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July 23, 2009

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Attention: Elizabeth Murphy
Secretary

Re: Request for Exemption from Certain Provisions of the U.S. Securities Exchange Act of 1934 and the Securities Act of 1933 with Respect to Cleared Credit Default Swaps

Ladies and Gentlemen:

We are writing on behalf of ICE Clear Europe Limited ("ICE Clear Europe"), a UK Recognised Clearing House ("RCH"), regulated and supervised by the UK Financial Services Authority ("FSA"), and its ultimate parent IntercontinentalExchange, Inc. ("ICE"), a corporation organized under the laws of the State of Delaware, to request that the U.S. Securities and Exchange Commission ("Commission" or "SEC") grant, under the circumstances and subject to the conditions and representations set forth in this letter, certain exemptive relief to ICE Clear Europe, clearing members of ICE Clear Europe that clear credit default swaps ("CDS") through ICE Clear Europe ("CDS Clearing Members"), certain entities affiliated with CDS Clearing Members[1] ("CM Affiliates") and inter-dealer brokers ("IDBs") in connection with CDS entered into by such CDS Clearing Members (or CM Affiliates) with other CDS Clearing Members using any means or instrumentality of interstate commerce and submitted to ICE Clear Europe for clearance and settlement as described herein. Specifically, ICE Clear Europe requests that the Commission issue three exemptive orders or rules:

(i) An order pursuant to Section 17A(b)(1) of the U.S. Securities Exchange Act of 1934, as amended ("Exchange Act"), for the avoidance of uncertainty, exempting ICE Clear Europe from any requirement that it register with the Commission as a clearing agency

[1] For purposes of this request, an affiliate means an entity that directly, or indirectly through one or more intermediaries controls or is controlled by, or is under common control with a clearing member.



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pursuant to Section 17A of the Exchange Act, to the extent such provisions would otherwise be applicable to ICE Clear Europe, on the terms and subject to the conditions described in Section IV.A of this request;[2]

(ii) An order pursuant to Section 36(a)(1) of the Exchange Act, for the avoidance of uncertainty, exempting ICE Clear Europe, CDS Clearing Members and CM Affiliates from any requirement that they comply with provisions of the Exchange Act governing securities transactions, to the extent such provisions would otherwise be applicable to ICE Clear Europe, CDS Clearing Members and CM Affiliates, in connection with the offer, acceptance, execution, termination, clearance, settlement, performance and related activities contemplated by the ICE Clear Europe Clearing Rules, as amended ("Rules"), and involving CDS transactions submitted (or executed on terms providing for submission) to ICE Clear Europe for clearance and settlement, subject to the condition that ICE Clear Europe, CDS Clearing Members and CM Affiliates comply with, and be subject to, the provisions of the Exchange Act applicable to "security-based swap agreements," as defined in section 206B of the Gramm-Leach-Bliley Act of 1999, as amended ("GLBA"); and

(iii) An order pursuant to Section 36(a)(1) of the Exchange Act, for the avoidance of uncertainty, exempting any IDB from any requirement that it comply with provisions of the Exchange Act governing securities transactions, to the extent such provisions would otherwise be applicable to such IDB, in connection with the effectuation by such IDB of CDSs submitted to ICE Clear Europe for clearance and settlement, on the terms and subject to the conditions described in Section IV.C of this request.

With this request, ICE Clear Europe requests exemptive relief similar to the exemptions granted by the Commission to ICE Trust U.S. LLC (formerly known as ICE US Trust LLC) ("ICE Trust")[3], Chicago Mercantile Exchange Inc. and Citadel Investment Group, LLC[4], and Liffe Administration and Management and LCH.Clearnet Ltd[5] related to central clearing of CDS.

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2 As part of this request, the applicants also seek relief from the provisions of Exchange Act Section 17A(b)(2) requiring the filing of a Form CA-1 in light of the information submitted and documents enclosed herein.

3 See Release No. 34-59527, "Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request on Behalf of ICE US Trust LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments," issued March 6, 2009, 74 Fed. Reg. 10791 (March 12, 2009) ("ICE Trust Order").

4 See Release No. 34-59578, "Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request of Chicago Mercantile Exchange Inc. and Citadel Investment Group, L.L.C. Related to Central Clearing of Credit Default Swaps, and Request for Comments," issued Mar. 13, 2009, 74 Fed. Reg. 52 (Mar. 19, 2009).

