

enable the portfolio manager to provide individualized investment advice. The sponsor is required to contact clients annually and provide them with quarterly notices to ensure that the sponsor has current information about the client's financial status, investment objectives, and restrictions on management of the account. Maintaining current information enables the portfolio manager to evaluate each client's portfolio in light of the client's changing needs and circumstances. The requirement that clients be provided with quarterly statements of account activity is designed to ensure each client receives an individualized report, which the Commission believes is a key element of individualized advisory services.

The Commission staff estimates that 3,109,671 clients participate each year in investment advisory programs relying on rule 3a-4. Of that number, the staff estimates that 220,805 are new clients and 2,888,866 are continuing clients. The staff estimates that each year investment advisory program sponsors staff engage in 1.5 hours per new client and 0.75 hours per continuing client to prepare, conduct and/or review interviews regarding the client's financial situation and investment objectives as required by the rule. Furthermore, the staff estimates that each year investment advisory program staff spends 1 hour per client to prepare and mail quarterly client account statements, including notices to update information. Based on the estimates above, the Commission estimates that the total annual burden of the rule's paperwork requirements is 5,607,528 hours.

The total annual hour burden of 5,607,528 hours represents an increase of 1,158,112.5 hours from the prior estimate of 4,449,415.5 hours. This increase principally results from an increase in the number of continuing clients, but also reflects an increase in the estimated burden hours associated with several of the collections of information required under the rule. The increase in estimated burden hours per collection of information results from an increase in burden hours reported by representatives of investment advisers that rely on rule 3a-4 that Commission staff surveyed.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information

unless it displays a currently valid control number.

Written comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burdens of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Charles Boucher, Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov).

December 4, 2009.

**Florence E. Harmon,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61119; File No. S7-05-09]

### Order Extending and Modifying Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request From ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments

December 4, 2009.

#### I. Introduction

Over the past year, the Securities and Exchange Commission ("Commission") has taken multiple actions to protect investors and ensure the integrity of the nation's securities markets, including actions<sup>1</sup> designed to address concerns

<sup>1</sup> 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), Securities Exchange Act Release No. 60373 (Jul. 23, 2009), 74 FR 37740 (Jul. 29, 2009) (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) (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) (temporary exemptions in

related to the market in credit default swaps ("CDS").<sup>2</sup> The over-the-counter ("OTC") market for CDS has been a source of 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 impacts. 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.<sup>3</sup>

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

connection with CDS clearing by ICE US Trust LLC (now "ICE Trust U.S. LLC") (hereinafter, the "March ICE Trust Order"), 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 therein.

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 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 Exchange Act Release No. 9063 (Sep. 14, 2009), 74 FR 47719 (Sep. 17, 2009) (extension until Nov. 30, 2010).

Further, the Commission has provided temporary exemptions in connection with Sections 5 and 6 of the Securities Exchange Act of 1934 for transactions in CDS. 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).

<sup>2</sup> A CDS is a bilateral contract between two parties, known as counterparties. The value of this financial contract is based on underlying obligations of a single entity ("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 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.

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

of the Gramm-Leach-Bliley Act.<sup>4</sup> For those CDS that are swap agreements, the exclusion from the definition of security in Section 3A of the Exchange Act, and related provisions, will continue to apply. The Commission's action today does not affect these CDS, and this Order does not apply to them. For those CDS that are not swap agreements ("non-excluded CDS"), the Commission's action today provides temporary conditional exemptions from certain requirements of the Exchange Act.

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 and among its participants, contributing generally 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.<sup>5</sup>

Earlier this year, the Commission granted temporary conditional exemptions to ICE Trust U.S. LLC ("ICE Trust") and certain related parties to permit ICE Trust to clear and settle CDS transactions.<sup>6</sup> Those exemptions are

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

<sup>5</sup> See generally actions referenced in note 1, *supra*.

<sup>6</sup> 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 Trust, 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

scheduled to expire on December 7, 2009. ICE Trust has requested that the Commission extend the exemptions, and expand them to address activities in connection with ICE Trust clearing CDS transactions of its members' customers (in addition to clearing CDS transactions of members and their affiliates, as permitted by the current exemption).<sup>7</sup>

Based on the facts presented and the representations made on behalf of ICE Trust,<sup>8</sup> and for the reasons discussed in this Order, and subject to certain conditions, the Commission is extending the exemption granted in the March ICE Trust Order, and is expanding it to accommodate customer clearing. Specifically, the Commission is extending the temporary ICE Trust conditional exemption 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 Commission also is extending the temporary exemption of eligible contract participants and others from certain Exchange Act requirements with respect to non-excluded CDS cleared by ICE Trust. In addition, this order conditionally exempts on a temporary basis ICE Trust clearing members from broker-dealer registration requirements and related requirements in connection with using ICE Trust to clear CDS transactions of their customers. The Commission further is extending the

comprised of the entities or securities described in subparagraph (i). As discussed above, the Commission's action today does not affect CDS that are swap agreements under Section 206A of the Gramm-Leach-Bliley Act. See text at note 4, *supra*.

<sup>7</sup> See Letter from Kevin McClear, ICE Trust, to Elizabeth Murphy, Secretary, Commission, Dec. 4, 2009 ("December 2009 request").

Market participants have committed to achieve customer access to CDS clearing by December 15, 2009. See Letter from dealers and buy-side institutions to Federal Reserve Bank of New York (Jun. 2, 2009) (<http://www.newyorkfed.org/newsevents/news/markets/2009/060209letter.pdf>) ("It is our goal to achieve buy-side access to CDS clearing (through either direct CCP membership or customer clearing) with customer initial margin segregation and portability of customer transactions no later than December 15, 2009.').

<sup>8</sup> See December 2009 request. The exemptions we are granting today are based on all of the representations made in the December 2009 request on behalf of ICE Trust, which incorporate representations made on behalf of ICE Trust as part of the request that preceded our earlier relief in connection with CDS clearing by ICE Trust. 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.

temporary exemption of ICE Trust 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 Trust. These exemptions are temporary and will expire on March 7, 2010.

## II. Discussion

### A. Description of ICE Trust's Activities to Date and Proposed Customer Clearing Activities

ICE Trust's request for an extension of its current temporary exemptions and for an expansion of those exemptions to accommodate clearing of customer CDS transactions describes how ICE Trust has cleared CDS to date and how the proposed arrangements for central clearing of customer CDS transactions would operate.<sup>9</sup> The request also makes representations about the safeguards associated with those arrangements, as described below.<sup>10</sup>

#### 1. ICE Trust CDS Clearing Activity to Date

ICE Trust has cleared the proprietary index CDS transactions of its clearing members since March 9, 2009, through acceptance and novation of those transactions.<sup>11</sup> As of October 30, 2009, ICE Trust had cleared approximately \$2.64 trillion notional amount of CDS contracts based on indices of securities. ICE Trust intends in the near future to also clear single-name CDS contracts based on individual reference entities or securities.

In clearing CDS transactions, ICE Trust has made use of procedures, described in the initial request for relief, whereby it has periodically required participants to execute certain CDS trades at the applicable end-of-day settlement price to enhance the reliability of end-of-day settlement

<sup>9</sup> See December 2009 request, *supra* note 7. The description in this Order of ICE Trust's proposed activities also is based on the provisions of ICE Trust's rules.

<sup>10</sup> ICE Trust has represented that there have been no material changes to the representations made in the letter that preceded the relief we initially granted to it, apart from the proposal to clear customer CDS transactions, and ICE Trust has incorporated the representations made in its earlier letter into the current request for relief.

<sup>11</sup> ICE Trust novates those cleared proprietary CDS transactions by becoming the seller of credit protection to the clearing member that is the buyer under the CDS, and the buyer of credit protection from the clearing member that is the seller under the CDS. ICE Trust collects initial and mark-to-market margin to secure each clearing member's obligations to ICE Trust under the cleared transactions, and ICE Trust has established a guaranty fund to provide additional financial protection in the case of clearing member default.

prices submitted as part of the daily mark-to-market process.<sup>12</sup> ICE Trust represents that it wishes to continue periodically requiring clearing members to execute certain CDS trades in this manner, and has requested the extension of the applicable relief.

## 2. Proposed Activity Clearing CDS Transactions of Members' Clients

ICE Trust has proposed a "Non-Member Framework" for clearing the CDS transactions of its members' clients. Under this framework, client positions could be submitted to ICE Trust for clearing in one of two ways. First, under the "bilateral model," clients could execute a CDS transaction directly with a clearing member (acting in a principal capacity), followed by the clearing member submitting a trade to ICE Trust with terms corresponding to the client-member trade; if the latter trade is accepted by ICE Trust,<sup>13</sup> two positions would be created within ICE Trust—a Client Position of the clearing member that mirrors the transaction between the client and the clearing member, and an offsetting House Position of the clearing member.<sup>14</sup>

Alternatively, under the "prime broker" or "designated clearing member" (or "DCM") model, a client could agree to a CDS transaction with an ICE Trust clearing member ("executing dealer") other than the member that clears the client's transactions. Then, pursuant to a give-up or similar agreement, the clearing member (as prime broker) and the executing dealer would enter into a trade that is submitted to ICE Trust for clearing, and the clearing member and the client would simultaneously enter into a trade.<sup>15</sup> The net result would be that the

<sup>12</sup> In particular, as part of this mark-to-market process, ICE Trust periodically requires clearing members to execute certain CDS trades at the price where the prices submitted by clearing members cross. ICE Trust requires these trades on 30 random days during any year and at the end of each quarter.

