certain geographic areas requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

1. *Applicant:* Permit Application No. 2011–023, Joseph Levy, Department of Geology, Portland State University, PO Box 751, Portland, OR 97207–0751.

Activity for Which Permit is Requested: Take and Import into the USA. The applicant plans to enter the Garwood Valley to collect algal mats from sediment outcrops where exposed, and from the surface of ponds. The goal of the project is to define the rate of geomorphic change in Garwood Valley in response to changing climate conditions. The geomorphic record will be reconstructed over the past 1-=2- kyr to infer past climate-driven landscape alteration at the end of the LGM and examine the current episode of landscape changes, including assessing the thermal equilibrium of buried massive ice. The past and current geomorphic changes will be used as a guide for predicting landscape response in the Dry Valleys should the >130 km^2 of ice-cored terrain in the valleys also begin to melt.

Location: Garwood Valley, Dry Valleys.

Dates: January 1, 2011 to February 1, 2014.

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. 2010–30337 Filed 12–2–10; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0331]

Appointments To Performance Review Boards for Senior Executive Service

AGENCY: Nuclear Regulatory Commission.

ACTION: Appointment to Performance Review Board for Senior Executive Service.

SUMMARY: This notice announces a change in the membership of the Senior Executive Service Performance Review Board for the U.S. Nuclear Regulatory Commission (NRC).

SUPPLEMENTARY INFORMATION: On October 26, 2010 (75 FR 65673), the NRC published its list of Performance Review Board appointees pursuant to the regulations at 5 CFR 430.310 (74 FR 51261). This notice announces the appointment of Charles L. Miller to the Performance Review Board in place of Catherine Haney, who is unavailable to participate this year. The NRC Performance Review Board (PRB) is responsible for making recommendations to the appointing and awarding authorities on performance appraisal ratings and performance awards for Senior Executives and Senior Level employees. For the public's convenience, an updated membership list of the Performance Review Board is provided below:

Darren B. Ash, Deputy Executive Director for Corporate Management, Office of the Executive Director for Operations;
R. W. Borchardt, Executive Director for Operations;
Stephen G. Burns, General Counsel;
Elmo E. Collins, Jr., Regional Administrator, Region IV;
Margaret M. Doane, Director, Office of International Programs;
James E. Dyer, Chief Financial Officer;
Kathryn O. Greene, Director, Office of Administration;
Eric J. Leeds, Director, Office of Nuclear Reactor Regulation;
Charles L. Miller, Director, Office of Federal and State Materials and Environmental Management Programs;
Martin J. Virgilio, Deputy Executive Director for Reactor and Preparedness Programs, Office of the Executive Director for Operations;
Michael F. Weber, Deputy Executive Director for Materials, Waste, Research, State, Tribal, and Compliance Programs, Office of the Executive Director for Operations;
James T. Wiggins, Director, Office of Nuclear Security and Incident Response.

The following individuals will serve as members of the NRC PRB Panel that was established to review appraisals and make recommendations to the appointing and awarding authorities for NRC PRB members:

Marvin L. Itzkowitz, Associate General Counsel for Hearings, Enforcement, and Administration, Office of the General Counsel;
Michael R. Johnson, Director, Office of New Reactors;
Brian W. Sheron, Director, Office of Nuclear Regulatory Research.

All appointments are made pursuant to Section 4314 of Chapter 43 of Title 5 of the United States Code.

DATES: *Effective Date:* December 3, 2010.

FOR FURTHER INFORMATION CONTACT: Secretary, Executive Resources Board, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 492–2076.

Dated at Bethesda, Maryland, this 23rd day of November, 2010.

For the U.S. Nuclear Regulatory Commission,

Miriam Cohen,

Secretary, Executive Resources Board.

[FR Doc. 2010–30354 Filed 12–2–10; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63387; File No. S7–05–09]

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

November 29, 2010.

I. Introduction

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

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

In March 2009, the Commission issued an order providing temporary conditional exemptions to ICE Trust U.S. LLC ("ICE Trust"), and certain other parties, to permit ICE Trust to clear and settle CDS transactions.[2] In response to ICE Trust's request, the Commission temporarily extended and expanded the exemptions in December 2009 and in March 2010.[3] The current exemptions pursuant to the March 2010 ICE Trust Exemptive Order are scheduled to expire on November 30, 2010, and ICE Trust has requested that the Commission extend and modify the exemptions contained in the March 2010 ICE Trust Exemptive Order.[4]

The Commission's current authority over the OTC market for CDS is limited.[5] Specifically, Section 3A of the Securities Exchange Act of 1934 ("Exchange Act") limits the Commission's authority over swap agreements, as defined in Section 206A of the Gramm-Leach-Bliley Act.[6] 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.

II. Discussion

A. Legislative Developments

Subsequent to the Commission's issuance of the March 2010 ICE Trust Exemptive Order, the President signed the Dodd-Frank Act into law.[7] The Dodd-Frank Act was enacted to, among other purposes, promote the financial stability of the United States by improving accountability and transparency in the financial system.[8] To this end, the provisions of Title VII of the Dodd-Frank Act provide for the comprehensive regulation of security-based swaps[9] by the Commission.[10] The Dodd-Frank Act amends the Exchange Act to require, among other things, that transactions in security-based swaps be cleared through a clearing agency that is registered with the Commission or that is exempt from registration if they are of a type that the Commission determines must be cleared, unless an exception or exemption from mandatory clearing applies.[11] Furthermore, Title VII of the Dodd-Frank Act provides that a depository institution that cleared swaps as a multilateral clearing organization prior to the date of enactment of the Dodd-Frank Act, such as ICE Trust, is deemed registered as a clearing agency for the purposes of clearing security-based swaps ("Deemed Registered Provision").[12] The Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011.[13] As a result, ICE Trust will no longer need the exemption from registration as a clearing agency under Section 17A of the Exchange Act provided by the March 2010 ICE Trust Exemptive Order, and previous orders, to clear security-based swaps after the Deemed Registered Provision becomes effective.

B. ICE Trust's Request for Extension of March 2010 ICE Trust Exemptive Order

ICE Trust seeks an extension of the relief provided by the March 2010 ICE Trust Exemptive Order, as modified herein.[14] In ICE Trust's request for an extension of the March 2010 ICE Trust Exemptive Order, ICE Trust represents that there have been no material changes to the operations of ICE Trust, and that the representations made by ICE Trust in connection with the March 2010 ICE Trust Exemptive Order remain true in all material respects.[15] These representations are discussed in detail in our earlier ICE Trust orders.

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

[2] Securities Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009).

[3] Securities Exchange Act Release Nos. 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009) and 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010).