5 See Release No. 34-59164, "Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request of Liffe Administration and Management and LCH.Clearnet Ltd. Related to Central Clearing of Credit Default Swaps, and Request for Comments," issued Dec. 24, 2008, 74 Fed. Reg. 139 (Jan. 2, 2009) (the "LCH.Clearnet Order").

ICE Clear Europe operates in the UK under the same regulatory regime as is applicable to LCH.Clearnet Ltd.

On January 14, 2009, the Commission adopted interim temporary final rules that define "eligible credit default swaps" and exempt them from all provisions of the Securities Act of 1933 (the "Securities Act") (other than the anti-fraud provisions of section 17(a)) as well as from the registration provisions of the Exchange Act and the provisions of the Trust Indenture Act of 1939, as amended, provided certain conditions are met. These rules also define "qualified purchaser" for purposes of the covered securities provisions of Securities Act section 18 (together, the "Securities Registration Rules"). The Securities Registration Rules became effective January 22, 2009. To the extent that the securities registration provisions of the Securities Act, the Exchange Act and the Trust Indenture Act of 1939, as amended, would apply to CDS, ICE Clear Europe intends to rely on the Securities Registration Rules.[6]

Certain CDS Clearing Members, CM Affiliates and IDBs are expected to be U.S. persons, as such term is used for purposes of the Exchange Act, and therefore ICE Clear Europe, IDBs and/or CDS Clearing Members or CM Affiliates in their activities may use means or instrumentalities of interstate commerce, as that term is used for purposes of the Exchange Act, to effect the business described herein. The exemptive relief requested herein and the conditions to be imposed by the Commission in connection therewith is requested solely to the extent that the transactions in CDS are within the scope of the U.S. federal securities laws.

Except as provided in the conditions for exemptive relief described in Sections IV.A and IV.C, this request is without prejudice to, and is not intended to limit, ICE Clear Europe's, the CDS Clearing Members' or CM Affiliates' and the other specified applicants' eligibility for or reliance on any other statutory or regulatory basis for relief from the provisions of the Exchange Act or Securities Act (together with the Exchange Act, the "Acts") in connection with the activities contemplated by this request. Similarly, this request is not meant to address the business of ICE Clear Europe, CDS Clearing Members or CM Affiliates except as described herein.

This request consists of five Sections. Section I sets out certain background information with respect to the CDS market. Section II provides a brief description of ICE Clear Europe and its proposed clearing activities. Section III describes certain considerations with respect to the regulatory status of CDS. Section IV describes regulatory oversight of ICE Clear Europe and the basis for the exemptive relief requested. Section V concludes the request.

We have included with this request the public exhibits listed in the Exhibit Index hereto.

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[6] See Release Nos. 33-8999; 34-59246; 39-2549, "Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps," issued Jan. 14, 2009, 74 Fed. Reg. 3967 (Jan. 22, 2009).

## I. Credit Default Swaps

A credit default swap or CDS is a bilateral executory derivative instrument. CDS can be used to hedge or transfer to another party the credit risk of an obligor or to gain exposure to the credit risk of an obligor. Under a typical CDS, the parties specify the obligor (called "reference entity") with respect to which credit protection is sought, the credit-related events, such as a payment default or bankruptcy (called "credit events"), that trigger settlement obligations, the debt obligations of the reference entity (called "reference obligations") whose nonpayment constitutes a credit event, and the debt obligations (called "deliverable obligations") that may be delivered upon the occurrence of a credit event or, in the case of cash settlement, the obligations (typically the reference obligations) whose value is used to determine the amount of any cash settlement payment under the CDS.

Very generally, the party seeking credit protection ("protection buyer") under a CDS makes periodic fixed payments to the party providing credit protection ("protection seller"). The protection seller agrees, in exchange for such periodic fixed payments, to purchase from the protection buyer, at par value (or for some other designated value), an agreed principal amount ("notional amount") of deliverable obligations in the event that the reference entity experiences one or more specified credit events or to effect a cash settlement by payment of the difference between the par (or other designated) value of a reference obligation and the reference obligation's market value following the credit event.

The reference entity can be a company, a governmental entity or any other borrower. The deliverable or reference obligations can consist of a specific obligation of the reference entity, a category of obligations, or all repayment obligations of the reference entity. There is no requirement that either party to a CDS hold any obligations of the reference entity.

A CDS enables a lender, for example, to purchase protection against a borrower's payment default. It similarly enables the protection seller to receive income in exchange for assuming exposure to the borrower's credit. A CDS also enables a market participant to take "long" or "short" positions on the credit quality of an obligor without transacting directly in the debt obligations of the obligor.