<sup>13</sup> ICE Trust will accept all CDS that meet the standards set forth in its rules, unless it determines not to accept the transaction for risk management reasons.

<sup>14</sup> "Client Positions" are cleared CDS transactions between ICE Trust and the clearing member that are offset or mirrored on a back-to-back basis by CDS transactions between the clearing member and the client. "House Positions" are all other cleared CDS transactions of a member, or affiliate, and ICE Trust.

ICE Trust would not have market exposure in connection with that transaction because it would have two offsetting positions with the clearing member.

<sup>15</sup> ICE Trust expects that, initially, client transactions likely will be submitted for clearing using the DCM model. These transactions will be subject to DCM Standard Terms, published by ICE Trust, that will provide procedures and timing requirements for submitting transactions to clearing. ICE Trust expects that the bilateral model

client's clearing member and the client would be counterparties to one transaction, the clearing member would have a Client Position with ICE Trust, and the executing dealer would have a House Position with ICE Trust.<sup>16</sup>

ICE Trust has no rule requiring an executing dealer to be a clearing member. ICE Trust Clearing Rule 314, moreover, requires that ICE Trust ensure that there shall be open access to its clearing system for all execution venues and trade processing platforms.<sup>17</sup>

ICE Trust expects that transactions under the DCM model will be submitted to ICE Trust through one or more "authorized trade processing platforms" that will facilitate the affirmation of the trade terms by the client, executing dealer and DCM, as well as the electronic submission of the affirmed trade to ICE Trust for clearing.<sup>18</sup> ICE Trust also expects that the platform would submit, to the relevant parties, notice of ICE Trust's acceptance or rejection of the trade. Authorized trade processing platforms may provide additional back-office or similar services to clearing members or clients. ICE Trust expects to enter into arrangements to accept transactions from multiple authorized trade processing platforms.<sup>19</sup>

Under the framework for clearing client transactions, ICE Trust would have no direct relationship with, or

will be used initially for back-loading of existing transactions into central clearing.

<sup>16</sup> As with the bilateral model, ICE Trust would not have market exposure in connection with the cleared transaction. In this situation the clearing member's Client Position with ICE Trust would offset the executing dealer's House Position with ICE Trust.

<sup>17</sup> ICE Trust Clearing Rule 314. Based on market feedback, ICE Trust anticipates that, initially, executing dealers will be Clearing Members. ICE Trust does not prohibit an executing dealer that is not a Clearing Member from having a trade submitted for clearance at ICE Trust through the Clearing Member. However, currently none of the "authorized trade processing platforms" permit, as an operational matter, such an arrangement. ICE Trust Clearing Rules, however, do provide for open access to its clearing system for all execution venues and trade processing platforms.

<sup>18</sup> Under this approach, for example, when a client and executing dealer agree to the terms of a transaction (including that the transaction should be submitted to ICE Trust for clearing), the executing dealer will submit the trade terms to the authorized trade processing platform, which will forward those terms to the client for affirmation. Once the client has affirmed the trade, the platform will forward those terms to the DCM designated by the client for affirmation. Once all three parties have affirmed the transaction, it will be submitted to ICE Trust for clearing. ICE Trust will determine whether to accept or reject the submitted trade in accordance with its risk management policies and procedures.

<sup>19</sup> ICE Trust states that it has committed to ensure that there will be open access to ICE Trust's clearing system for platforms that meet ICE Trust's qualifications and criteria to provide the necessary services.

liability to, clients. To facilitate the transfer or liquidation of client-member transactions in the event of clearing member default, however, clearing members would pledge to ICE Trust the clearing members' rights under the client-member transactions and their rights to related margin, to secure the clearing members' obligations to ICE Trust under the related client positions, and the clearing member's obligations to other clients under other client-member transactions.

The cleared CDS transaction between the clearing member and its client will be documented pursuant to a negotiated International Swaps and Derivatives Association ("ISDA") master agreement between those parties, supplemented by a standard annex approved by ICE Trust. This standard annex would treat these cleared client-member CDS transactions differently from other derivatives transactions between those parties: it would make the cleared CDS transactions subject to separate ICE Trust margin requirements, it would incorporate a standard definition of clearing member default (based on a determination by ICE Trust), and it would specify procedures for remedies in the case of clearing member default. As discussed below, under the standard annex the client could also agree that certain default portability rules would apply.<sup>20</sup>

## 3. Framework for Collection and Protection of Client Margin

ICE Trust states that the Non-Member Framework is intended to protect clients from default by their clearing members, particularly with regard to their initial margin. Also, the Non-Member Framework, and central clearing of CDS generally, is intended to enhance the financial stability of CDS markets as a whole.<sup>21</sup>

### a. Margin Requirements for Clearing Members and Clients

ICE Trust rules will require clearing members to collect initial and variation margin from clients for CDS transactions cleared by ICE Trust, in an amount at least equal to the amount of margin ICE Trust would require on a gross basis for the related Client Positions. Clearing members would be able to collect additional margin from customers beyond what ICE Trust rules require.<sup>22</sup>

<sup>20</sup> See part II.A.4.c, *infra*.

<sup>21</sup> ICE Trust states that it will implement a program to monitor for its clearing members' compliance with this segregation framework.

<sup>22</sup> As discussed below, this Order sets forth conditions intended to protect all of the margin that clearing members collect from their clients, including this type of "additional" margin.

Clearing members will be permitted to calculate the initial margin collected from individual clients on a net basis, across all of the CDS transactions of that customer that are cleared through ICE Trust. Clearing members, however, would not be permitted to net across multiple clients cleared through ICE Trust. This required "ICE Gross Margin" that a clearing member collects from a client must be pledged by the client in favor of the clearing member, and must not be subject to liens or other encumbrances in favor of third parties.

Under ICE Trust rules, clearing members must post the ICE Gross Margin they collect from clients to ICE Trust, as custodian, promptly upon receipt, and it is expected that clearing members would transfer this margin on the business day of receipt.<sup>23</sup> Prior to posting, the clearing member must maintain that ICE Gross Margin in a segregated client omnibus account or in an individual segregated client account, on its own books or on the books of a custodian, pursuant to which the clearing member would receive the margin in an agency or custodial capacity.

ICE Trust will determine a net initial margin requirement for each clearing member with regard to the cleared CDS positions of all of the member's clients. Clearing members could use collateral posted by clients to satisfy this "ICE Net Margin" obligation.<sup>24</sup>

#### b. Treatment of Client Margin Required Pursuant to ICE Trust Rules

Clearing members must post all the margin they collect from customers pursuant to ICE Trust requirements—both the ICE Net Margin and the remainder of the margin that clearing members collect from their clients pursuant to ICE Trust rules—to the Custodial Client Omnibus Margin Account<sup>25</sup> that would be maintained at ICE Trust or a subcustodian.

<sup>23</sup> ICE Trust states, however, that this may not be feasible when the clearing member receives the client margin toward the end of the business day.

Clearing members and clients may agree that the clearing member will post with ICE Trust a different type of collateral than what the client posts with ICE Trust, and that the collateral posted with ICE Trust will become the client's property. Thus, for example, a client and clearing member may agree that cash collateral that the client posts to the clearing member may be invested in U.S. Treasury securities, and posted to ICE Trust as such.

<sup>24</sup> Clearing members also may initially satisfy this obligation with their proprietary assets, pending receipt of required margin from their clients.

<sup>25</sup> The "Custodial Client Omnibus Margin Account" is one or more accounts maintained by or on behalf of ICE Trust "with respect to a Participant for the purposes of holding on an omnibus basis margin of Non-Participant Parties posted to that Participant in respect of their respective Minimum ICE Trust Required Initial

The Custodial Client Omnibus Margin Account will be held for the benefit of all clients of the relevant clearing member (or for the clearing member as agent or custodian on behalf of such clients), and will be segregated from other assets of the clearing member (including assets in its proprietary "House Account"). The Custodial Client Omnibus Margin Account will consist of a cash collateral subaccount for cash margin and a custody subaccount for securities collateral. ICE Trust will maintain title to cash in the cash collateral subaccount (ICE Trust, however, will be obligated to return the cash as required for the benefit of the relevant client or of the clearing member as the client's agency or custodian), and ICE Trust will hold assets in the custody subaccount as custodian (subject to a security interest in favor of the clearing member or ICE Trust as applicable). Assets in the Custodial Client Omnibus Margin Account may be invested in a range of investments as permitted by ICE Trust's Custodial Asset Policies,<sup>26</sup> and the clearing member and its client may agree how the return on those investments may be distributed between them. ICE Trust rules will require clearing members to maintain records of the identity of the clients, the margin they post, the transfer of those assets to the Custodial Client Omnibus Margin Account and the use of that margin.

