulation of security prices; (b) Section 10(b), 15 U.S.C. 78j(b), and underlying rules prohibiting fraud, manipulation or insider trading (but not prophylactic reporting or recordkeeping requirements); (c) Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices; (d) Sections 16(a) and (b), 15 U.S.C. 78p(a) and (b), which address disclosure by directors, officers and principal stockholders, and short-swing trading by those persons, and

As a result, we concluded that it is appropriate in the public interest and consistent with the protection of investors to apply temporarily substantially the same framework to transactions by market participants in non-excluded CDS that applies to transactions in security-based swap agreements. Consistent with that conclusion, we temporarily exempted ICE Clear Europe, and certain members and eligible contract participants, from a number of Exchange Act requirements, subject to certain conditions, while excluding certain enforcement-related and other provisions from the scope of the exemption.

We believe that continuing to facilitate the central clearing of CDS transactions by ICE Clear Europe through this type of temporary exemption will provide important risk management benefits and systemic benefits. Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption through November 30, 2010 from certain requirements under the Exchange Act.

As before, this temporary conditional exemption applies to ICE Clear Europe, any ICE Clear Europe Clearing Member²¹ which is not a broker or dealer registered under Section 15(b)

rules with respect to reporting requirements under Section 16(a); (e) Section 20(d), 15 U.S.C. 78t(d), providing for antifraud liability in connection with certain derivative transactions; and (f) Section 21A(a)(1), 15 U.S.C. 78u-1(a)(1), related to the Commission's authority to impose civil penalties for insider trading violations.

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

²¹ For purposes of this Order, an “ICE Clear Europe Clearing Member” means any clearing member of ICE Clear Europe that submits Cleared CDS to ICE Clear Europe for clearance and settlement exclusively (i) for its own account or (ii) for the account of an affiliate that controls, is controlled by, or is under common control with the clearing member of ICE Clear Europe. See definition in paragraph III.(e)(1) of this Order.

of the Exchange Act (other than paragraph (11) thereof), and any eligible contract participants²² other than: eligible contract participants that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling or holding Cleared CDS positions for other persons;²³ eligible contract participants that are self-regulatory organizations or eligible contract participants that are registered brokers or dealers.²⁴

As before, under this temporary conditional exemption, and solely with respect to Cleared CDS, those persons generally are exempt from the provisions of the Exchange Act and the rules and regulations thereunder that do not apply to security-based swap agreements. Thus, those persons would still be subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements.²⁵ In addition, all provisions of the Exchange Act related to the Commission's enforcement authority in connection with

²² This exemption in general applies to eligible contract participants, as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order, other than persons that are eligible contract participants under paragraph (C) of that section.

²³ Solely for purposes of this requirement, an eligible contract participant would not be viewed as receiving or holding funds or securities for purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons, if the other persons involved in the transaction would not be considered "customers" of the eligible contract participant under the analysis used for determining whether certain persons would be considered "customers" of a broker-dealer under Exchange Act Rule 15c3-3(a)(1). For these purposes, and for the purpose of the definition of "Cleared CDS," the terms "purchasing" and "selling" mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing the rights or obligations under, a Cleared CDS, as the context may require. This is consistent with the meaning of the terms "purchase" or "sale" under the Exchange Act in the context of security-based swap agreements. See Exchange Act Section 3A(b)(4).

²⁴ A separate temporary exemption addresses the Cleared CDS activities of registered broker-dealers. See Part II.E, infra. Solely for purposes of this Order, a registered broker-dealer, or a broker or dealer registered under Section 15(b) of the Exchange Act, does not refer to someone that would otherwise be required to register as a broker or dealer solely as a result of activities in Cleared CDS in compliance with this Order.

²⁵ See note 20, infra.

violations or potential violations of such provisions would remain applicable.²⁶ In this way, the temporary conditional exemption would apply the same Exchange Act requirements in connection with non-excluded CDS as apply in connection with OTC credit default swaps.