CDS can be written on a single reference entity ("Single Name CDS") or CDS can be written with respect to groups or indices of reference entities ("Index CDS"). Index CDS allow market participants to more efficiently manage or assume exposure to the creditworthiness of specific sectors of the economy. ICE Clear Europe will initially clear Index CDS based on iTraxx indices.[7] It proposes in the near future to clear other Index CDS and Single Name CDS.

CDS are bilaterally negotiated transactions documented under the International Swaps and Derivatives Association's ("ISDA") master agreement ("Master Agreement") and a schedule ("Schedule") that is used to supplement and/or modify the Master Agreement based on each

[7] iTraxx is the brand name for a family of CDS index products covering regions of Europe, Japan and non-Japan Asia.

party's own assessment of its contractual requirements. In addition, the parties typically enter into a credit support annex ("CSA") that, if used, establishes a framework between the two parties for the collateralization of credit exposures (by one or both parties), based on the counterparty risk presented by each party and its positions. The specific terms of an individual CDS transaction are documented in a confirmation ("Confirmation") that supplements and incorporates the Master Agreement, Schedule and CSA in place between the parties. As market participants naturally seek to maximize market depth and liquidity, CDS trading has coalesced around market conventions (such as common expiration dates, common credit events, etc.) that enhance liquidity. Despite these developments, market participants remain free to and do negotiate customized transaction terms. Additionally, the ISDA Schedule and CSA tend to be extensively negotiated on a bilateral basis.

Even though CDS are a relatively recent financial innovation, they have become an important and widely-used tool for the mitigation and transfer of credit risk. Prior to the advent of the over-the-counter ("OTC") CDS market, no tradable financial instrument existed that would enable a company exposed to a third party's default risk to manage that credit risk efficiently and in a liquid market. CDS have seen significant growth in recent years.

The Bank for International Settlements ("BIS") has estimated that, as of June 2008, the outstanding notional amount of CDS was just under $58 trillion;[8] after a series of voluntary netting initiatives, this number has more recently been estimated at just over $28 trillion.[9] A majority of the market is comprised of bilateral OTC transactions between dealers, which

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[8] Report entitled "Credit Default Swap Market Notional amounts outstanding at end of June 2008" published by the Bank for International Settlement, available at http://www.bis.org/statistics/otcder/dt21.pdf.

It is important to note that the outstanding notional amount of CDS published by the BIS does not accurately reflect the actual levels of market and credit risk exposures in the CDS market. To calculate such exposures one would need to consider the following: (i) net exposure of the participants in the market, after taking into account offsetting positions; (ii) the probability that the underlying reference entities will default; (ii) the probability that any party to a CDS will default in its obligations under the applicable CDS; (iv) the amount of collateral held by participants in the market; and (v) the probable recovery amounts that the participants will collect upon the occurrence of probable defaults. Due to the bilateral nature of CDS transactions and the lack of any central counterparty or systematic information aggregator, it is very difficult to determine actual risk exposures in this market.

[9] See http://www.dtcc.com/products/derivserv/data_table_i.php, http://www.markit.com/information/news/press_releases/2008/october/16.html, http://www.markit.com/information/news/press_releases/2008/october/31.html, http://www.markit.com/information/news/press_releases/2008/november/24.html, "Chicago Missing Swaps Swagger; Melamed Vows Comeback." Bloomberg, April 27, 2009, available at http://www.bloomberg.com/apps/news?pid=20601109&sid=a_XaG9y5cvPA&refer=news, and "UPDATE: DTCC: $28.2 Tln Credit Derivatives Outstanding April 17." Wall St. Journal, April 21, 2009, available at http://online.wsj.com/article/BT-CO-20090421-719742.html.

includes approximately 15 to 20 global commercial and investment banks, and the largest share of the notional amount within that sector is comprised of index CDS.[10]

The current CDS market faces a number of credit and related operational challenges and inefficiencies:

1. Counterparty Risk. Counterparty risk is a primary concern for CDS market participants. As bilateral transactions, CDS expose each party to the risk of the other party's non-performance. This is of particular concern to the protection buyer under a CDS, because its ability to successfully protect itself against the failure or default of a reference entity depends on the protection seller's ability to perform its obligations under the CDS.