#### c. Treatment of additional margin that clearing members collect from clients beyond ICE Trust requirements

Clearing members may collect margin from clients, in connection with Cleared CDS transactions, in excess of the margin that ICE Trust rules require they collect. ICE Trust permits this "additional" margin to be posted to the Custodial Client Omnibus Margin Account, but does not require that it be posted to that account. Under the conditions of this Order's temporary exemption from certain broker-dealer related requirements of the Exchange Act, however, such "additional" margin must be posted either to the Custodial Client Omnibus Margin Account, or else to a third-party custodian that is

Margin and Participant Excess Margin requirements, as applicable." ICE Trust rules state that ICE Trust may establish a separate account or subaccount with respect to a portion of the Custodial Client Omnibus Margin Account corresponding to the Net Client Omnibus Margin Amount.

<sup>26</sup> ICE Trust states that these generally include assets of the type allowed under CFTC Rule 1.25. However, a narrower range of assets is acceptable margin for satisfying the net margin requirement. This includes only cash in specified currencies and G-7 government debt for initial margin, and only cash for mark-to-market margin.

unaffiliated with the clearing member.<sup>27</sup> The temporary exemption from those broker-dealer related requirements is unavailable to any clearing member that fails to segregate customer collateral in that manner.

#### d. Treatment of Variation Margin

ICE Trust states that the amount of variation margin that must be provided to a client, or by a client, will be determined daily for that client's portfolio based on ICE Trust's end-of-day settlement price determinations. ICE Trust further states that in the event that ICE Trust owes variation margin to a clearing member in respect of client positions that have moved in the client's favor, the standard annex would provide that the clearing member has a corresponding obligation to provide variation margin in favor of clients.<sup>28</sup>

### 4. Default and Portability Rules

#### a. Termination Amounts

In the event a client-member transaction is terminated due to clearing member default, termination amounts owed by a client on CDS transactions cleared by ICE Trust would not be netted against termination amounts owed with respect to the client's other trades with that clearing member. This is intended to facilitate portability of positions.

Moreover, in the event of member default, ICE Trust would undertake a close-out process that separately would calculate net termination with respect to the closeout of the clearing member's House Positions and its Client Positions. ICE Trust would not undertake this process, however, in the event that the defaulting clearing member's receiver (such as the Federal Deposit Insurance Corporation or similar authority) transfers the relevant positions to another non-defaulting entity in accordance with applicable law.

The rules generally would not permit netting between a clearing member's Client Positions and House Positions; however, ICE Trust would offset any amount that the clearing member owes to ICE Trust in respect of Client Positions against any amount that ICE Trust owes to the clearing member in respect of House Positions.

If a clearing member default is due to a default resulting from a client's position, ICE Trust may use the margin

<sup>27</sup> See Part II.E, *infra*.

<sup>28</sup> Over the duration of this temporary exemption, the staff intends to evaluate the protections afforded to clients' mark-to-market profits associated with Cleared CDS positions, and to consider the potential benefits of requiring clearing members to segregate clients' variation margin in connection with Cleared CDS positions.

posted to the clearing member's Custodial Client Omnibus Margin Account up to the amount of the ICE Net Margin requirement.<sup>29</sup> ICE Trust will not be able to access the remainder of the assets of a non-defaulting client in the account in amounts above the net margin requirement.<sup>30</sup> The Commission notes that, as a result of these rules, clients of a clearing member are subject to the risk of loss resulting from the default of another client of that clearing member, up to the amount of the clearing member's net margin requirement.

#### b. Pre-Default Portability

ICE Trust rules require clearing members to agree to the transfer of client-member transactions and related positions upon client request, provided that the client obtains a new clearing member willing to accept the positions. In connection with that transfer, ICE Trust would move related margin between the Custodial Client Omnibus Margin Accounts of the two clearing members.

#### c. Post-Default Portability

If a client agrees to the application of the default rules set forth in the standard annex, it would consent that, in the event of the clearing member's default, ICE Trust may transfer client-member transactions to a new clearing member, or otherwise establish replacement transactions.<sup>31</sup> The client also would agree not to exercise its

<sup>29</sup> ICE Trust cannot use a client's positions in this account if the clearing member's default was the result of its proprietary activities, rather than the result of a default resulting from a client's position.

In the event of a clearing member's default resulting from a Client Position, net losses to ICE Trust would be paid from the following sources in order: (i) Any margin of the defaulting client held in the Custodial Client Omnibus Margin Account, to the extent of that client's obligations to the clearing member; (ii) amounts received from clients under their client-member transactions; (iii) the defaulting clearing member's house margin; (iv) the defaulting clearing member's contribution to the guaranty fund; (v) the defaulting clearing member's Custodial Client Omnibus Margin Account up to the amount of the net margin requirement; and (vi) other guaranty fund contributions. ICE Trust would not need to apply these assets to the extent it can close out or replace the defaulting clearing member's transactions without loss to ICE Trust.

<sup>30</sup> ICE Trust, however, could apply all of the margin that a defaulting client has posted into the account.

<sup>31</sup> Under the standard annex, only the client—and not the clearing member—can elect as to whether the default portability rules will apply to the cleared transaction.

If the client does not agree to the use of the default portability rules, then the customer could apply the liquidation procedures discussed below in part II.A.4.d upon the clearing member's default.

rights to terminate during the transfer period.<sup>32</sup>

If the clearing member is in default, ICE Trust rules would permit ICE Trust to transfer, or arrange for the transfer of, the defaulting clearing member's client positions and related transactions and margin to a new clearing member. Alternatively, ICE Trust could terminate the existing transactions and establish new positions with the new clearing member. ICE Trust may attempt to transfer some or all of the client-member transactions. Also, ICE Trust may (but would not be obligated to) take into account client prearrangements for the use of one or more "backup" clearing members to which their transactions would be transferred in the event their primary clearing member defaults.

#### d. Liquidation Procedures

If ICE Trust is unable to transfer or terminate and replace client-member transactions during the transfer period, the client may terminate the client-member transactions as provided by the terms of the agreement.<sup>33</sup> ICE Trust then would determine the close-out price for the client positions and the client-member transaction.

If a client owes the clearing member with respect to the cleared CDS transactions, the client's margin in the Custodial Client Omnibus Margin Account will be applied to satisfy that obligation, and thereafter would be available to pay amounts owed to ICE Trust in connection with the related client positions and other clients in respect of their client-member transactions. Conversely, clients owed by the clearing member on a net basis will have a claim for that amount, together with their *pro rata* share of margin being used to satisfy the ICE Net Margin Requirement.<sup>34</sup>

Clients will be separately entitled to the return of their remaining excess margin in the Custodial Client Omnibus Margin Account, except to the extent the margin is applied to satisfy the client's obligation to the clearing

<sup>32</sup> The transfer period will be limited to three business days or fewer.

<sup>33</sup> The client alternatively may opt out of the liquidation procedures, in which case the client-member transactions also will be terminated.

<sup>34</sup> Clients will have available, in respect of their Net Termination Claims, an amount equal to the sum of: (i) The remaining amount of the ICE Net Margin Requirement after application by ICE Trust together with any net amounts paid by ICE Trust in respect of the termination of Client Positions, plus (ii) any termination amounts paid by Clients that is not applied by ICE Trust, plus (iii) the amount of any client's excess margin applied to its obligations. If these proceeds are insufficient to pay all Net Termination Claims, clients will share in the proceeds *pro rata*, based on their respective claims.

member.<sup>35</sup> Clients will share in the assets in the Custodial Client Omnibus Margin Account in proportion of their claims, but will not be entitled to the return of specific assets in that account.

#### 5. Other Clearing Member Requirements Related to Customer Clearing

ICE Trust states that before offering the Non-Member Framework, it will adopt a requirement that clearing members subject to the framework are regulated by: (i) A signatory to the International Organization of Securities Commissions ("IOSCO") Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, or (ii) a signatory to a bilateral arrangement with the Commission for enforcement cooperation.

#### B. Extended Temporary Conditional Exemption From Clearing Agency Registration Requirement

On March 6, 2009, in connection with its efforts to facilitate the establishment of one or more central counterparties ("CCP") for Cleared CDS, the Commission issued the March ICE Trust Order, conditionally exempting ICE Trust from clearing agency registration under Section 17A of the Exchange Act on a temporary basis. Subject to the conditions in that order, ICE Trust 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 March ICE Trust Order expires on December 7, 2009. Pursuant to its authority under Section 36 of the Exchange Act,<sup>36</sup> for the reasons described herein, the Commission is

<sup>35</sup> The Standard Annex provides that if the clearing member is in default and the Client owes a net termination payable, amounts the client owes to the clearing member cannot be netted with amounts the clearing member owes to the Client in respect of any non-cleared Client position. Funds that the client owes to the clearing member in respect of this net termination payable secure the clearing member's obligations in favor of ICE Trust and as such will be paid directly to ICE Trust. Conversely, where the client has a net termination claim against the clearing member, the client may net the amount owed to the client against amounts owed by the client in respect of a non-cleared position.