[4] *See* Letter from Kevin McClear, ICE Trust, to Elizabeth Murphy, Secretary, Commission, Nov. 29, 2010 ("November 2010 Request").

[5] Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") addresses limitations on the Commission's current authority in this area. As discussed in Part II.A *infra,* provisions of Title VII of the Dodd-Frank Act generally become effective on July 16, 2011.

[6] 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.

[7] Public Law 111–203 (July 21, 2010).

[8] *See* Public Law 111–203, Preamble.

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

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

[11] *See* Section 763(a) of the Dodd-Frank Act (adding new Section 3C(a)(1) to the Exchange Act, 15 U.S.C. 78c-2).

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

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

[14] *See* November 2010 Request, *supra* note 6.

[15] *See id.* ICE Trust indicated in its November 2010 Request Letter that it intends to apply to the CFTC for registration as a derivatives clearing organization in advance of the date Title VII of the Dodd-Frank Act goes into effect in order to facilitate implementation of the Dodd-Frank Act requirements. As part of the transition to derivatives clearing organization status, ICE Trust expects to admit futures commission merchants registered with the CFTC (which may be registered broker-dealers) as clearing members for customer clearing and may introduce related changes to its rules. *See* Part II.G, *infra.*

[16] 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,

Continued

based on the facts presented and the representations made by ICE Trust,[17] and for the reasons discussed in this Order and subject to certain conditions, the Commission is extending, subject to the modifications discussed in this Order, each of the existing exemptions connected with CDS clearing by ICE Trust, which include: The temporary conditional exemption granted to ICE Trust from clearing agency registration under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS; the temporary conditional exemption of 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 certain non-excluded CDS cleared by ICE Trust; the temporary conditional exemption of certain eligible contract participants and others from certain Exchange Act requirements with respect to certain non-excluded CDS cleared by ICE Trust; the temporary conditional exemption of ICE Trust clearing members and certain others from broker-dealer registration requirements and related requirements in connection with CDS clearing by ICE Trust (including clearing of customer CDS transactions); and the temporary conditional exemption from certain Exchange Act requirements granted to registered broker-dealers with respect to certain non-excluded CDS.

C. Extended and Modified Temporary Conditional Exemption From Clearing Agency Registration Requirement

In the March 2010 ICE Trust Exemptive Order, the Commission granted a temporary conditional exemption from clearing agency registration under Section 17A of the Exchange Act to permit ICE Trust to act as a CCP for Cleared CDS[18] 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.

In the March 2010 ICE Trust Exemptive 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 exemptions in the March 2010 ICE Trust Exemptive Order were subject to a number of conditions designed to enable Commission staff to monitor ICE Trust's clearance and settlement of CDS transactions.[19] Moreover, the temporary exemptions in the March 2010 ICE Trust Exemptive Order in part were 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: *Recommendations for Central Counterparties* ("RCCP").[20] The RCCP establishes a framework that requires a CCP to have: (i) The ability to facilitate the prompt and accurate clearance and settlement of CDS transactions and to safeguard its users' assets; and (ii) sound risk management, including the ability to appropriately determine and collect clearing fund and monitor its users' trading. This framework is generally consistent with the requirements of Section 17A of the Exchange Act.

The Commission believes that continuing to facilitate the central clearing of CDS transactions—including customer CDS transactions—through a temporary conditional exemption from Section 17A will continue to provide important risk management and systemic benefits by avoiding an interruption in those CCP clearance and settlement services pending the effective date of Title VII of the Dodd-Frank Act and the related Deemed Registered Provision. Any interruption in CCP clearance and settlement services for CDS transactions would eliminate the benefits ICE Trust provides to the non-excluded CDS market.

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 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 continue to monitor the competitive effects of ICE Trust's rules and operations under this exemptive relief 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.[21]

This temporary extension of the March 2010 ICE Trust Exemptive Order

to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

[17] *See* November 2010 Request, *supra* note 6. The exemptions we are granting today are based on all of the representations made by ICE Trust in its request, which incorporate representations made by ICE Trust in connection with the March 2010 ICE Trust Exemptive Order, which in turn incorporates representations related to our earlier exemptive orders. 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.

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

[19] *See* Securities Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009).

[20] 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 CFTC.

[21] ICE Trust has no rule requiring an executing dealer to be a clearing member. As an operational matter, ICE Trust currently has one authorized trade processing platform for submission of client CDS transactions, ICE Link. Currently, ICE Link does not have a mechanism by which a non-member dealer could submit a transaction for clearing at ICE Trust. However, ICE Trust Clearing Rule 314 provides for open access to ICE Trust's clearing systems for all reasonably qualified execution venues and trade processing platforms. ICE Trust has represented that it remains committed to work with reasonably qualified execution venues and trade processing platforms to facilitate functionality for submission of trades by non-member dealers if there is interest in such functionality. *See* Letter from Kevin McClear, ICE Trust, to Elizabeth Murphy, Secretary, Commission, Mar. 5, 2010.

also is designed to assure that—as represented in ICE Trust's request—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 CDS.[22] 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.

Accordingly, and consistent with our findings in the ICE Trust Exemptive Orders and for the reasons described herein, the Commission finds pursuant to Section 36 of the Exchange Act[23] that it is necessary and appropriate in the public interest and is consistent with the protection of investors for the Commission to extend, as modified herein, until July 16, 2011, the relief provided from the clearing agency registration requirements of Section 17A by the March 2010 ICE Trust Exemptive Order.

This temporary extension of the March 2010 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[24] and its annual audited financial statements prepared by independent audit personnel; and (vii) report all significant systems outages to the Commission.

This temporary extension of the March 2010 ICE Trust Exemptive Order is also 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.[25]

This temporary extension of the March 2010 ICE Trust Exemptive Order is modified by adding one condition. If any ICE Trust clearing member that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons is a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof), and is permitted under the Financial Industry Regulatory Authority ("FINRA") rules to use the applicable margin pursuant to ICE Trust rules as a minimum for computing customer or broker-dealer margin, ICE Trust shall not materially change its methodology for determining Cleared CDS margin levels without prior written approval from the Commission staff, and from FINRA with respect to customer margin requirements that would apply to broker-dealers.

D. Extended Temporary Conditional Exemption From Exchange Registration Requirements

In the March 2010 ICE Trust Exemptive Order, the Commission 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. The Commission 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,[26] while Section 6 provides the procedures for registering as a national securities exchange.[27]

The Commission 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. As part of this mark-to-market process, ICE Trust has periodically required its clearing members to execute certain CDS trades at the price at which certain quotations of the clearing members cross. ICE Trust represents that it wishes to continue periodically requiring clearing members to execute certain CDS trades in this manner.