2. Redundant Gross Notional Exposures. As professional intermediaries supply liquidity to the CDS market, they simultaneously accumulate large notional exposures. Many of these exposures are offsetting but are executed opposite different counterparties. Professional intermediaries may also have large offsetting exposures with each other. These offsetting gross notional CDS exposures give rise to potentially redundant counterparty credit exposures that remain on market participants' books so long as the offsetting CDS exposures remain outstanding. The large population of redundant, offsetting transactions also gives rise to additional operational inefficiencies for the market as noted below.

3. CDS Transaction Processing Backlog. The CDS market's rapid growth has seen widespread use of these products by large numbers and categories of market participants. ISDA has estimated that from 2004 to 2006 the notional size of the CDS market grew fivefold.[11] Because CDS are individually negotiated and are generally not executed through exchanges or other electronic matching engines, the processing of confirmations evidencing CDS transactions is generally handled individually by market participants, each of which has different levels of operational infrastructure and capacity to process CDS transactions. Not surprisingly, this has resulted in processing backlogs in the confirmation of CDS transactions.[12]

4. Monitoring and Managing CDS Transactions. As noted above, the volume and bilateral character of CDS transactions requires that firms have significant operational resources. Large outstanding CDS trade populations increase the operational

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10 Testimony of Patrick M. Parkinson, Deputy Director, Division of Research and Statistics of the Federal Reserve Board, before the Subcommittee on Securities, Insurance and Investment of the U.S. Senate Committee on Banking, Housing and Urban Affairs, July 8, 2008 (the "Parkinson Testimony"), p. 1. This testimony is available at http://www.federalreserve.gov/newsevents/testimony/parkinson20080709a.htm.

11 "Fed Says Banks Meet Target on Derivatives Backlog." Bloomberg, February 16, 2006, available at http://www.bloomberg.com/apps/news?pid=10000006&sid=aO.Ek0E2iqpI&refer=home.

12 In order to address this issue, major market participants have increasingly used the trade comparison and confirmation services offered by DTCC's Deriv/SERV service described in Section II below. The use of this service and other measures has significantly reduced confirmation backlogs for many of the largest market participants.

resources necessary to monitor and administer these positions. This operational burden can become particularly acute in times of market stress, such as in circumstances where a major counterparty defaults, or in the case of a credit event affecting a borrower that is a reference entity under large numbers of CDS.

In order to help mitigate the counterparty credit exposures and related operational inefficiencies associated with the current CDS market and large redundant trade populations, ICE Clear Europe proposes to act as a central counterparty ("CCP") to qualifying CDS market participants in connection with eligible CDS transactions submitted to it for clearing, as described more fully in Section II below.

## II. Description of ICE Clear Europe's Proposed Clearing Activities

### A. Overview

#### 1. Background

ICE Clear Europe currently offers a clearing service for the ICE exchange and OTC energy markets, and expects to launch a clearing service for CDS contracts in Europe in the second quarter of 2009. The services offered by ICE Clear Europe in Europe would supplement the launch of ICE Trust as a new global central clearing platform for CDS in the U.S.

#### 2. Information about ICE

ICE, organized in May 2000 under the laws of the State of Delaware, is a publicly traded company listed on the New York Stock Exchange ("NYSE") that trades under the ticker symbol "ICE". ICE, directly and through its wholly-owned subsidiaries ("ICE Group"), operates global regulated futures exchanges and OTC-markets for commodities and derivative products and currently operates four central party clearing houses in North America and, in November 2008, commenced operating through ICE Clear Europe a central counterparty clearing house based in the UK. ICE operates its OTC energy markets through its globally distributed electronic platform and ICE directly or indirectly owns or controls:

- ICE Futures Europe ("ICE Futures"), which is supervised by the FSA as a Recognised Investment Exchange ("RIE") in the United Kingdom and enables price discovery, trading and risk management within the energy commodity futures and options;

- ICE Futures U.S., Inc., which operates as a United States Designated Contract Market for the purpose of price discovery, trading and risk management within the soft commodity, index and currency futures and options markets;

- ICE Futures Canada, Inc., which operates as a Canadian Commodity Futures Exchange for the purpose of price discovery, trading and risk management within the agricultural futures and options markets;

- ICE, which operates an OTC exempt commercial market ("ECM") for the purpose of price discovery, trading and risk management of energy forwards and swaps ("ICE OTC");

- Creditex Group Inc., which operates in the OTC CDS markets;

- ICE Clear U.S., which performs the clearing and settlement of every futures and options contract traded through ICE Futures U.S., Inc.;

- ICE Clear Canada, which performs the clearing and settlement of every futures and options contract traded through ICE Futures Canada, Inc.;

- ICE Trust, which performs the clearing of CDS in the U.S.;

- ICE Clear Europe, which, since November 8, 2008, performs the clearing and settlement of every futures and options contract trading through ICE Futures Europe and for all of ICE's cleared OTC energy products;

- The Clearing Corporation ("TCC"), which performs clearing for certain futures exchanges and provides CDS processing services for ICE Trust and ICE Clear Europe.