<sup>36</sup> 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.

extending the exemption granted in that Order until March 7, 2010.

In the March ICE Trust order, the Commission recognized the need to ensure the prompt establishment of ICE Trust as a CCP for CDS transactions. The Commission also recognized the need to ensure that important elements of Section 17A of the Exchange Act, 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 March ICE Trust Order was subject to a number of conditions designed to enable Commission staff to monitor ICE Trust's clearance and settlement of CDS transactions.<sup>37</sup> Moreover, the temporary exemption in that order in part was based on ICE Trust's representation that it met the standards set forth in the Committee on Payment and Settlement Systems ("CPSS") and IOSCO report entitled: *Recommendation for Central Counterparties* ("RCCP").<sup>38</sup> 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 funds 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—including customer CDS transactions—through a temporary conditional exemption from Section 17A would provide important risk management and systemic benefits by avoiding an interruption in those CCP clearance and settlement services. Any interruption in CCP clearance and settlement services for CDS transactions would eliminate in the future the benefits ICE Trust provides to the non-excluded CDS market during the exemptive period. Accordingly, and consistent with our findings in the March ICE Trust Order, we find pursuant to Section 36 of the Exchange Act that it is necessary and appropriate in the public interest and is consistent with the protection of investors for the

Commission to extend, until March 7, 2010, the relief provided from the clearing agency registration requirements of Section 17A by the March ICE Trust Order.

Our action today balances the aim of facilitating ICE Trust'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 continued use of temporary 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 Trust does not act in an anticompetitive manner or indirectly facilitate anticompetitive behavior with respect to fees charged to members, the dissemination of market data, and the access to clearing services by independent CDS exchanges or CDS trading platforms.

This temporary extension of the March ICE Trust Order also is designed to assure that—as represented in the request on behalf of ICE Trust—information will continue to be available to market participants about the terms of the CDS cleared by ICE Trust, the creditworthiness of ICE Trust or any guarantor, and the clearance and settlement process for the CDS.<sup>39</sup> The Commission believes continued operation of ICE Trust 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 March ICE Trust Order is subject to a number of conditions that are designed to enable Commission staff to continue to monitor ICE Trust's clearance and settlement of CDS transactions and help reduce risk in the CDS market. These conditions require that ICE Trust: (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) provide 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; (iv) notify the Commission about material disciplinary actions taken against any of its members utilizing its Cleared CDS clearance and settlement services, and about the involuntary termination of the membership of an entity that is utilizing ICE Trust's Cleared CDS clearance and settlement services; (v) provide the Commission with changes to rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services; (vi) provide the Commission with reports prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements<sup>40</sup> and its annual audited financial statements prepared by independent audit personnel; and (vii) report all significant systems outages to the Commission.

In addition, this temporary extension of the March ICE Trust Order is conditioned on ICE Trust, 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 Trust may establish to calculate mark-to-market margin requirements for ICE Trust clearing members; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by ICE Trust. The Commission believes this is an appropriate condition for ICE Trust's temporary continued exemption from registration as a clearing agency.

As a CCP, ICE Trust collects and processes information about CDS transactions, prices, and positions from all of its participants. With this information, a CCP calculates and disseminates current values for open positions for the purpose of setting

<sup>37</sup> See Securities Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009).

<sup>38</sup> The RCCP was drafted by a joint task force ("Task Force") composed of representative members of IOSCO and CPSS and published in November 2004. The Task Force consisted of securities regulators and central bankers from 19 countries and the European Union. The U.S. representatives on the Task Force included staff from the Commission, the Federal Reserve Board, and the Commodity Futures Trading Commission.

<sup>39</sup> 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/pwgpolicystatementktturmoil\\_03122008.pdf](http://www.treas.gov/press/releases/reports/pwgpolicystatementktturmoil_03122008.pdf).

<sup>40</sup> See Automated Systems of Self-Regulatory Organization, Exchange Act Release No. 27445 (November 16, 1989), File No. S7-29-89, and Automated Systems of Self-Regulatory Organization (II), Exchange Act Release No. 29185 (May 9, 1991), File No. S7-12-91.

appropriate margin levels. The availability of such information can improve fairness, efficiency, and competitiveness of the market—all of which enhance investor protection and facilitate capital formation. Moreover, with pricing and valuation information relating to Cleared CDS, market participants would be able to derive information about underlying securities and indexes. This may improve the efficiency and effectiveness of the securities markets by allowing investors to better understand credit conditions generally.

### *C. Extended Temporary Conditional Exemption From Exchange Registration Requirements*

When we initially provided exemptions in connection with CDS clearing by ICE Trust, we granted a temporary conditional exemption to ICE Trust from the requirements of Sections 5 and 6 of the Exchange Act, and the rules and regulations thereunder, in connection with ICE Trust's calculation of mark-to-market prices for open positions in Cleared CDS. We also temporarily exempted ICE Trust participants from the prohibitions of Section 5 to the extent that they use ICE Trust to effect or report any transaction in Cleared CDS in connection with ICE Trust'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,<sup>41</sup> while Section 6 provides the procedures for registering as a national securities exchange.<sup>42</sup>

We granted these temporary exemptions to facilitate the establishment of ICE Trust's end-of-day settlement price process. ICE Trust 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 Trust participant has a cleared position, based on prices submitted by the participants. ICE Trust stated that as part of this mark-to-market process, it periodically would require

participants to execute certain CDS trades at the applicable end-of-day settlement price, to help ensure that the prices that the participants submit reflect their assessment of the value of each open position in Cleared CDS, thereby reducing risk by helping ICE Trust to impose appropriate margin requirements.

As part of its current request, ICE Trust has stated that since it has commenced clearing operations for Cleared CDS, it has periodically required ICE Trust clearing members to execute certain CDS trades at the applicable end-of-day settlement price. ICE Trust further represents that it wishes to continue periodically requiring 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 Trust. Consistent with that finding—and in reliance on ICE Trust'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, until March 7, 2010, ICE Trust'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 Trust clearing members' temporary exemption from Section 5 with respect to such trading activity.<sup>43</sup>

The temporary exemption for ICE Trust will continue to be subject to three conditions. First, ICE Trust 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.

Reporting of this information will assist the Commission in carrying out its responsibility to supervise and regulate the securities markets.

Second, ICE Trust 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 Trust 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 Trust trading for their own accounts. ICE Trust must establish and maintain adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed. This condition is designed to prevent any misuse of ICE Trust clearing member trading information that may be available to ICE Trust in connection with the daily marking-to-market process of open positions in Cleared CDS. This should strengthen confidence in ICE Trust as a CCP for CDS, thus promoting participation in central clearing of CDS.

Third, ICE Trust 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 Trust's ability to act as a CCP for non-excluded CDS, and given ICE Trust's representation that the end-of-day settlement pricing process, including the periodically required trading, is integral to its risk management.

### *D. Modified and Extended Temporary Conditional General Exemption for ICE Trust and Certain Eligible Contract Participants*

As we recognized when we initially provided temporary exemptions in connection with CDS clearing by ICE Trust, 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

<sup>41</sup> 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.

<sup>42</sup> 15 U.S.C. 78f. Section 6 of the Exchange Act also sets forth various requirements to which a national securities exchange is subject.

<sup>43</sup> We are making a technical modification to this exemption so it refers to ICE Trust's clearing members rather than "ICE Trust Participants." The latter defined term was used in our earlier Order consistent with the scope of that Order, and the term no longer is necessary given the expansion of our exemptive relief to accommodate customer clearing by ICE Trust. See note 46, *infra*.

agreements already are subject to those provisions.<sup>44</sup>

As a result, we concluded that it is appropriate in the public interest and consistent with the protection of investors temporarily to apply substantially the same framework to transactions by market participants in non-excluded CDS that applies to transactions in security-based swap agreements. Consistent with that conclusion, we temporarily exempted ICE Trust, and certain members and eligible contract participants from a number of Exchange Act requirements, 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 Trust through this type of temporary exemption will provide important risk management benefits and systemic benefits. We also believe that facilitating the central clearing of customer CDS transactions, subject to the conditions in this Order, will provide an opportunity for the customers of ICE Trust clearing members to control counterparty risk.

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until March 7, 2010 from certain requirements under the Exchange Act. To account for the additional relief we are granting in connection with customer CDS clearing by ICE Trust, we are modifying the parameters of the relief we previously granted.

<sup>44</sup> While Section 3A of the Exchange Act excludes "swap agreements" from the definition of "security," certain antifraud and insider trading provisions under the Exchange Act explicitly apply to security-based swap agreements. See (a) paragraphs (2) through (5) of Section 9(a), 15 U.S.C. 78i(a), prohibiting the manipulation of security prices; (b) Section 10(b), 15 U.S.C. 78j(b), and underlying rules prohibiting fraud, manipulation or insider trading (but not prophylactic reporting or recordkeeping requirements); (c) Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices; (d) Sections 16(a) and (b), 15 U.S.C. 78p(a) and (b), which address disclosure by directors, officers and principal stockholders, and short-swing trading by those persons, and rules with respect to reporting requirements under Section 16(a); (e) Section 20(d), 15 U.S.C. 78t(d), providing for antifraud liability in connection with certain derivative transactions; and (f) Section 21A(a)(1), 15 U.S.C. 78u-1(a)(1), related to the Commission's authority to impose civil penalties for insider trading violations.