Consistent with the 2009 ICE Clear Europe Order, this temporary conditional exemption does not extend to: the exchange registration requirements of Exchange Act Sections 5 and 6;²⁷ the clearing agency registration requirements of Exchange Act Section 17A; the requirements of Exchange Act Sections 12, 13, 14, 15(d), and 16;²⁸ the Commission's administrative proceeding authority under paragraphs (4) and (6) of Exchange Act Section 15(b),²⁹ and the rules and regulations thereunder that apply to a broker or dealer that is not registered with the Commission; or certain provisions related to government securities.³⁰

²⁶ Thus, for example, the Commission retains the ability to investigate potential violations and bring enforcement actions in the federal courts as well as in administrative proceedings, and to seek the full panoply of remedies available in such cases.

²⁷ These are subject to a separate temporary class exemption. See note 1, supra. A national securities exchange that effects transactions in Cleared CDS would continue to be required to comply with all requirements under the Exchange Act applicable to such transactions. A national securities exchange could form subsidiaries or affiliates that operate exchanges exempt under that order. Any subsidiary or affiliate of a registered exchange could not integrate, or otherwise link, the exempt CDS exchange with the registered exchange including the premises or property of such exchange for effecting or reporting a transaction without being considered a "facility of the exchange." See Section 3(a)(2), 15 U.S.C. 78c(a)(2).

This Order also includes a separate temporary exemption from Sections 5 and 6 in connection with the mark-to-market process of ICE Clear Europe, discussed above, at note 17 and accompanying text.

²⁸ 15 U.S.C. 78l, 78m, 78n, 78o(d), 78p. Eligible contract participants and other persons instead should refer to the interim final temporary rules issued by the Commission. See note 1, supra.

²⁹ Exchange Act Sections 15(b)(4) and 15(b)(6), 15 U.S.C. 78o(b)(4) and (b)(6), grant the Commission authority to take action against broker-dealers and associated persons in certain situations.

³⁰ This exemption specifically does not extend to the Exchange Act provisions applicable to government securities, as set forth in Section 15C, 15 U.S.C. 78o-5, and its underlying rules and regulations. The exemption also does not extend to related definitions found at paragraphs (42) through (45) of Section 3(a), 15 U.S.C. 78c(a). The Commission does not have authority under Section 36 to issue exemptions in connection with those provisions. See Exchange Act Section 36(b), 15 U.S.C. 78mm(b).

We are modifying this temporary conditional exemption by providing that ICE Clear Europe clearing members must be in material compliance with ICE Clear Europe rules to be eligible to take advantage of this exemption from Exchange Act requirements. This should promote compliance with the applicable CCP rules.

E. Extended Temporary General Exemption for Certain Registered Broker-Dealers

The 2009 ICE Clear Europe Order included a limited conditional exemption from Exchange Act requirements to registered broker-dealers in connection with their activities involving Cleared CDS. In crafting this temporary conditional exemption, we balanced the need to avoid creating disincentives to the prompt use of CCPs against the critical role that certain broker-dealers play in promoting market integrity and protecting customers (including broker-dealer customers that are not involved with CDS transactions).

In light of the risk management and systemic benefits in continuing to facilitate CDS clearing by ICE Clear Europe through targeted exemptions to registered broker-dealers, the Commission finds pursuant to Section 36 of the Exchange Act that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to extend this temporary registered broker-dealer exemption from certain Exchange Act requirements through November 30, 2010.³¹

Consistent with the temporary exemptions discussed above, and solely with respect to Cleared CDS, we are temporarily exempting registered broker-dealers from provisions of the Exchange Act and the rules and regulations thereunder that do not apply to security-based swap

³¹ The temporary exemption addressed above with regard to ICE Clear Europe, certain clearing members and certain eligible contract participants are not available to persons that are registered as broker-dealers with the Commission (other than those that are notice registered pursuant to Exchange Act Section 15(b)(11)). Exchange Act Section 15(b)(11) provides for notice registration of certain persons that effect transactions in security futures products. 15 U.S.C. 78o(b)(11).