ICE does not risk its own capital by extending credit to market participants in any trading activities. ICE does, however, have capital at risk in its contributions to certain guaranty funds described herein, and does take matched principal positions in a small portion of Creditex's business but only as an intermediary between two counterparties. ICE's business generally serves as a marketplace, bringing together buyers and sellers of derivatives, physical commodities and financial contracts and allowing its participants to optimize their trading, risk management and hedging operations.

3. Information about ICE Clear Europe

ICE Clear Europe is indirectly a wholly-owned subsidiary of ICE. It was incorporated in England and Wales on April 19, 2007 as a private limited company under the Companies Act 1985 (as amended, now largely superseded by the Companies Act 2006) with registered number 06219884. ICE Clear Europe's registered office is at Milton Gate, 60 Chiswell Street, London, EC1Y 4SA. ICE Clear Europe's operations are provided from its registered address.

ICE Clear Europe was formed to provide clearing services to certain markets within the ICE Group. Since launch, the markets it clears are those operated by ICE Futures Europe (a UK RIE) and ICE, Inc. (a US ECM). As mentioned, ICE Clear Europe expects to launch a clearing service for CDS contracts in Europe in the second quarter of 2009.

ICE Clear Europe is supervised by the FSA as an RCH. It has also been designated by the FSA as a "designated system" for purposes of the Financial Markets and Insolvency

(Settlement Finality) Regulations 1999 ("Settlement Finality Regulations") and Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems, providing it with Europe-wide insolvency law protections.

In the United States, ICE Clear Europe has been granted an order by the Commodity Futures Trading Commission ("CFTC") pursuant to Section 409(b)(3) of the Federal Deposit Insurance Corporation Improvement Act 1991 ("FDICIA") determining that the UK legal and regulatory regime operated by the FSA in the recognition and subsequent supervision of ICE Clear Europe satisfies appropriate standards thereby permitting ICE Clear Europe to operate a multilateral clearing organization ("MCO") for the clearing of US OTC derivative instruments, or otherwise to engage in activities that constitute such a MCO.[13]

4. Information about ICE Trust

ICE Trust, effective December 4, 2008, is organized as a New York State chartered limited purpose limited liability trust company and received approval to become a member of the Federal Reserve System on March 4, 2009.[14] ICE Trust was granted a temporary exemption by the SEC under the ICE Trust Order.[15]

ICE Trust is subject to direct supervision and examination by the New York State Banking Department and, due to its membership in the Federal Reserve System, it is subject to direct supervision and examination by the Board of Governors of the Federal Reserve System ("Federal Reserve") and the Federal Reserve Bank of New York.

Initially, ICE Trust's business is limited to the provision of clearing services for the OTC CDS market. During this initial phase, ICE Trust will act as a central counterparty for the participants of ICE Trust (in each case, acting as principal for its own account or the account of an Affiliate[16]) by assuming, through novation, the obligations of all eligible CDS transactions accepted by it for clearing and collecting margin and other credit support from the ICE Trust Participants to collateralize their obligations to ICE Trust.

5. Information about TCC

TCC, a closely held corporation organized under the laws of the State of Delaware, was originally owned by eleven major financial institutions, three leading OTC derivatives inter-

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13 Note that ICE Clear Europe has on May 8, 2009 filed an application for registration as a Derivative Clearing Organization with the CFTC. This application relates solely to the clearing of energy derivatives and related products.

14 Order, dated March 4, 2009, at http://www.federalreserve.gov/newsevents/press/orders/20090304a.htm.

15 See footnote 3 above.

16 In cases in which an ICE Trust Participant acts for the account of an Affiliate, it will be for the proprietary account of such Affiliate as principal and not as agent for any other person.

dealer brokers, an international exchange and a leading OTC services provider.[17] It was acquired by ICE on March 6, 2009. TCC is a registered derivatives clearing organization, regulated by the Commodity Futures Trading Commission. TCC has cleared futures contracts as an independent clearinghouse since 1925. Currently, TCC has approximately 50 participants and provides derivatives clearing services for multiple exchanges and marketplaces, which currently includes the Chicago Climate Futures Exchange, the Eurex Global Clearing Link, and OTC Benchmark Treasury Futures. As a registered derivatives clearing organization, TCC is currently regulated by the CFTC. Throughout its history, TCC has continuously evolved to meet the evolving needs of the derivatives market. It has been an industry innovator while continuing its role as central counterparty.