As discussed above, the Commission has found in general that it is necessary or appropriate in the public interest, and is consistent with the protection of

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

[23] *See supra* note 16.

[24] *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. S7–12–19.

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

[26] 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.

[27] 15 U.S.C. 78f. Section 6 of the Exchange Act also sets forth various requirements to which a national securities exchange is subject.

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—the Commission further finds that it is necessary or appropriate in the public interest, and is consistent with the protection of investors that the Commission exercise its authority under Section 36 of the Exchange Act to extend, until July 16, 2011, 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.

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.

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 restricting the trading by employees of ICE Trust 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.

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.

E. Extended Temporary Conditional General Exemption for ICE Trust, Certain ICE Trust Clearing Members, and Certain Eligible Contract Participants

As the Commission recognized when it 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. The Commission also recognized that it is important that the antifraud provisions of the Exchange Act apply to transactions in non-excluded CDS, particularly given that OTC transactions subject to individual negotiation that qualify as security-based swap agreements already are subject to those provisions.[28]

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

The Commission believes 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. The Commission also believes 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 extend the relief provided by the March 2010 ICE Trust Exemptive Order, until July 16, 2011, related to ICE Trust's, and certain members' and eligibility contract participants' exemption from certain requirements under the Exchange Act, as modified herein.

This temporary conditional exemption applies to ICE Trust and to any eligible contract participants [29]—including any ICE Trust clearing member—other than eligible contract participants that are self-regulatory organizations, registered brokers or dealers, or futures commission merchants registered pursuant to Section 4f(a)(1) of the CEA that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons.[30]

As before, under this temporary conditional exemption, and solely with respect to Cleared CDS, those persons generally are exempt from the provisions of the Exchange Act and the rules and regulations thereunder that do not apply to security-based swap agreements. Thus, those persons would still be subject to those Exchange Act

[28] 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.

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

[30] A separate temporary exemption addresses the Cleared CDS activities of registered broker-dealers (including broker-dealers that are also registered as futures commission merchants pursuant to Section 4f(a)(1) of the CEA). *See* Part II.H, *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. In addition, a separate temporary exemption addresses the Cleared CDS activities of a futures commission merchant registered pursuant to Section 4f(a)(1) of the CEA (but that is not registered as a broker-dealer under Section 15(b) of the Exchange Act (other than paragraph 11 thereof)) that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons. *See* Part II.G, *infra*.

requirements that explicitly are applicable in connection with security-based swap agreements.[31] 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.[32] In this way, the temporary conditional exemption would apply the same Exchange Act requirements in connection with non-excluded CDS as apply in connection with OTC credit default swaps.

Consistent with the March 2010 ICE Trust Exemption Order, this temporary conditional exemption does not extend to: the exchange registration requirements of Exchange Act Sections 5 and 6;[33] the clearing agency registration requirements of Exchange Act Section 17A; the requirements of Exchange Act Sections 12, 13, 14, 15(d), and 16;[34] the broker-dealer registration requirements of Section 15(a)(1)[35] and the other requirements of the Exchange Act, including paragraphs (4) and (6) of Section 15(b),[36] and the rules and regulations thereunder that apply to a broker or dealer that is not registered with the Commission; or certain provisions related to government securities.[37]

As before, any ICE Trust clearing member relying on this temporary conditional exemption from Exchange Act requirements must be in material compliance with ICE Trust rules to be eligible for this exemption. In addition, any ICE Trust clearing member relying on this exemption that participates in the clearing of Cleared CDS transactions on behalf of other persons annually must provide a certification to ICE Trust that attests to whether the clearing member is relying on the temporary conditional exemption from broker-dealer related requirements described below.[38]

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

In the March 2010 ICE Trust Exemptive Order, the Commission granted a conditional temporary exemption from particular Exchange Act requirements to certain clearing members of ICE Trust, and to certain eligible contract participants, in connection with CDS cleared on ICE Trust. 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.[39] Certain reporting and other requirements of the Exchange Act could apply to such persons, as broker-dealers, regardless of whether they are registered with the Commission.

In granting that exemption, the Commission noted that 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.[40] The Commission recognized, however, that 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, to the detriment of the markets and market participants generally. The Commission concluded that those factors, along with certain representations of ICE Trust,[41] argued 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 not as strong as those required of registered broker-dealers.

As a result, and solely with respect to Cleared CDS, the Commission provided a temporary conditional exemption 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)[42]) and the rules and

[31] *See* note 28, *supra.*

[32] 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.

[33] This Order includes a separate temporary exemption from Sections 5 and 6 in connection with the mark-to-market process of ICE Trust, discussed above, at Section II.D.

[34] 15 U.S.C. 78*l,* 78m, 78n, 78o(d), 78p. Eligible contract participants and other persons instead should refer to the interim final temporary rules issued by the Commission.

[35] 15 U.S.C. 78o(a)(1).

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

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

[38] 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 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.

[39] 15 U.S.C. 78o(a)(1). This section 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).

[40] Registered broker-dealers are required to segregate assets held on behalf of customers from proprietary assets, because segregation will assist customers in recovering assets in the event the intermediary fails. Absent such segregation, collateral could be used by an intermediary to fund its own business, and could be attached to satisfy the intermediary's debts were it to fail. 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.

[41] We noted that in granting the temporary exemption, we also relied on ICE Trust's representation that before offering the Non-Member Framework, it will adopt a requirement that non-U.S. clearing 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. We further noted that non-U.S. clearing members that do not meet these criteria would not be eligible to rely on this exemption.

[42] As noted above, *see* note 36, *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 the exemption we granted from broker-dealer requirements generally extended 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.

In addition, such persons may be subject to actions under Exchange Act Section 15(c)(1), 15

Continued

regulations thereunder that apply to a broker or dealer that is not registered with the Commission, to: (i) ICE Trust clearing members other than registered broker-dealers; and (ii) 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.[43]

That exemption was subject to a number of conditions. 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, these included a condition requiring the clearing member, as promptly as practicable after receipt, to transfer such funds and securities (other than those promptly returned to such other persons) to either the Custodial Client Omnibus Margin Account at ICE Trust or to an account held by a third-party custodian. Additional related conditions addressed the types of permissible arrangements for holding collateral at a third-party custodian, and permissible custodians.[44] These conditions requiring customer collateral to be segregated from clearing members address only the initial margin that customers post in connection with Cleared CDS.

As before, the Commission is required 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. The Commission believes that the segregation framework set forth in the earlier orders represents a reasonable step to help protect the collateral posted by customers of ICE Trust's clearing members from the threat of loss in the event of clearing member insolvency.