"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.

As revised, this temporary exemption applies to ICE Trust and to any eligible contract participants<sup>45</sup>—including any ICE Trust clearing member<sup>46</sup>—other than: Eligible contract participants that are self-regulatory organizations; or eligible contract participants that are registered brokers or dealers.<sup>47</sup>

As before, under this temporary 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.<sup>48</sup> In addition, all provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions would remain applicable.<sup>49</sup> In this way, the temporary exemption would apply the same Exchange Act requirements in connection with non-excluded CDS as apply in connection with OTC credit default swaps.

In light of the temporary conditional exemption—discussed below—that we are granting from certain Exchange Act requirements related to broker-dealers, we are modifying this temporary exemption by excluding from its scope the broker-dealer registration requirements of Section 15(a)(1),<sup>50</sup> and the other requirements of the Exchange Act, including paragraphs (4) and (6) of Section 15(b),<sup>51</sup> and the rules and

<sup>45</sup> This exemption in general applies to eligible contract participants, as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order, other than persons that are eligible contract participants under paragraph (C) of that section.

<sup>46</sup> The prior exemption specifically applied to any "ICE Trust Participant," which was defined to exclude those members that submitted customer CDS trades for clearing. In light of our expansion of the ICE Trust relief to accommodate customer clearing, we no longer are limiting the exemption in that way, and are not using the "ICE Trust Participant" definition.

<sup>47</sup> A separate temporary exemption addresses the Cleared CDS activities of registered broker-dealers. See Part II.F, *infra*. Solely for purposes of this Order, a registered broker-dealer, or a broker or dealer registered under Section 15(b) of the Exchange Act, does not refer to someone that would otherwise be required to register as a broker or dealer solely as a result of activities in Cleared CDS in compliance with this Order.

<sup>48</sup> See note 44, *supra*.

<sup>49</sup> 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.

<sup>50</sup> 15 U.S.C. 78o(a)(1).

<sup>51</sup> Exchange Act Sections 15(b)(4) and 15(b)(6), 15 U.S.C. 78o(b)(4) and (b)(6), grant the Commission

regulations thereunder that apply to a broker or dealer that is not registered with the Commission.

Consistent with our earlier exemptions, and for the same reasons, this temporary exemption also does not extend to: the exchange registration requirements of Exchange Act Sections 5 and 6;<sup>52</sup> the clearing agency registration requirements of Exchange Act Section 17A; the requirements of Exchange Act Sections 12, 13, 14, 15(d), and 16;<sup>53</sup> or certain provisions related to government securities.<sup>54</sup>

To take advantage of this temporary exemption from Exchange Act requirements, moreover, ICE Trust clearing members must be in material compliance with ICE Trust rules. Also, to help promote compliance with the exemption—discussed below—that we are granting from certain Exchange Act requirements specifically related to broker-dealers, this more general Exchange Act exemption is conditioned on any ICE Trust clearing member that participates in the clearing of Cleared CDS transactions on behalf of other persons annually providing a certification to ICE Trust that attests to whether the clearing member is relying on the temporary exemption from broker-dealer related requirements described below.<sup>55</sup>

authority to take action against broker-dealers and associated persons in certain situations.

<sup>52</sup> 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 Trust, discussed above, at note 41 and accompanying text.

<sup>53</sup> 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*.

<sup>54</sup> This exemption specifically does not extend to the Exchange Act provisions applicable to government securities, as set forth in Section 15C, 15 U.S.C. 78o-5, and its underlying rules and regulations; nor does the exemption extend to related definitions found at paragraphs (42) through (45) of Section 3(a), 15 U.S.C. 78c(a). The Commission does not have authority under Section 36 to issue exemptions in connection with those provisions. See Exchange Act Section 36(b), 15 U.S.C. 78mm(b).

<sup>55</sup> This condition requiring clearing members to convey information to ICE Trust as a repository for regulators, and other conditions of this Order that require clearing members or others to convey

*E. Conditional Temporary Exemption from Broker-Dealer Related Requirements for Certain Clearing Members of ICE Trust and Others*

The March ICE Trust Order did not address clearing of customer transactions by ICE Trust, and that order thus did not provide ICE Trust clearing members that hold customer collateral in connection with cleared CDS transactions with an exemption from broker-dealer requirements under the Exchange Act. Absent an exception or exemption, persons that effect transactions in non-excluded CDS that are securities may be required to register as broker-dealers pursuant to Section 15(a)(1) of the Exchange Act.<sup>56</sup> Moreover, certain other requirements of the Exchange Act could apply to such persons, as broker-dealers, regardless of whether they are registered with the Commission.

It is consistent with our investor protection mandate to require securities intermediaries that receive or hold funds and securities on behalf of others to comply with standards that safeguard the interests of their customers. For example, a registered broker-dealer is required to segregate assets held on behalf of customers from proprietary assets because segregation will assist customers in recovering assets in the event the broker-dealer fails. To the extent that funds and securities are not segregated, they could be used by an intermediary to fund its own business and could be attached to satisfy debts of the intermediary if it were to fail.<sup>57</sup>

information (e.g., an audit report related to the clearing member's compliance with exemptive conditions) to ICE Trust, does not impose upon ICE Trust any independent duty to audit or otherwise review that information. These conditions also do not impose on ICE Trust any independent fiduciary or other obligation to any customer of a clearing member.

<sup>56</sup> Section 15(a)(1) generally provides that, absent an exception or exemption, a broker or dealer that uses the mails or any means of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of, any security must register with the Commission.

Section 3(a)(4) of the Exchange Act generally defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others," but excludes certain bank securities activities. 15 U.S.C. 78c(a)(4). Section 3(a)(5) of the Exchange Act generally defines a "dealer" as "any person engaged in the business of buying and selling securities for his own account," but includes exceptions for certain bank activities. 15 U.S.C. 78c(a)(5). Exchange Act Section 3(a)(6) defines a "bank" as a bank or savings association that is directly supervised and examined by state or federal banking authorities (with certain additional requirements for banks and savings associations that are not chartered by a federal authority or a member of the Federal Reserve System). 15 U.S.C. 78c(a)(6).

<sup>57</sup> In the context of the December 15 commitment for customer CDS clearing, an ISDA buy-side/sell-

Moreover, the maintenance of adequate capital and liquidity protects customers, CCPs and other market participants. Adequate books and records (including both transactional and position records) are necessary to facilitate day to day operations as well as to help resolve situations in which an intermediary fails and either a regulatory authority or receiver is forced to liquidate the firm. Appropriate records also are necessary to allow examiners to review for improper activities, such as insider trading or fraud.

At the same time, requiring intermediaries that receive or hold funds and securities on behalf of customers in connection with transactions in non-excluded CDS to register as broker-dealers may deter the use of CCPs in customer CDS transactions, which would cause customers to lose the counterparty risk benefits of central clearing, and would lessen the systemic risk reduction benefits associated with central clearing.

Those factors argue in favor of flexibility in applying the requirements of the Exchange Act to these intermediaries, conditioned on requiring the intermediaries to take reasonable steps to help increase the likelihood that their customers would be protected in the event the intermediary became insolvent, even if those safeguards are as not as strong as those required of registered broker-dealers. This requires us to balance the goals of promoting the central clearing of customer CDS transactions against the goal of protecting customers, and to be mindful that these conditions cannot provide legal certainty that customer collateral in fact would be protected in the event an ICE Trust clearing member were to become insolvent.

In granting the temporary exemption, we also are relying on ICE Trust's representation that before offering the Non-Member Framework, it will adopt a requirement that non-U.S. clearing

side committee issued a report extensively analyzing the legal issues associated with segregating the collateral that customers post with members. See Distilled Report (Jul. 13, 2009) ([http://www.newyorkfed.org/markets/Distilled\\_Report.pdf](http://www.newyorkfed.org/markets/Distilled_Report.pdf)); Full Report (Jun. 30, 2009) ([http://www.newyorkfed.org/markets/Full\\_Report.pdf](http://www.newyorkfed.org/markets/Full_Report.pdf)); see also Press Release, "New York Fed Welcomes CDS Central Counterparty Legal Analysis" (Jul. 13, 2009) (<http://www.newyorkfed.org/newsevents/news/markets/2009/an090713.html>) ("Segregation and portability are key elements in building robust central counterparties. We requested the analysis because market participants were not making enough progress to analyze and address these buy-side issues. This is a good first step and, as we move the OTC derivatives market to central clearing, we will work to strengthen the regulatory and legal environment for buy-side clearing," said William C. Dudley, president of the New York Fed.").

members subject to the framework are regulated by: (i) A signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, or (ii) a signatory to a bilateral arrangement with the Commission for enforcement cooperation.<sup>58</sup>

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant a conditional exemption until March 7, 2010, with respect to certain Exchange Act requirements related to broker-dealers. This exemption is available to ICE Trust clearing members other than registered broker-dealers. This exemption also is available to any eligible contract participant, other than a registered broker-dealer, that does not receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons.<sup>59</sup> Solely with respect to Cleared CDS, those persons temporarily will be exempt from the broker-dealer registration requirements of Section 15(a)(1), and the other requirements of the Exchange Act (other than paragraphs (4) and (6) of Section 15(b))<sup>60</sup> and the

<sup>58</sup> Non-U.S. clearing members that do not meet these criteria would not be eligible to rely on this exemption.