In connection with its CDS clearing activities, it is envisaged that ICE Clear Europe will initially receive systems and certain operational support from TCC, ICE, ICE Trust and other wholly-owned subsidiaries of ICE. ICE Clear Europe also shares its office and various administrative staff with ICE Futures Europe and ICE. Following the payment of license fees from ICE Clear Europe to ICE Trust, the former shareholders of TCC will share in the distribution of the net revenues consistent with the profits, if any, of the CDS clearing business of ICE Clear Europe by ICE Trust to ICE US Holding Company L.P., but the former shareholders of TCC will not have a direct or an indirect equity interest in ICE Clear Europe.

B. CDS Clearing Members of ICE Clear Europe

Membership of ICE Clear Europe for CDS clearing is open to all qualified applicants, each of whom will clear transactions solely as principal for its own account (although it may use a CM Affiliate as agent for holding CDS contracts or as a customer) and not initially on behalf of other persons. CDS Clearing Members may appoint CM Affiliates as "Representatives" under the Rules to carry out certain clearing activities on behalf of the CDS Clearing Member but the CDS Clearing Member will be the principal that is responsible for and party to contracts with ICE Clear Europe. In order to qualify as a CDS Clearing Member, an applicant will be required to satisfy ICE Clear Europe's general clearing member criteria set out in Rule 201(a) at the time that the applicant applies to ICE Clear Europe and on an ongoing basis thereafter. In addition, the applicant must meet various additional requirements applicable to CDS Clearing Members which are specified in ICE Clear Europe's CDS procedures ("CDS Procedures").

These criteria are specified in Rule 201 and CDS Procedures paragraph 2.2. As of the date of this letter, these requirements include the following:

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[17] The former shareholders of TCC, which now hold Class B limited partnership interests in ICE US Holding Company L.P., a Cayman Island limited partnership, include: Bank of America Strategic Investments Corporation, Barclays Bank PLC, Citigroup Global Markets Inc., Credit Suisse First Boston Next Fund, Inc., Creditex Group Inc., Deutsche Bank Securities Inc., GFInet Inc., Goldman, Sachs & Co., ICAP Securities No. 2 B.V., LabMorgan Corporation, Markit Group Limited, Merrill Lynch, Pierce, Fenner & Smith Incorporated, MF Global Inc., Morgan Stanley & Co. Incorporated, UBS Americas Inc., and U.S. Exchange Holdings, Inc.

1. General ICE Clear Europe Membership Criteria

In order to attain and maintain membership as a clearing member ("Clearing Member"), including a CDS Clearing Member, a person must, at a minimum, as from the date on which it is proposed that it becomes a member, among other things:

- Hold sufficient capital;
- Be party to a Clearing Membership Agreement (as defined in the Rules);
- Hold all necessary regulatory authorizations, licenses, permissions and approvals;
- Satisfy ICE Clear Europe that it and its directors and officers satisfy requirements of an "approved person" under FSA rules;[18]
- Have appropriate technical and operational systems and controls;
- Have appropriate business continuity procedures;
- Hold an account or accounts (as necessary) at a financial institution that is a member of ICE Clear Europe's payment system in relation to each of which a direct debit mandate has been established in favor of ICE Clear Europe;
- Be able to meet margin requirements;
- Have contributed the minimum requested amount to the Guaranty Fund (defined in the Rules); and
- Not be subject to an insolvency or other event of default.

2. CDS Clearing Membership Criteria

The following additional requirements are specified in the CDS Procedures for the purposes of becoming a CDS Clearing Member:

- It has a minimum of $5 billion of capital; provided that this requirement may, at the discretion of ICE Clear Europe, be met by a direct or indirect parent of such CDS Clearing Member that is acceptable to ICE Clear Europe ("Parent") if such Parent provides a guarantee in accordance with the Finance Procedures.

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[18] Rule 201(a)(xx). For the requirements of an approved person under FSA rules, see http://fsahandbook.info/FSA/html/handbook/APER/2/1.