agreements. As discussed above, we are not excluding registered broker-dealers from Exchange Act provisions that explicitly apply in connection with security-based swap agreements or from related enforcement authority provisions.³² As above, and for similar reasons, we are not exempting registered broker-dealers from: Sections 5, 6, 12, 13, 14, 15(b)(4), 15(b)(6), 15(d), 16 and 17A of the Exchange Act.³³

Further we are not exempting registered broker-dealers from the following additional provisions under the Exchange Act: (1) Section 7(c),³⁴ regarding the unlawful extension of credit by broker-dealers; (2) Section 15(c)(3),³⁵ regarding the use of unlawful or manipulative devices by broker-dealers; (3) Section 17(a),³⁶ regarding broker-dealer obligations to make, keep and furnish information; (4) Section 17(b),³⁷ regarding broker-dealer records subject to examination; (5) Regulation T,³⁸ a Federal Reserve Board regulation regarding extension of credit by broker-dealers; (6) Exchange Act Rule 15c3-1, regarding broker-dealer net capital; (7) Exchange Act Rule 15c3-3, regarding broker-dealer reserves and custody of securities; (8) Exchange Act Rules 17a-3 through 17a-5, regarding records to be made and preserved by broker-dealers and reports

³² See notes 20 and 26, *supra*. As noted above, broker-dealers also would be subject to Section 15(c)(1) of the Exchange Act, which prohibits brokers and dealers from using manipulative or deceptive devices, because that provision explicitly applies in connection with security-based swap agreements. In addition, to the extent the Exchange Act and any rule or regulation thereunder imposes any other requirement on a broker-dealer with respect to security-based swap agreements (e.g., requirements under Rule 17h-1T to maintain and preserve written policies, procedures, or systems concerning the broker or dealer's trading positions and risks, such as policies relating to restrictions or limitations on trading financial instruments or products), these requirements would continue to apply to broker-dealers' activities with respect to Cleared CDS.

³³ We also are not exempting those members from provisions related to government securities, as discussed above.

³⁴ 15 U.S.C. 78g(c).

³⁵ 15 U.S.C. 78o(c)(3).

³⁶ 15 U.S.C. 78q(a).

³⁷ 15 U.S.C. 78q(b).

³⁸ 12 CFR 220.1 *et seq.*

to be made by broker-dealers; and (9) Exchange Act Rule 17a-13, regarding quarterly security counts to be made by certain exchange members and broker-dealers.³⁹ Registered broker-dealers must comply with these provisions in connection with their activities involving non-excluded CDS because these provisions protect investors, provide safeguards with respect to the financial responsibility and related practices of broker-dealers, and safeguard against fraud and abuse.⁴⁰

G. Solicitation of Comments

When we granted the 2009 ICE Clear Europe Order, we requested comment on all aspects of the exemptions. We received no comments in response. In connection with this Order extending the exemptions granted in connection with CDS clearing by ICE Clear Europe, 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 S7-16-09 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov/>). Follow the instructions for submitting comments.

³⁹ Solely for purposes of this temporary exemption, in addition to the general requirements under the referenced Exchange Act sections, registered broker-dealers shall only be subject to the enumerated rules under the referenced Exchange Act sections.

⁴⁰ See 15 U.S.C. 78o(c)(3) (directing the Commission to establish minimum financial responsibility requirements for broker-dealers, including rules relating to the acceptance of custody, the use of customers' securities and the carrying and use of customers' deposits or credit balances).

Paper comments:

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

All submissions should refer to File Number S7-16-09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. We will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/other.shtml>). Comments are also available for Web site 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, through November 30, 2010:

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

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

- (1) ICE Clear Europe shall make available on its Web site its annual audited financial statements.
- (2) ICE Clear Europe shall keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other

such records as shall be made or received by it relating to its Cleared CDS clearance and settlement services. These records shall be kept for at least five years and for the first two years shall be held in an easily accessible place.

(3) ICE Clear Europe shall supply information and periodic reports relating to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission and, subject to cooperation with the FSA and upon such terms and conditions as may be agreed between the FSA and the Commission, shall provide access to the Commission to conduct on-site inspections of all facilities (including automated systems and systems environment), records, and personnel related to ICE Clear Europe's Cleared CDS clearance and settlement services.