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 extend, as modified herein, until July 16, 2011, relief provided from certain Exchange Act requirements related to broker-dealers by the March 2010 ICE Trust Exemption Order.[45]

This exemption is available to ICE Trust clearing members other than registered broker-dealers or futures commission merchants registered pursuant to Section 4f(a)(1) of the CEA that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons.[46] As before, this relief is also 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.[47] As before, and 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)) and the rules and regulation thereunder that apply to a broker or dealer that is not registered with the Commission.

As before, 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.

Additional conditions apply to ICE Trust clearing members that receive or hold funds or securities of U.S. persons (or that 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. For those ICE Trust clearing members, this temporary exemption is conditioned on the customer not being a natural person, and on the clearing member providing certain risk disclosures to the customer.[48]

In addition, such clearing members must, as promptly as practical after receipt, transfer such funds and securities—other than those promptly returned to such other person—to either the Custodial Client Omnibus Margin Account at ICE Trust[49] or an account held by a third-party custodian, as described below.

As before, collateral that is held at a third-party custodian 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

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.

[43] 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).

[44] Other conditions of this exemption precluded the clearing of CDS transaction for natural persons, required certain risk disclosures to customers, required 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, and required the clearing member to agree to provide the Commission with access to information related to Cleared CDS transactions.

[45] As before, in granting this relief we are relying on representations by ICE Trust that non-U.S. clearing members that provide their customers with access to CDS clearing on ICE Trust 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. Non-U.S. clearing members that do not meet these criteria would not be eligible to rely on this exemption.

[46] Only registered broker-dealers were excluded in the March 2010 ICE Trust Exemptive Order.

[47] 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).

[48] 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.

[49] Cash collateral transferred to ICE Trust may be invested in "Eligible Custodial Assets," as defined in ICE Trust's "Custodial Asset Policies." Also, collateral transferred to ICE Trust may be held at a subcustodian.

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.[50] Under either approach, the third-party custodian cannot be affiliated with the clearing member.[51] 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,[52] 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,[53] and must 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.[54] Finally, a clearing member that uses a third-party custodian to hold customer collateral must notify ICE Trust of that use.

As before, to the extent there is any delay in the clearing member transferring such funds and securities to ICE Trust or a third-party custodian,[55] 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."

Also, as before, this temporary exemption is conditioned on clearing member compliance with a self-assessment and audit requirement,[56] and on the clearing member's agreement to provide the Commission with access to information related to Cleared CDS transactions.[57]

As the Commission discussed in the March 2010 ICE Trust Exemptive Order, requiring clearing members that receive or hold customer collateral to satisfy such 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. The Commission believes, however, that these steps will increase the likelihood that customers would be able to access collateral in such an insolvency event. The Commission also recognizes 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 required as a condition to this temporary exemption.

[50] 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.

[51] 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. *See* definition in paragraph III.(g)(2) of this Order. 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).

[52] 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).

[53] Custodians that are non-U.S. entities must have total capital, as calculated to 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).

[54] *See* note 49, *supra.*

[55] 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.

[56] In particular, to facilitate compliance with the segregation practices that are required as a condition to this temporary exemption, the clearing member 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.

As the self-assessment is intended to serve as the basis for the third-party auditor's report, we expect the self-assessment to be generally contemporaneous with that report.

[57] Specifically, 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 agreeing to provide the Commission with access to information related to Cleared CDS transactions. This requirement is consistent with a requirement in Exchange Act Rule 15a–6(a)(3)(i)(B), which exempts certain foreign broker-dealers from registering with the Commission. *See* Exchange Act Rule 15a–6(a)(3)(i)(B).

Under this condition, 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, *see* Section 3(a)(50) of the Exchange Act, 15 U.S.C. 78c(a)(50)), 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 conditional exemption would no longer be available to the clearing member.

Consistent with the discussion above as to the loss of an exemption due to an underlying representation no longer being accurate, *see* note 17, *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.

G. Conditional Temporary Exemption for Certain Clearing Members of ICE Trust That Are Registered Futures Commission Merchants

Absent an exception or exemption, futures commission merchants 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.[58] Moreover, certain reporting and 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 that intermediaries in securities transactions that receive or hold funds and securities on behalf of others comply with standards that safeguard the interests of their customers. 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, prior to the effective date of the Dodd-Frank Act, to register as broker-dealers may deter the use of CCPs in CDS transactions, to the detriment of the markets and market participants generally.

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 July 16, 2011 from certain Exchange Act requirements. In general, the Commission is providing a temporary exemption, subject to the conditions discussed below, to any ICE Trust clearing member registered as a futures commission merchant pursuant to Section 4f(a)(1) of the CEA (but that is not registered as a broker-dealer under Section 15(b) of the Exchange Act (other than paragraph (11) thereof)) that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling or holding Cleared CDS positions for other persons. Solely with respect to Cleared CDS, those members generally will be exempt from those provisions of the Exchange Act and the underlying rules and regulations that do not apply to security-based swap agreements. This exemption does not extend to Exchange Act provisions that explicitly apply in connection with security-based swap agreements,[59] or to related enforcement authority provisions.[60]

This temporary exemption also does not extend to: The exchange registration requirements of Exchange Act Sections 5 and 6;[61] the clearing agency registration requirements of Exchange Act Section 17A; the requirements of Exchange Act Sections 12, 13, 14, 15(d), and 16;[62] the Commission's administrative proceeding authority under Sections 15(b)(4) and (b)(6);[63] or certain provisions related to government securities.[64]

This temporary exemption is subject to the clearing member complying with conditions that are important for protecting customer funds and securities. Any ICE Trust clearing member relying on this temporary exemption must be in material compliance with the rules of ICE Trust, and 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.[65] In addition, the customers for whom the clearing member receives or holds such funds or securities may not be natural persons, and the clearing member must make certain risk disclosures to those customers.[66]

This temporary exemption is further conditioned on funds or securities received or held by the clearing member for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for those customer being held: (i) In an account established pursuant to Section 4d of the CEA; or (ii) in the absence of a 4d Order from the CFTC, in an account that is part of a separate account class, specified by CFTC Bankruptcy Rules,[67] established for a futures commission merchant to hold its customers' positions and collateral in cleared OTC derivatives.

To facilitate compliance with these segregation conditions, the clearing member—regardless of the type of account discussed above that it uses—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.[68] Finally, an ICE Trust clearing member that receives or holds funds or securities of customers for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions shall segregate such funds and securities of customers from the ICE Trust clearing member's own assets (*i.e.,* the member may not permit the customers to "opt out" of applicable segregation requirements for such funds and securities even if regulations or laws would permit the customer to "opt out").