<sup>59</sup> In some circumstances, an eligible contract participant that does not hold customer funds or securities nonetheless may act as a dealer in securities transactions, or as a broker (such as an inter-dealer broker).

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

<sup>60</sup> As noted above, see note 51, *supra*, Exchange Act Sections 15(b)(4) and 15(b)(6) grant the Commission authority to take action against broker-dealers and associated persons in certain situations. Accordingly, while this exemption from broker-dealer requirements generally extends to persons that act as broker-dealers in the market for Cleared CDS (potentially including inter-dealer brokers that do not hold funds or securities for others), such persons may be subject to actions under Sections 15(b)(4) and (b)(6) of the Exchange Act.

rules and regulations thereunder that apply to a broker or dealer that is not registered with the Commission.

For all ICE Trust clearing members—regardless of whether they receive or hold customer collateral in connection with Cleared CDS—this temporary exemption is conditioned on the clearing member being in material compliance with ICE Trust’s rules, as well as on the clearing member being in compliance with applicable laws and regulations relating to capital, liquidity, and segregation of customers’ funds and securities (and related books and records provisions) with respect to Cleared CDS.

For ICE Trust clearing members that receive or hold funds or securities of U.S. persons (or who receive or hold funds or securities of any person in the case of a U.S. clearing member)—other than for an affiliate that controls, is controlled by, or is under common control with the clearing member—in connection with Cleared CDS, this temporary exemption further is conditioned on the customer not being a natural person, and on the clearing member providing certain risk disclosures to the customer.<sup>61</sup>

Also, those clearing members that receive or hold such customer funds or securities must transfer those funds and securities, as promptly as practicable after receipt, to either the Custodial Client Omnibus Margin Account at ICE Trust<sup>62</sup> or an account held by a third-party custodian, as described below.

Collateral that is held at a third-party custodian, moreover, must either be held: (1) In the name of the customer, subject to an agreement in which the customer, the clearing member and the custodian are parties, acknowledging that the assets held therein are customer

assets used to collateralize obligations of the customer to the clearing member, and that the assets held in the account may not otherwise be pledged or rehypothecated by the clearing member or the custodian; or (2) in an omnibus account for which the clearing member maintains daily records as to the amount owing to each customer, and which is subject to an agreement between the clearing member and the custodian specifying: (i) That all account assets are held for the exclusive benefit of the clearing member’s customers and are being kept separate from any other accounts that the clearing member maintains with the custodian; (ii) that the account assets may not be used as security for a loan to the clearing member by the custodian, and shall be subject to no right, charge, security interest, lien, or claim of any kind in favor of the custodian or any person claiming through the custodian; and (iii) that the assets may not otherwise be pledged or rehypothecated by the clearing member or the custodian.<sup>63</sup> Under either approach, the third-party custodian cannot be affiliated with the clearing member.<sup>64</sup> Moreover, if the third-party custodian is a U.S. entity, it must be a bank (as that term is defined in Section 3(a)(6) of the Exchange Act), have total regulatory capital of at least \$1 billion,<sup>65</sup> and have been approved to engage in a trust business by an appropriate regulatory agency. A custodian that is not a U.S. entity must have regulatory capital of at least \$1 billion,<sup>66</sup> and must

<sup>63</sup> We do not contemplate that either of these approaches involving the use of a third-party custodian would interfere with the ability of a clearing member and its customer to agree as to how any return or losses earned on those assets would be distributed between the clearing member and its customer.

Also, the restriction in both approaches on the clearing member’s and the custodian’s ability to rehypothecate these customer funds and securities does not preclude that collateral from being transferred to ICE Trust as necessary to satisfy variation margin requirements in connection with the customer’s CDS position.

<sup>64</sup> For purposes of the Order, an “affiliated person” of a clearing member mean any person who directly or indirectly controls a clearing member or any person who is directly or indirectly controlled by or under common control with a clearing member; ownership of 10 percent or more of an entity’s common stock will be deemed *prima facie* control of that entity. This standard is analogous to the standard used to identify affiliated persons of broker-dealers under Exchange Act Rule 15c3–3(a)(13), 17 CFR 240.15c3–3(a)(13).

<sup>65</sup> In particular, custodians that are U.S. entities must have total capital, as calculated to meet the applicable requirements imposed by the entity’s appropriate regulatory agency, of at least \$1 billion. The term “appropriate regulatory agency” is defined in Section 3(a)(34) of the Exchange Act, 15 U.S.C. 78c(a)(34).

<sup>66</sup> Custodians that are non-U.S. entities, particularly must have total capital, as calculated to

provide the clearing member, the customer and ICE Trust with a legal opinion providing that the account assets are subject to regulatory requirements in the custodian’s home jurisdiction designed to protect, and provide for the prompt return of, custodial assets in the event of the custodian’s insolvency, and that the assets held in that account reasonably could be expected to be legally separate from the clearing member’s assets in the event of the clearing member’s insolvency. Also, cash collateral posted with the third-party custodian may be invested in other assets, consistent with the investment policies that govern collateral held at ICE Trust.<sup>67</sup> Finally, a clearing member that uses a third-party custodian to hold customer collateral must notify ICE Trust of that use.

To the extent there is any delay in the clearing member transferring such funds and securities to ICE Trust or a third-party custodian,<sup>68</sup> the clearing member must effectively segregate the collateral in a way that, pursuant to applicable law, could reasonably be expected to effectively protect the collateral from the clearing member’s creditors. The clearing member may not permit customers to “opt out” of such segregation even if applicable regulations or laws otherwise would permit such “opt out.”

To facilitate compliance with the segregation practices that are required as a condition to this temporary exemption, the clearing member also must annually provide ICE Trust with a self-assessment that it is in compliance with the requirements, along with a report by the clearing member’s independent third-party auditor that attests to that assessment. The report must be dated the same date as the clearing member’s annual audit report (but may be separate from it), and must be produced in accordance with the standards that the auditor follows in auditing the clearing member’s financial statements.

Finally, to support these segregation practices and enhance the ability to detect and deter circumstances in which clearing members fail to segregate customer collateral consistent with the exemption, this temporary exemption is conditioned on the clearing member

meet the applicable requirements imposed by the foreign financial regulatory authority of at least \$1 billion. The term “foreign financial regulatory authority” is defined in Section 3(a)(52) of the Exchange Act, 15 U.S.C. 78c(a)(52)).

<sup>67</sup> See note 26, *supra*.

<sup>68</sup> This provision is intended to address short-term technology or operational issues. ICE Trust rules require collateral to be transferred promptly on receipt, with the expectation that margin would be transferred on the same business day.

In addition, such persons may be subject to actions under Exchange Act Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices. As noted above, Section 15(c)(1) explicitly applies to security-based swap agreements. Sections 15(b)(4), 15(b)(6) and 15(c)(1), of course, would not apply to persons subject to this exemption who do not act as broker-dealers or associated persons of broker-dealers.

<sup>61</sup> The clearing member must disclose that it is not regulated by the Commission and that U.S. broker-dealer segregation requirements and protections under the Securities Investor Protection Act will not apply, that the insolvency law of the applicable jurisdiction may affect the customer’s ability to recover funds and securities or the speed of any such recovery, and (if applicable) that non-U.S. members may be subject to an insolvency regime that is materially different from that applicable to U.S. persons.

<sup>62</sup> Cash collateral transferred to ICE Trust may be invested in “Eligible Custodial Assets,” as defined in ICE Trust’s “Custodial Asset Policies.” See note 26 *supra* and accompanying text. Also, collateral transferred to ICE Trust may be held at a subcustodian.

agreeing to provide the Commission with access to information related to Cleared CDS transactions.<sup>69</sup> In particular, the clearing member would provide the Commission (upon request and subject to agreements reached between the Commission or the U.S. Government and an appropriate foreign securities authority<sup>70</sup>) with information or documents within the clearing member's possession, custody, or control, as well as testimony of clearing member personnel and assistance in taking the evidence of other persons, that relates to Cleared CDS transactions. If, after the clearing member has exercised its best efforts to provide this information (including requesting the appropriate governmental body and, if legally necessary, its customers), the clearing member nonetheless is prohibited from providing the information by applicable foreign law or regulations, this temporary exemption shall not longer be available to the clearing member.<sup>71</sup>

We recognize that requiring clearing members that receive or hold customer collateral to satisfy these conditions will not guarantee that a customer would receive the return of its collateral in the event of a clearing member's insolvency, particularly in light of the fact-specific nature of the insolvency process and the multiplicity of insolvency regimes that may apply to ICE Trust's members clearing for U.S. customers. We believe, however, that these are reasonable steps for increasing the likelihood that customers would be able to access collateral in such an insolvency event. We also recognize that these customers generally may be expected to be sophisticated market participants that should be able to weigh the risks associated with entering into arrangements with intermediaries that are not registered broker-dealers, particularly in light of the disclosure

<sup>69</sup> This requirement for clearing members to make information available to the Commission is consistent with a requirement in Exchange Act Rule 15a-6, which exempts certain foreign broker-dealers from registering with the Commission. See Exchange Act Rule 15a-6(a)(3)(i)(B).