- At the time of admission, it has a minimum long-term senior unsecured debt rating of at least the following from each of the following rating agencies (or any successor to the rating business thereof) that provides such a rating (with a minimum of one such rating): (i) "A2" from Moody's Investors Service ("Moody's"), (ii) "A" from Standard & Poor's Ratings Services ("S&P"), a division of The McGraw-Hill Companies, Inc., (iii) "A" from Fitch Ratings ("Fitch") or (iv) the equivalent rating from any other rating agency that ICE Clear Europe designates from time to time for this purpose; provided that, if such applicant does not have such a rating from any of the foregoing rating agencies, it demonstrates to ICE Clear Europe that it otherwise satisfies, in the discretion of ICE Clear Europe, stringent credit criteria, such satisfaction to be confirmed by an examination of its books and records, then this requirement will be met; provided further that this requirement may, at the discretion of ICE Clear Europe, be met by Parent if such Parent provides a guarantee in accordance with the Finance Procedures;

- At no time after admission, does it (or, if applicable, its Parent) have a long-term senior unsecured debt rating below the following from any of the following rating agencies (or any successor to the rating business thereof) or, at the discretion of ICE Clear Europe, does any such rating agency suspend or withdraw such rating: (i) "Baa2" from Moody's, (ii) "BBB" from S&P, (ii) "BBB" from Fitch or (iv) the equivalent rating from any other rating agency ICE Clear Europe designates from time to time for this purpose or, if applicable, it or its Parent ceases to satisfy objective criteria established by ICE Clear Europe at its discretion;

- It demonstrates operational competence in CDS contracts substantially similar (as determined by ICE Clear Europe) to CDS Contracts (as defined in the Rules), including having a portfolio of such bilateral agreements with an outstanding notional amount of at least $500 billion;

- It is a member of industry organizations related to CDS, as designated by ICE Clear Europe from time to time for this purpose, which as at the date of launch of CDS clearing by ICE Clear Europe are ISDA and Deriv/SERV;

- It has executed an agreement with ICE Clear Europe in the form set out in paragraph 10 of the CDS Procedures; and

- If it is not incorporated in England and Wales, it has appointed an agent for service of process pursuant to Rule 113(e).

These requirements are consistent with the Financial Services and Markets Act 2000 (Recognition Requirements Regulations) Regulation 2001 (as amended) and FSA rules applicable to RCH ("Recognition Requirements").

ICE Clear Europe represents to the Commission that it meets the standards for central counterparties set forth in the document entitled "Recommendations for Central Counterparties"

dated November 2004 published by the Bank for International Settlements and International Organization of Securities Commissions ("BIS IOSCO CCP Recommendations"). On the launch of its CDS clearing service, ICE Clear Europe will continue to meet such standards.

The Recognition Requirements, which are enclosed as Exhibit 3 hereto, are substantially similar to the international standards for central counterparties as articulated in the BIS IOSCO CCP Recommendations.[19]

ICE Clear Europe currently has 44 Clearing Members clearing energy derivatives. It is anticipated that initially the CDS Clearing Members will be affiliates of the following eleven major CDS dealers: Bank of America, Barclays, Citibank, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JPMorgan Chase, Morgan Stanley, RBS and UBS.

C. Clearing of CDS

ICE Clear Europe's structure and operations are subject to supervision and review by the FSA. In addition, ICE Clear Europe consults with industry participants on best practices. Further development of its structure and operations, including CDS clearing, is subject to supervision by the FSA. We respectfully request that the exemptive relief sought herein apply on an ongoing basis to ICE Clear Europe, CDS Clearing Members, CM Affiliates and IBDs as the Rules, CDS Procedures and operations evolve subject to regulatory supervision by the FSA.

1. ICE Clear Europe as Central Counterparty

ICE Clear Europe will act as a central counterparty for ICE Clear Europe Clearing Members by assuming, through novation, the obligations of all eligible CDS transactions accepted by it for clearing and collecting margin and other credit support from ICE Clear Europe Clearing Members to collateralize their obligations to ICE Clear Europe. In order for ICE Clear Europe to act as central counterparty and clear CDS, it must first receive accurate and reliable information regarding the transactions that are submitted for clearing. Additionally, as a clearinghouse, ICE Clear Europe's primary role will be to reduce the credit risk associated with cleared contracts. Accordingly, ICE Clear Europe's trade submission process is designed to ensure that it maintains a matched book of offsetting contracts, a prerequisite for any central counterparty.