H. Extended and Modified Temporary General Exemption for Certain Registered Broker-Dealers

The March 2010 ICE Trust Exemptive Order included limited exemptions from Exchange Act requirements to registered broker-dealers in connection with their activities involving Cleared CDS. In crafting these temporary exemptions, the Commission balanced the need to avoid creating disincentives to the prompt use of CCPs against the critical role that certain broker-dealers

[58] 15 U.S.C. 78o(a)(1). This section 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.

[59] *See* note 28, *supra.*

[60] 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.

[61] This Order also includes a separate temporary exemption from Sections 5 and 6 in connection with the settlement price calculation methodology of ICE Trust. *See* Part II.D, *supra.*

[62] 15 U.S.C. 78*l,* 78m, 78n, 78o(d), 78p. Futures commission merchants instead should refer to the interim final temporary rules issued by the Commission. *See* note 1, *supra.*

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

[64] 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).

[65] The term "customer," solely for purposes of Part III.(e) and (f)2, *infra,* and corresponding references in this Order, means a "customer" as defined under CFTC Regulation 1.3(k). 17 CFR 1.3(k).

[66] The clearing member must disclose that it is not regulated by the Commission, 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 to collateralize Cleared CDS, and that the applicable insolvency law may affect such customers' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding.

[67] 17 CFR 190.01 *et seq.*

[68] 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.

This condition requiring the clearing member to convey a third-party audit report to ICE Trust as a repository for regulators does not impose upon ICE Trust any independent duty to audit or otherwise review that information. This condition also does not impose on ICE Trust any independent fiduciary or other obligation to any customer of a clearing member.

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 prior to the effective date of the Dodd-Frank Act, 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 July 16, 2011, subject to certain modifications discussed below.[69]

Consistent with the temporary exemptions discussed above, and solely with respect to Cleared CDS, the Commission is temporarily exempting registered broker-dealers, including registered broker-dealers that are also registered as futures commission merchants pursuant to Section 4f(a)(1) of the CEA ("BD–FCMs"), from provisions of the Exchange Act and the rules and regulations thereunder that do not apply to security-based swap agreements, subject to certain conditions. The Commission is not excluding registered broker-dealers, including BD–FCMs, from Exchange Act provisions that explicitly apply in connection with security-based swap agreements or from related enforcement authority provisions.[70] As above, and for similar reasons, the Commission is not exempting registered broker-dealers, including BD–FCMs, 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.[71]

Further the Commission is not exempting registered broker-dealers, including BD–FCMs (except as discussed below), from the following additional provisions under the Exchange Act: (1) Section 7(c),[72] regarding the unlawful extension of credit by broker-dealers; (2) Section 15(c)(3),[73] regarding the use of unlawful or manipulative devices by broker-dealers; (3) Section 17(a),[74] regarding broker-dealer obligations to make, keep and furnish information; (4) Section 17(b),[75] regarding broker-dealer records subject to examination; (5) Regulation T,[76] a Federal Reserve Board regulation regarding extension of credit by broker-dealers; (6) Exchange Act Rule 15c3–1,[77] regarding broker-dealer net capital; (7) Exchange Act Rule 15c3–3,[78] regarding broker-dealer reserves and custody of securities; (8) Exchange Act Rules 17a–3 through 17a–5,[79] 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,[80] regarding quarterly security counts to be made by certain exchange members and broker-dealers.[81] Registered broker-dealers, including BD–FCMs (except as discussed below), 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.[82]

ICE Trust clearing members that are BD–FCMs and that receive or hold customer funds or securities for the purpose of purchasing, selling, clearing, settling, or holding CDS positions cleared by ICE Trust in a futures account (as that term is defined in Rule 15c3–3(a)(15)) [83] also shall be exempt from Exchange Act Rule 15c3–3, subject to conditions that are similar to those—discussed above—that are applicable to ICE Trust clearing members that are FCMs but are not registered broker-dealers and that hold customer funds and securities in connection with Cleared CDS transactions. Thus, such BD–FCMs must be in material compliance with ICE Trust rules, as well as 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. A BD–FCM may not receive or hold funds or securities relating to Cleared CDS transactions and positions for customers who are natural persons. In addition, the BD–FCM must make certain risk disclosures to each such customer.[84] Further, the BD–FCM must hold the customer funds or securities in the same type of account as is required for other futures commission merchants that hold customer funds and securities in connection with Cleared CDS transactions.[85] The BD–FCM also must segregate the funds and securities of customers from the ICE Trust clearing member's own assets (*i.e.,* the member may not permit the customers to "opt out" of applicable segregation requirements for such funds and securities even if regulations or laws would permit the customer to "opt out"). In addition, the BD–FCM 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

[69] 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).

[70] *See* note 28, *supra.* As noted above, broker-dealers also would be subject to Section 15(c)(1) of the Exchange Act, which prohibits brokers and dealers from using manipulative or deceptive devices, because that provision explicitly applies in connection with security-based swap agreements. In addition, to the extent the Exchange Act and any rule or regulation thereunder imposes any other requirement on a broker-dealer with respect to security-based swap agreements (*e.g.,* requirements under Rule 17h–1T to maintain and preserve written policies, procedures, or systems concerning the broker or dealer's trading positions and risks, such as policies relating to restrictions or limitations on trading financial instruments or products), these requirements would continue to apply to broker-dealers' activities with regard to Cleared CDS.

[71] *See* notes 33 and 34, *supra,* and accompanying text. We also are not exempting those members from provisions related to government securities, as discussed above. *See* note 37, *supra.*

[72] 15 U.S.C. 78g(c).

[73] 15 U.S.C. 78o(c)(3).

[74] 15 U.S.C. 78q(a).

[75] 15 U.S.C. 78q(b).

[76] 12 CFR 220.1 *et seq.*

[77] 17 CFR 240.15c3–1.

[78] 17 CFR 240.15c3–3.

[79] 17 CFR 240.17a–3 through 240.17a–5.

[80] 17 CFR 240.17a–13.

[81] 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.

[82] 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.

[83] 17 CFR 240.15c3–3(a)(15).

[84] The BD–FCM must disclose 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 to collateralize Cleared CDS positions, and that the applicable insolvency law may affect such customers' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding.

This BD–FCM condition differs from the analogous disclosure conditions related to other ICE Trust clearing members that hold customer funds and securities, in that the other conditions also require disclosure that the clearing member is not regulated by the Commission.

[85] As with the exemption applicable to those other ICE Trust clearing members, in the absence of a 4d order from the CFTC, the BD–FCM may hold the funds and securities in an account that is part of a separate account class, specified by CFTC Bankruptcy Rules, established for a futures commission merchant to hold its customers' positions in cleared OTC derivatives (and funds and securities posted to margin, guarantee, or secure such positions). *See* Part II.G, *supra.*

third-party auditor that attests to that assessment.[86]

Finally—and in addition to the conditions that are applicable to ICE Trust clearing members that are not broker-dealers and that hold customer funds and securities in connection with Cleared CDS transactions—the ICE Trust clearing member must comply with the margin rules for Cleared CDS of the self-regulatory organization that is its designated examining authority[87] (*e.g.,* FINRA).