<sup>70</sup> The term "foreign securities authority" is defined in Section 3(a)(50) of the Exchange Act, 15 U.S.C. 78c(a)(50).

<sup>71</sup> Consistent with the discussion above as to the loss of an exemption due to an underlying representation no longer being accurate, see note 8, *supra*, if a clearing member were to lose the benefit of this exemption due to the failure to provide information to the Commission as the result of a prohibition by an applicable foreign law or regulation, the legal status of existing open positions in non-excluded CDS associated with those clearing members and its customers would remain unchanged, but the clearing member could not establish new CDS positions pursuant to the exemption.

required as a condition to this temporary exemption.

#### *F. Extended Temporary General Exemption for Certain Registered Broker-Dealers*

When we initially provided exemptions in connection with CDS clearing by ICE Trust, we granted limited exemptions from Exchange Act requirements to registered broker-dealers in connection with their activities involving Cleared CDS. In crafting these temporary exemptions, 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 Trust 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 until March 7, 2010.<sup>72</sup>

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 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.<sup>73</sup> As above, and

<sup>72</sup> The temporary exemptions addressed above—with regard to ICE Trust, 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).

<sup>73</sup> See notes 44 and 49, *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

for similar reasons, we are not exempting registered broker-dealers from: Sections 5, 6, 12(a) and (g), 13, 14, 15(b)(4), 15(b)(6), 15(d), 16 and 17A of the Exchange Act.<sup>74</sup>

Further we are not exempting registered broker-dealers from the following additional provisions under the Exchange Act: (1) Section 7(c),<sup>75</sup> regarding the unlawful extension of credit by broker-dealers; (2) Section 15(c)(3),<sup>76</sup> regarding the use of unlawful or manipulative devices by broker-dealers; (3) Section 17(a),<sup>77</sup> regarding broker-dealer obligations to make, keep and furnish information; (4) Section 17(b),<sup>78</sup> regarding broker-dealer records subject to examination; (5) Regulation T,<sup>79</sup> 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 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.<sup>80</sup> Registered broker-dealers must comply with these provisions in connection with their activities involving non-excluded CDS because these provisions are especially important to helping protect customer funds and securities, ensure proper credit practices and safeguard against fraud and abuse.<sup>81</sup>

#### *G. Solicitation of Comments*

When we granted our initial exemptions relief in connection with CDS clearing by ICE Trust, we solicited comment on all aspects of the exemptions, and specifically requested

and risks, such as policies relating to restrictions or limitations on trading financial instruments or products), these requirements would continue to apply to broker-dealers' activities with respect to Cleared CDS.

<sup>74</sup> We also are not exempting those members from provisions related to government securities, as discussed above.

<sup>75</sup> 15 U.S.C. 78g(c).

<sup>76</sup> 15 U.S.C. 78o(c)(3).

<sup>77</sup> 15 U.S.C. 78q(a).

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

<sup>79</sup> 12 CFR 220.1 *et seq.*

<sup>80</sup> 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.

<sup>81</sup> Indeed, Congress directed the Commission to promulgate broker-dealer financial responsibility rules, including rules relating to custody, the use of customer securities, the use of customers' deposits or credit balances, and the establishment of minimum financial requirements.

comment as to the duration of the temporary exemptions, the appropriateness of the exemptive conditions, and whether ICE Trust should be required to register as a clearing agency under the Exchange Act. We received no comments in response to this request.

In connection with this Order extending the exemptions granted in connection with CDS clearing by ICE Trust, and expanding that relief to accommodate central clearing of customer CDS transactions, we reiterate our request for comments on all aspects of the exemptions. We particularly request comments as to the relief we are granting in connection with customer clearing, including whether ICE Trust members that clear customer CDS transactions should be required to register as broker-dealers, whether the conditions that we have placed on the relief adequately protect customer funds and securities from the threat posed by clearing member insolvency, whether additional conditions or requirements are appropriate to promote compliance with the requirements of the exemptions, and what, if any, additional conditions would be appropriate. We also particularly request comment on whether additional conditions, such as a segregation requirement, are necessary to protect customers' mark-to-market profits associated with Cleared CDS transactions that are held at clearing members; in that regard, commenters particularly are invited to discuss whether, in practice, there are impediments to customers receiving such mark-to-market profits from their clearing members promptly after they are earned.

Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/other.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-05-09 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 Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090. All submissions should refer to File Number S7-05-09. This file number should be included on the subject line if e-mail is used. To help us process and

review your comments more efficiently, please use only one method. We will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/other.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 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 March 7, 2010:

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

ICE Trust U.S. LLC ("ICE Trust") 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 (f)(1) of this Order), subject to the following conditions:

(1) ICE Trust shall make available on its Web site its annual audited financial statements.

(2) ICE Trust 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 Trust shall supply information and periodic reports relating to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission, and 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 Trust's Cleared CDS clearance and settlement services.

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

circumstances that led to ICE Trust's disciplinary action.

(5) ICE Trust shall notify the Commission of all changes to 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, the day before effectiveness or implementation of such rule changes or, in exigent circumstances, as promptly as reasonably practicable under the circumstances. All such rule changes will be posted on ICE Trust's Web site. Such notifications will not be deemed rule filings that require Commission approval.

(6) ICE Trust shall provide the Commission with reports prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements. ICE Trust shall provide the Commission (beginning in its first year of operation) with its annual audited financial statements prepared by independent audit personnel.

(7) ICE Trust shall report all significant systems outages to the Commission. If it appears that the outage may extend for 30 minutes or longer, ICE Trust shall report the systems outage immediately. If it appears that the outage will be resolved in less than 30 minutes, ICE Trust shall report the systems outage within a reasonable time after the outage has been resolved.

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

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

(1) ICE Trust 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 Trust 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 Trust shall establish and maintain adequate safeguards and procedures to protect clearing members' confidential trading information. Such safeguards and procedures shall include:

(A) Limiting access to the confidential trading information of clearing members to those employees of ICE Trust 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 Trust trading for their own accounts. ICE Trust must establish and maintain adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed; and

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

(c) Exemption for ICE Trust, ICE Trust clearing members, and certain eligible contract participants.

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

(i) ICE Trust; and

(ii) 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)), including any ICE Trust clearing member, other than:

(A) 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

(B) 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 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) The broker-dealer registration requirements of Section 15(a)(1), and the other requirements of the Exchange Act (including paragraphs (4) and (6) of Section 15(b)) and the rules and regulations thereunder that apply to a broker or dealer that is not registered with the Commission;

(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 Trust clearing members.

(i) Any ICE Trust clearing member relying on this exemption must be in material compliance with the rules of ICE Trust.

(ii) Any ICE Trust clearing member relying on this exemption that participates in the clearing of Cleared CDS transactions on behalf of other persons must annually provide a certification to ICE Trust that attests to whether the clearing member is relying

on the exemption from broker-dealer related requirements set forth in paragraph (d) of this Order.

(d) Exemption from broker-dealer related requirements for ICE Trust clearing members and certain eligible contract participants.

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

(i) Any ICE Trust clearing member (other than one that is registered as a broker or dealer under Section 15(b) of the Exchange Act (other than paragraph (11) thereof)); and

(ii) Any eligible contract participant that does not receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons (other than one that is registered as a broker or dealer under Section 15(b) of the Exchange Act (other than paragraph (11) thereof)).

(2) Scope of exemption. The persons described in paragraph (d)(1) shall, solely with respect to Cleared CDS, be exempt from the broker-dealer registration requirements of Section 15(a)(1) and the other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)) and the rules and regulations thereunder that apply to a broker or dealer that is not registered with the Commission, subject to the conditions set forth in paragraph (d)(3) with respect to ICE Trust clearing members.

(3) Conditions for ICE Trust clearing members.

(i) General condition for ICE Trust clearing members. An ICE Trust clearing member relying on this exemption must be in material compliance with the rules of ICE Trust, and also must be in material compliance with applicable laws and regulations relating to capital, liquidity, and segregation of customers' funds and securities (and related books and records provisions) with respect to Cleared CDS.