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

(5) ICE Clear Europe shall notify the Commission of all changes to its rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services, including its fee schedule and changes to risk management practices, not less than one day prior to effectiveness or implementation of such changes or, in exigent circumstances, as promptly as reasonably practicable under the circumstances. If ICE Clear Europe gives notice to, or seeks approval from, the FSA regarding any other

changes to its rules regarding its Cleared CDS clearance and settlement services, ICE Clear Europe will also provide notice to the Commission. All such rule changes will be posted on ICE Clear Europe's Web site. Such notifications will not be deemed rule filings that require Commission approval.

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

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

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

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

(1) ICE Clear Europe shall be exempt from the requirements of Sections 5 and 6 of the Exchange Act and the rules and regulations thereunder in connection with its

calculation of mark-to-market prices for open positions in Cleared CDS, subject to the following conditions:

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

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

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

(ii) ICE Clear Europe shall establish and maintain adequate safeguards and procedures to protect members' confidential trading information. Such safeguards and procedures shall include: (A) limiting access to the confidential trading information of members to those employees of ICE Clear Europe who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (B) establishing and maintaining standards controlling employees of ICE Clear Europe trading for their own accounts. ICE Clear Europe must establish and maintain adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed; and

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

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

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

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

(i) ICE Clear Europe;

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

(iii) Any eligible contract participant (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), other than: (A) an eligible contract participant that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons; (B) an eligible contract participant that is a self-regulatory organization, as that term is defined in Section 3(a)(26) of the Exchange Act; or (C) a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof).

(2) Scope of exemption.

(i) In general. Subject to the conditions specified in paragraph (c)(3) of this subsection, such persons generally shall, solely with respect to Cleared CDS, be exempt from the provisions of the Exchange Act and the rules and regulations thereunder that do not apply in connection with security-based swap agreements. Accordingly, under this exemption, those persons would remain subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements (i.e., paragraphs (2) through (5) of Section 9(a), Section 10(b), Section 15(c)(1), paragraphs (a) and (b) of Section 16, Section 20(d) and Section 21A(a)(1) and the rules thereunder that explicitly are applicable to security-based swap agreements). All provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions also remain applicable.

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

- (A) Paragraphs (42), (43), (44), and (45) of Section 3(a);
- (B) Section 5;
- (C) Section 6;
- (D) Section 12 and the rules and regulations thereunder;
- (E) Section 13 and the rules and regulations thereunder;
- (F) Section 14 and the rules and regulations thereunder;
- (G) Paragraphs (4) and (6) of Section 15(b);
- (H) Section 15(d) and the rules and regulations thereunder;

- (I) Section 15C and the rules and regulations thereunder;
- (J) Section 16 and the rules and regulations thereunder; and
- (K) Section 17A (other than as provided in paragraph (a)).

(3) Conditions for ICE Clear Europe Clearing Members. Any ICE Clear Europe Clearing Members relying on this exemption must be in material compliance with the rules of ICE Clear Europe.

(d) Exemption for certain registered broker-dealers.

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

- (1) Section 7(c);
- (2) Section 15(c)(3);
- (3) Section 17(a);
- (4) Section 17(b);
- (5) Regulation T, 12 CFR 200.1 et seq.;
- (6) Rule 15c3-1;
- (7) Rule 15c3-3;
- (8) Rule 17a-3;
- (9) Rule 17a-4;
- (10) Rule 17a-5; and
- (11) Rule 17a-13.

(e) Definitions.

For purposes of this Order:

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

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

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

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

(C) A foreign sovereign debt security;

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

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

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

(2) "ICE Clear Europe Clearing Member" shall mean any clearing member of ICE Clear Europe that submits Cleared CDS to ICE Clear Europe for clearance and settlement exclusively (i) for its own account or (ii) for the account of an affiliate that controls, is controlled by, or is under common control with the clearing member of ICE Clear Europe.

By the Commission.

Elizabeth M. Murphy
Secretary