I. Solicitation of Comments

When the Commission granted the March 2010 ICE Trust Exemptive Order extending the exemptions granted in connection with CDS clearing by ICE Trust, it requested comment on all aspects of the exemptions. The Commission received one comment in response to this request.[88]

In connection with this Order extending the exemptions granted in connection with CDS clearing by ICE Trust, the Commission reiterates the request for comments on all aspects of the exemptions.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml);* or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–05–09 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 Elizabeth M. Murphy, 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. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/other.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

III. Conclusion

It is hereby ordered, pursuant to Section 36(a) of the Exchange Act, that, until July 16, 2011:

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

ICE Trust U.S. LLC (ICE Trust U.S. LLC and any successor entity thereto is hereinafter referred to as "ICE Trust")[89] 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 (g)(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.

[86] 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. *See* text accompanying note 68, *supra.*

[87] *See* 17 CFR 240.17d–1 for a description of a designated examining authority.

[88] *See* Comment from Alessandro Cocco, Managing Director and Associate General Counsel, JP Morgan, Mar. 2, 2010, suggesting that customers' variation margin should not be required to be held in a segregated account. We also solicited comments earlier as part of the December 2009 ICE Trust Order and the March 2009 ICE Trust Order. We received one comment in response to our request to the December 2009 ICE Trust Order, *see* Comment from Kristie L. Lovelady, Dec. 9, 2009, requesting stronger restrictions generally, and no comments in response to our request to the March 2009 ICE Trust Order.

[89] ICE Trust has stated it intends to apply to the CFTC for registration as a derivatives clearing organization ("DCO") in advance of the Dodd-Frank Act implementation date to facilitate implementation of the Dodd-Frank Act requirements. ICE Trust has also indicated it may accomplish this transition by establishing a new entity registered as a DCO and either merging ICE Trust into the new DCO entity or transferring the assets and liabilities of ICE Trust to the new DCO entity. *See* November 2010 Request, *supra* note 4.

(9) If any ICE Trust clearing member that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons is a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof), and is permitted under FINRA rules to use the applicable margin pursuant to ICE Trust rules as a minimum for computing customer or broker-dealer margin, ICE Trust shall not materially change its methodology for determining Cleared CDS margin levels without prior written approval from the Commission staff, and from FINRA with respect to customer margin requirements that would apply to broker-dealers.

(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)–(9) 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, certain 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;

(B) A broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof); or

(C) A futures commission merchant registered pursuant to Section 4f(a)(1) of the Commodity Exchange Act that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons.

(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 certain 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) or one that is registered as a futures commission merchant pursuant to Section 4f(a)(1) of the Commodity Exchange Act that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons); 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 person's 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 (g)(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)(ii)(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)(ii)(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 no longer be available to the clearing member.

(e) Exemption for certain ICE Trust clearing members registered as futures commission merchants.

Any ICE Trust clearing member registered as a futures commission merchant pursuant to Section 4f(a)(1) of the Commodity Exchange Act (but that is not registered as a broker or dealer under Section 15(b) of the Exchange Act (other than paragraph (11) thereof)) that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS for other persons shall be exempt from the provisions of the Exchange Act and the rules and regulations thereunder specified in paragraph (c)(2), and 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, solely with respect to Cleared CDS, subject to the following conditions:

(1) The clearing member shall be in material compliance with the rules of ICE Trust and also shall 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;

(2) The customers for whom the clearing member receives or holds such funds or securities shall not be natural persons;

(3) The clearing member shall disclose to such customers that the clearing member is not regulated by the Commission, 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 to collateralize Cleared CDS positions, and that the applicable insolvency law may affect such customers' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding;

(4) Customer funds and securities received or held by the clearing member for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for such customers shall be held in one of the following manners:

(i) In an account established in accordance with section 4d of the Commodity Exchange Act and CFTC Rules 1.20 through 1.30 and 1.32 [17 CFR 1.20 through 1.30 and 1.32] thereunder; or

(ii) In the absence of an Order from the Commodity Futures Trading Commission ("CFTC") permitting the use of an account specified in subparagraph (e)(4)(i) for holding such funds and securities, in an account that is part of a separate account class, specified by CFTC Bankruptcy Rules [17 CFR 190.01 *et seq.*], established for a futures commission merchant to hold its customers' positions in cleared OTC derivatives (and funds and securities posted to margin, guarantee, or secure such positions);

(5) The clearing member annually shall provide ICE Trust with

(i) An assessment by the clearing member that it is in compliance with subparagraph (e)(4) 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 subparagraph (e)(5)(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; and

(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.

(6) To the extent that the clearing member receives or holds funds or securities of customers for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions, the clearing member shall segregate such funds and securities of customers from the clearing member's own assets (*i.e.,* the member may not permit such customers to "opt out" of applicable segregation requirements for such funds and securities even if regulations or laws would permit the customer to "opt out").

(f) Exemption for certain registered broker-dealers.

(1) In general. 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:

(i) Section 7(c);

(ii) Section 15(c)(3);

(iii) Section 17(a);

(iv) Section 17(b);

(v) Regulation T, 12 CFR 200.1 *et seq.;*

(vi) Rule 15c3–1;

(vii) Rule 15c3–3;

(viii) Rule 17a–3;

(ix) Rule 17a–4;

(x) Rule 17a–5; and

(xi) Rule 17a–13.

(2) Broker-dealers that also are futures commission merchants. An ICE Trust clearing member that is a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof) and that is also registered as a futures commission merchant pursuant to Section 4f(a)(1) of the Commodity Exchange Act and that receives or holds customer funds and securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS in a futures account (as that term is defined in Rule 15c3–3(a)(15) [17 CFR 240.15c3–3(a)(15)]) also shall be exempt from Exchange Act Rule 15c3–3, subject to the following conditions:

(i) The clearing member shall comply with the conditions set forth in paragraphs (e)(1), (2), (4), (5), and (6) above;

(ii) The clearing member shall disclose to Cleared CDS customers that the U.S. broker-dealer segregation requirements and protections under the Securities Investor Protection Act will not apply to funds or securities held by the clearing member to collateralize Cleared CDS positions, and that the applicable insolvency law may affect such customers' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding; and

(iii) The clearing member shall collect from each customer the amount of margin that is not less than the amount required for Cleared CDS under the margin rule of the self-regulatory organization that is its designated examining authority.

(g) 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.