(ii) Additional conditions for ICE Trust clearing members that receive or hold customer funds or securities. Any ICE Trust clearing member that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for U.S. persons (or for any person if the clearing member is a U.S. clearing member)—other than for an affiliate that controls, is controlled by, or is under common control with the clearing member—also shall comply with the following conditions with respect to such activities:

(A) The U.S. person (or any person if the clearing member is a U.S. clearing member) for whom the clearing member

receives or holds such funds or securities shall not be natural persons;

(B) The clearing member shall disclose to such U.S. person (or to any such person if the clearing member is a U.S. clearing member) that the clearing member is not regulated by the Commission and that U.S. broker-dealer segregation requirements and protections under the Securities Investor Protection Act will not apply to any funds or securities held by the clearing member, that the insolvency law of the applicable jurisdiction may affect such persons' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding, and, if applicable, that non-U.S. clearing members may be subject to an insolvency regime that is materially different from that applicable to U.S. persons;

(C) As promptly as practicable after receipt, the clearing member shall transfer such funds and securities (other than those promptly returned to such other person) to:

(I) The clearing member's Custodial Client Omnibus Margin Account at ICE Trust; or

(II) an account held by a third-party custodian, subject to the following requirements:

(a) The funds and securities must be held either:

(1) In the name of a customer, subject to an agreement to which the customer, the clearing member and the custodian are parties, acknowledging that the assets held therein are customer assets used to collateralize obligations of the customer to the clearing member, and that the assets held in that account may not otherwise be pledged or rehypothecated by the clearing member or the custodian; or

(2) in an omnibus account for which the clearing member maintains a daily record as to the amount held in the account that is owed to each customer, and which is subject to an agreement between the clearing member and the custodian specifying that:

(i) all assets in that account are held for the exclusive benefit of the clearing member's customers and are being kept separate from any other accounts maintained by the clearing member with the custodian;

(ii) the assets held in that account shall at no time be used directly or indirectly as security for a loan to the clearing member by the custodian and shall be subject to no right, charge, security interest, lien, or claim of any kind in favor of the custodian or any person claiming through the custodian; and

(iii) the assets held in that account may not otherwise be pledged or rehypothecated by the clearing member or the custodian;

(b) The custodian may not be an affiliated person of the clearing member (as defined at paragraph (f)(2)); and

(1) If the custodian is a U.S. entity, it must be a bank (as that term is defined in section 3(a)(6) of the Exchange Act), have total capital, as calculated to meet the applicable requirements imposed by the entity's appropriate regulatory agency (as defined in section 3(a)(34) of the Exchange Act), of at least \$1 billion, and have been approved to engage in a trust business by its appropriate regulatory agency;

(2) if the custodian is not a U.S. entity, it must have total capital, as calculated to meet the applicable requirements imposed by the foreign financial regulatory authority (as defined in section 3(a)(52) of the Exchange Act) responsible for setting capital requirements for the entity, equating to at least \$1 billion, and provide the clearing member, the customer and ICE Trust with a legal opinion providing that the assets held in the account are subject to regulatory requirements in the custodian's home jurisdiction designed to protect, and provide for the prompt return of, custodial assets in the event of the insolvency of the custodian, and that the assets held in that account reasonably could be expected to be legally separate from the clearing member's assets in the event of the clearing member's insolvency;

(c) such funds may be invested in Eligible Custodial Assets as that term is defined in ICE Trust's Custodial Asset Policies; and

(d) the clearing member must provide notice to ICE Trust that it is using the third-party custodian to hold customer collateral.

(D) To the extent there is any delay in transferring such funds and securities to the third-parties identified in paragraph (C), the clearing member shall effectively segregate the collateral in a way that, pursuant to applicable law, is reasonably expected to effectively protect such funds and securities from the clearing member's creditors. The clearing member shall not permit such persons to "opt out" of such segregation even if regulations or laws otherwise would permit such "opt out."

(E) The clearing member annually must provide ICE Trust with

(I) an assessment by the clearing member that it is in compliance with all the provisions of paragraphs (d)(3)(i)(A) through (D) in connection with such activities, and

(II) a report by the clearing member's independent third-party auditor that attests to, and reports on, the clearing member's assessment described in paragraph (d)(3)(i)(E)(I) and that is

(a) dated as of the same date as, but which may be separate and distinct from, the clearing member's annual audit report;

(b) produced in accordance with the auditing standards followed by the independent third party auditor in its audit of the clearing member's financial statements.

(F) The clearing member shall provide the Commission (upon request or pursuant to agreements reached between the Commission or the U.S. Government and any foreign securities authority (as defined in Section 3(a)(50) of the Exchange Act)) with any information or documents within the possession, custody, or control of the clearing member, any testimony of personnel of the clearing member, and any assistance in taking the evidence of other persons, wherever located, that the Commission requests and that relates to Cleared CDS transactions, except that if, after the clearing member has exercised its best efforts to provide the information, documents, testimony, or assistance, including requesting the appropriate governmental body and, if legally necessary, its customers (with respect to customer information) to permit the clearing member to provide the information, documents, testimony, or assistance to the Commission, the clearing member is prohibited from providing this information, documents, testimony, or assistance by applicable foreign law or regulations, then this exemption shall not longer be available to the clearing member.

(e) 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.

(f) Definitions.

(1) For purposes of this Order, the term "Cleared CDS" shall mean a credit

default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to ICE Trust, 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 (1).

(2) For purposes of this Order, the term "Affiliated Person of the Clearing Member" shall mean any person who directly or indirectly controls a clearing member or any person who is directly or indirectly controlled by or under common control with the clearing member. Ownership of 10 percent or more of the common stock of the relevant entity will be deemed *prima facie* control of that entity.

December 4, 2009.

By the Securities and Exchange Commission.

**Florence E. Harmon,**  
*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-61104; File No. SR-NYSEArca-2009-106]

**Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Arca, Inc. Relating to the Listing Fee and Annual Fee Applicable to Derivative Securities Products**

December 3, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the

"Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on November 24, 2009, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

NYSE Arca, through its wholly owned subsidiary NYSE Arca Equities, Inc. ("NYSE Arca Equities"), is proposing to amend its Schedule of Fees and Charges for Exchange Services ("Fee Schedule") to revise the Listing Fees and Annual Fees applicable to Derivative Securities Products listed on NYSE Arca, LLC ("NYSE Arca Marketplace"), the equities facility of NYSE Arca Equities. The revised portions of the Fee Schedule are attached to the filing as Exhibit 5. A copy of this filing is available on the Exchange's Web site at <http://www.nyx.com>, at the Exchange's principal office and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

**1. Purpose**

NYSE Arca has determined to amend the Exchange's Schedule of Fees and Charges for Exchange Services to revise the Listing Fee and Annual Fee applicable to Derivative Securities Products ("DSPs") listed on the NYSE Arca Marketplace.<sup>3</sup> Specifically, the

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> As specified in footnote 3 to the Fee Schedule, for the purposes of the Fee Schedule, the term

Exchange proposes to increase the Listing Fee for each issue of DSPs, with the exception of Managed Fund Shares listed under NYSE Arca Equities Rule 8.600, and Managed Trust Securities listed under NYSE Arca Equities Rule 8.700, from \$5,000 to \$7,500. For Managed Fund Shares and Managed Trust Securities, the Listing Fee will be \$10,000.

In addition, the Exchange proposes to amend the Annual Fee applicable to DSPs. For DSPs, with the exception of Managed Fund Shares and Managed Trust Securities, the Exchange proposes to increase the Annual Fee to \$5,000 for each such issue with fewer than 25 million shares outstanding; \$7,500 for each such issue with 25 million to 49,999,999 shares outstanding; and \$10,000 for each such issue with 50 million to 99,999,999 shares outstanding. The current Annual Fee for all DSP issues is \$2,000 for an issue with less than 25 million shares outstanding; \$4,000 for an issue with 25 million to 49,999,999 shares outstanding; and \$8,000 for an issue with 50 million to 99,999,999 shares outstanding. For DSP issues, except for Managed Fund Shares and Managed Trust Securities, that have 100 million shares or more outstanding, the Annual Fee will remain unchanged.

For Managed Fund Shares and Managed Trust Securities, the Exchange proposes to impose an Annual Fee for each such issue as follows:

Shares outstanding (each issue)	Annual fee
Less than 25 million .....	\$7,500
25 million up to 49,999,999 .....	10,000
50 million up to 99,999,999 .....	12,500
100 million up to 249,999,999 .....	20,000
250 million up to 499,999,999 .....	30,000
500 million and over .....	40,000

The Exchange believes that the proposed increases in the Listing Fee and, for certain DSPs, in the Annual Fee, are reasonable and appropriate in view of the increased costs incurred by the Exchange to support the rule making process, listing administration process, issuer services, and consultative legal services provided to issuers in support of new product development as the industry evolves with innovative product lines for investors.

"Derivative Securities Products" includes securities described in NYSE Arca Equities Rules 5.2(j)(3) (Investment Company Units); 8.100 (Portfolio Depositary Receipts); 8.200 (Trust Issued Receipts); 8.201 (Commodity-Based Trust Shares); 8.202 (Currency Trust Shares); 8.203 (Commodity Index Trust Shares); 8.204 (Commodity Futures Trust Shares); 8.300 (Partnership Units); 8.500 (Trust Units); 8.600 (Managed Fund Shares), and 8.700 (Managed Trust Securities).