IV. Paperwork Reduction Act

Certain provisions of this Order contain "collection of information requirements" within the meaning of the Paperwork Reduction Act of 1995.[90] The Commission has submitted the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. 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.

A. Collection of Information

The Commission found it to be necessary or appropriate in the public interest and consistent with the protection of investors to grant the conditional temporary exemptions discussed in this Order until July 16, 2011. Among other things, the Order would require certain ICE Trust clearing members that receive or holds customers' funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions to: (i) Provide ICE Trust with certain certifications/notifications, (ii) make certain disclosures to cleared CDS customers, (iii) enter into certain agreements to protect customer assets, (iv) maintain a record of each customer's share of assets maintained in an omnibus account, and (v) obtain a separate report, as part of its annual audit report, as to its compliance with the conditions of the ICE Trust Order regarding protection of customer assets. The Order also would require certain ICE Trust clearing members that receive or hold customers' funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions to: (a) Make certain disclosures to those customers; and (b) provide ICE Trust with a self-assessment as to its compliance with certain exemptive conditions, and obtain a separate report, as part of its annual audit report, as to its compliance with the conditions of the Order regarding protection of customer assets.

B. Proposed Use of Information

These collection of information requirements are designed, among other things, to inform cleared CDS customers that their ability to recover assets placed with the clearing member are dependent on the applicable insolvency regime, provide Commission staff with access to information regarding whether clearing members are complying with the conditions of the ICE Trust order, and provide documentation helpful for the protection of cleared CDS customers' funds and securities.

C. Respondents

Based on conversations with industry participants, the Commission understands that approximately 14 firms may be presently engaged as CDS dealers and thus may seek to be a clearing member of ICE Trust. In addition, 6 more firms may enter into this business. Consequently, the Commission estimates that ICE Trust, like the other CCPs that clear CDS transactions, may have up to 20 clearing members.

D. Total Annual Reporting and Recordkeeping Burden

Paragraph III.(c)(3)(ii) of this Order requires any ICE Trust clearing member relying on the exemptive relief specified in paragraph (c) that participates in the clearing of cleared CDS transactions on behalf of other persons to 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 that Order. The Commission estimates that it would take a clearing member approximately one half hour each year to complete the certification and provide it to ICE Trust, resulting in an aggregate burden of 10 hours per year for all 20 clearing members to comply with this requirement on an annual basis.[91]

Paragraph III.(d)(3)(ii)(C)(II)(*d*) of this Order requires that a clearing member notify ICE Trust if it is using a third-party custodian to hold customer collateral. The Commission estimates that it would take a clearing member approximately one half hour each year to draft a notification and provide it to ICE Trust, which would result in an aggregate burden of 10 hours per year for all 20 clearing members to comply with this requirement on an annual basis.[92]

Paragraph III.(d)(3)(ii)(B) of this Order requires an ICE Trust clearing member to disclose to its U.S. customers[93] 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 to any funds or securities it holds, that the insolvency law of the applicable jurisdiction may affect the customers' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding, and, if it is not a U.S. entity, that it may be subject to an insolvency regime that is materially different from that applicable to U.S. persons. The Commission believes that clearing members could use the language in the ICE Trust order that describes the disclosure that must be made as a template to draft the disclosure. Consequently the Commission estimates, based on staff experience, that it would take a clearing member approximately one hour to draft the disclosure. Further, the Commission believes clearing members will include this disclosure with other documents or agreements provided to cleared CDS customers and a clearing member may take approximately one half hour to

[90] 44 U.S.C. 3501 *et seq.*

[91] 10 hours = (20 clearing members × ½ hour per clearing member). This estimate is based on burden estimates published with respect to other Commission actions that contained similar certification requirements (*see e.g.,* Exchange Act Release No. 41661 (Jul 27, 1999) (64 FR 42012 (Aug. 3, 1999)), and the burden associated with the Year 2000 Operational Capability Requirements, including notification and certifications required by Rule 15b7–3T(e).

[92] *Id.*

[93] If the clearing member is a U.S. entity, it must make this disclosure to all of its customers.

determine how the disclosure should be integrated into those other documents or agreements, resulting in a one-time aggregate burden of 30 hours for all 20 clearing members to comply with this requirement.[94]

Paragraph III.(d)(3)(ii)(C)(II)(*a*)(*1*) of this Order requires that, if an ICE Trust clearing member chooses to segregate each of its customers' funds and securities in a separate account, it must obtain a tri-party agreement for each such account acknowledging that the assets held in the account 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 re-hypothecated by the clearing member or the custodian. Paragraph III.(d)(ii)(C)(II)(*a*)(*2*) of the ICE Trust order requires that, if an ICE Trust clearing member chooses to segregate its customers' funds and securities on an omnibus basis, it must obtain an agreement with the custodian with respect to the omnibus account acknowledging that the assets held in the account (i) are customer assets and are being kept separate from any other accounts maintained by the clearing member with the custodian, (ii) may 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) may not otherwise be pledged or re-hypothecated by the clearing member or the custodian. Opening a bank account generally includes discussions regarding the purpose for the account and a determination as to the terms and conditions applicable to such an account. The Commission understands that most banks presently maintain omnibus and other similar types of accounts that are designed to recognize legally that the assets in the account may not be attached to cover debts of the account holder. Thus the standard agreement for this type of account used by banks should contain the representations and disclosures required by the proposed amendment. However, a small percentage of clearing members may need to work with a bank to modify its standard agreement. The Commission estimates that 5% of the 20 clearing members, or 1 firm, may use a bank with a standard agreement that does not contain the required language.[95] The Commission further estimates each clearing member that uses a bank with a standard agreement that does not contain the required language would spend approximately 20 hours of employee resources working with the bank to update its standard agreement template. Therefore, the Commission estimates that the total one-time burden to the industry as a result of this proposed requirement would be approximately 20 hours.[96]

Paragraph III.(d)(3)(ii)(C)(II)(*a*)(*2*) of this Order further requires that the clearing member maintain a daily record as to the amount held in the omnibus account that is owed to each customer. The Commission included this requirement in the ICE Trust order to stress the importance of such a record. However it believes that a prudent clearing member likely would create and maintain such a record for business purposes. Consequently, the Commission believes this requirement would not create any additional paperwork burden.

Paragraph III.(d)(3)(ii)(E) of this Order requires ICE Trust clearing members that receive or hold customers' funds or securities for the purpose of purchasing, selling, clearing, settling, or holding cleared CDS positions annually to provide ICE Trust with an assessment that it is in compliance with all the provisions of paragraphs III.(d)(3)(ii)(A) through (D) of that order in connection with such activities, and a report by the clearing member's independent third-party auditor, as of the same date as the firm's annual audit report,[97] that attests to, and reports on, the clearing member's assessment. Paragraph III.(e)(5) of this Order requires ICE Trust clearing members that receive or hold customers' funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions annually to provide ICE Trust with an assessment that it is in compliance with all the provisions of paragraphs III.(e)(4)(i) through (iii) of that order in connection with such activities, and a report by the clearing member's independent third-party auditor, as of the same date as the firm's annual audit report,[98] that attests to, and reports on, the clearing member's assessment. Each clearing member will have to comply with either Paragraph III.(d)(3)(ii)(E) of this Order or Paragraph III.(e)(5) of this Order but not both. The Commission estimates that it will take each clearing member approximately five hours each year to assess its compliance with the requirements of the order relating to segregation of customer assets and attest that it is in compliance with those requirements.[99] Further, the Commission estimates that it will cost each clearing member approximately $200,000 more each year to have its auditor prepare this special report as part of its audit of the clearing member.[100] Consequently, the Commission estimates that compliance with this requirement will result in an aggregate annual burden of 100 hours for all 20 clearing members, and that the total additional cost of this requirement will be approximately $4,000,000 each year.[101]

Paragraph III.(e)(3) of the Order requires that any ICE Trust clearing

[94] 30 hours = (1 hour per clearing member to draft the disclosure + ½ hour per clearing member to determine how the disclosure should be integrated into those other documents or agreements) × 20 clearing members.

[95] This estimate is based on burden estimates published with respect to other Commission actions that contained similar certification requirements (*see e.g.,* Exchange Act Release No. 55431 (Mar. 9, 2007) (72 FR 12862 (Mar. 19, 2007)), and the burden associated with the amendments to the financial responsibility rules, including language required in securities lending agreements).

[96] 20 hours = (20 clearing members × 5%) × 20 hours to work with a bank to update its standard agreement template to include the necessary language.

[97] The Commission intends for this requirement to be performed in conjunction with the firm's annual audit report.

[98] The Commission intends for this requirement to be performed in conjunction with the firm's annual audit report.

[99] This estimate is based on burden estimates published with respect to other Commission actions that contained similar certification requirements (*see e.g.,* Securities Act Release No. 8138 (Oct. 9, 2002) (67 FR 66208 (Oct. 30, 2002)), and the burden associated with the Disclosure Required by the Sarbanes-Oxley Act of 2002, including requirements relating to internal control reports).

[100] This estimate is based on staff conversations with an audit firm. That firm suggested that the cost of such an audit report could range from $10,000 to $1 million, depending on the size of the clearing member, the complexity of its systems, and whether the work included a review of other systems already being reviewed as part of audit work the firms is already providing to the clearing member. The staff understands that it would be less costly to perform this type of audit if the clearing member chooses to forward all customer collateral to ICE Trust (an option allowed by this Order) and does not use any third party. The staff understands that most ICE Trust clearing members are large dealers whose audits likely include internal control reviews and SAS 70 reports regarding custody of customer assets, which would require a review of the same or similar systems used to comply with the audit report requirement in this order. Finally, the staff notes that if the clearing member were a futures commission merchant complying with Paragraph III.(e)(5) of this Order, an auditor already must review custody of customer assets pursuant to CFTC Rule 17 CFR 1.16(d)(1). Consequently, the Commission believes the cost of this requirement for FCMs may be lower than it would be for other types of entities that are not subject to a specific audit requirement to review custody of customer assets.

[101] 100 hours = (5 hours for each clearing member to assess its compliance with the requirements of the order relating to segregation of customer assets and attest that it is in compliance with those requirements × 20 clearing members). $4 million = $200,000 per clearing member × 20 clearing members.

member holding customer collateral in connection with cleared customer CDS transactions that seeks to rely on the exemptive relief specified in paragraph III.(e) of the Order to disclose to those customers that the clearing member is not regulated by the Commission, that U.S. broker-dealer segregation requirements and protections under the Securities Investor Protection Act will not apply to any funds or securities it holds, and that the applicable insolvency law may affect the customers' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding. The Commission believes that clearing members could use the language in the Order that describes the disclosure that must be made as a template to draft the disclosure. Consequently the Commission estimates, based on staff experience, that it would take a clearing member approximately one hour to draft the disclosure. Further, the Commission believes clearing members will include this disclosure with other documents or agreements provided to cleared CDS customers, and estimates (based on staff experience) that a clearing member may take approximately one half hour to determine how the disclosure should be integrated into those other documents or agreements, resulting in a one-time aggregate burden of 30 hours for all 20 clearing members to comply with this requirement.[102]

E. Collection of Information Is Mandatory

The collections of information contained in the conditions to this Order are mandatory for any entity wishing to rely on the exemptions granted by this Order.

F. Confidentiality

Certain of the conditions of this Order that address collections of information require ICE Trust clearing members to make disclosures to their customers, or to provide other information to ICE Trust (and in some cases also to customers). Apart from those requirements, the provisions of this Order that address collections of information do not address or restrict the confidentiality of the documentation prepared by ICE Trust clearing members under the exemptive conditions. Accordingly, ICE Trust clearing members would have to make the applicable information available to regulatory authorities or other persons to the extent otherwise provided by law.

G. Request for Comment on Paperwork Reduction Act

The Commission requests, pursuant to 44 U.S.C. 3506(c)(2)(B), comment on the collections of information contained in this Order to:

(i) Evaluate whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;

(ii) Evaluate the accuracy of the Commission's estimates of the burden of the collections of information;

(iii) Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and

(iv) Evaluate whether there are ways to minimize the burden of the collections of information on those required to respond, including through the use of automated collection techniques or other forms of information technology.

Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, and refer to File No. S7–05–09. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this document in the **Federal Register**; therefore, comments to OMB are best assured of having full effect if OMB receives them within 30 days of this publication. The Commission has submitted the proposed collections of information to OMB for approval. Requests for the materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–05–09, and be submitted to the Securities and Exchange Commission, Records Management Office, 100 F Street, NE., Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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[102] 30 hours = (1 hour per clearing member to draft the disclosure + ½ hour per clearing member to determine how the disclosure should be integrated into those other documents or agreements) × 20 clearing members.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63390; File No. S7–17–09]

Order Extending Temporary Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of Eurex Clearing AG Related to Central Clearing of Credit Default Swaps and Request for Comment

November 29, 2010.

I. Introduction

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

In July 2009, the Commission issued an order providing temporary conditional exemptions to Eurex Clearing AG ("Eurex"), and certain other parties, to permit Eurex to clear and settle CDS transactions.[2] In response to Eurex's request, the Commission temporarily extended and expanded the exemptions in April 2010.[3] The current

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

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

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