Although CDS are currently bilaterally negotiated and executed, major market participants frequently use DTCC's Deriv/SERV comparison and confirmation service when documenting their CDS. This service creates accurate electronic records of transaction terms and counterparties. As part of this service, market participants separately submit the terms of a CDS to Deriv/SERV in electronic form. Paired submissions are compared to verify that their terms match in all required respects. If a match is confirmed, the parties receive an electronic confirmation of the submitted transaction. All submitted transactions are recorded in the

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[19] BIS IOSCO CCP Recommendations, p. 16-17.

Deriv/SERV Trade Information Warehouse, which serves as the primary registry for submitted transactions.[20]

ICE Clear Europe will leverage the Deriv/SERV infrastructure in operating its CDS clearing service. Initially, all trades submitted by CDS Clearing Members and CM Affiliates for clearing through ICE Clear Europe will be recorded in the Deriv/SERV Trade Information Warehouse. ICE Clear Europe will, initially on a weekly basis, obtain from DTCC matched trades that have been recorded in the Deriv/SERV Trade Information Warehouse as having been submitted for clearing through ICE Clear Europe. ICE Clear Europe expects that, in time, the matching service provided by Deriv/SERV or other parties will automatically forward, on a real time basis, to ICE Clear Europe qualifying matched CDS contracts that both parties have elected to submit for clearing.

CDS Clearing Members and CM Affiliates may use the facilities of an IDB to execute CDS, for example, to access liquidity more rapidly or to maintain pre-execution anonymity, and submit such transactions for clearance and settlement to ICE Clear Europe.[21] These IDBs may variously be unregistered with the Commission, may be registered as broker-dealers, or may be registered as broker-dealers and operating subject to Regulation ATS. Any such IDBs established within the European Economic Area would require regulation by their home state regulator, such as the FSA, for such activities. To our knowledge, none of these IDBs discipline their subscribers other than by exclusion from trading. Additionally, to our knowledge, these IDBs, although they are compensated for matching and effecting CDS transactions, do not handle the funds or property of their CDS clearing members. The IDB similarly do not assume market positions in connection with their intermediation of CDS transactions.

As described below, once a matched CDS contract has been forwarded to, or obtained by, ICE Clear Europe, and has been accepted for clearing by it pursuant to the proposed new Rule 401(a)(ix) and paragraph 4 of the CDS Procedures, ICE Clear Europe will clear the CDS contract by becoming the central counterparty to each party to the trade. Deriv/SERV's current infrastructure will help to ensure that ICE Clear Europe maintains a matched book of offsetting CDS contracts. Maintaining a matched offsetting book is essential to managing the credit risk associated with CDS submitted to ICE Clear Europe for clearing.

Under the current draft Rules and Procedures, generally, each bilateral CDS contract between two CDS Clearing Members that is submitted to and accepted by ICE Clear Europe for clearing will be novated. Under the proposed new Rule 401(a)(ix), if a bilateral CDS between two CDS Clearing Members is submitted to ICE Clear Europe, two CDS contracts arise: one between the selling CDS Clearing Member and ICE Clear Europe and the other between ICE Clear Europe and the buying CDS Clearing Member, at the time specified in the CDS

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20 Deriv/SERV has recently begun to manage payment flows, settlements, and adjustments to contract terms through the CDS lifecycle.

21 Inter-dealer brokers currently active in the CDS market include Garban, Creditex, GFI, Tullet Prebon, Markit and ICAP.

Procedures, provided that no CDS contract shall arise unless (i) ICE Clear Europe has given notice to the buying CDS Clearing Member and selling CDS Clearing Member in accordance with the CDS Procedures that it proposes to accept the bilateral CDS contract for clearing and (ii) ICE Clear Europe has received complete data in respect of such bilateral CDS contract from the relevant selling CDS Clearing Member and the relevant buying CDS Clearing Member. Under these new contracts, ICE Clear Europe will act as protection buyer to the original protection seller and as protection seller to the original protection buyer. As central counterparty to each of the new CDS contract, ICE Clear Europe will be able to net offsetting positions on a multilateral basis, even though ICE Clear Europe will have different counterparties with respect to the new CDS contracts that are being netted.

Pursuant to Rule 401 and the definition of the term "Contract Terms" in Rule 101, the terms of the CDS between ICE Clear Europe and its CDS Clearing Members will be those specified in the Rules. As part of the process by which Cleared CDS are novated, the terms and conditions governing the CDS bilaterally negotiated by the submitting counterparties will be superseded by the relevant provisions of the Rules, CDS Procedures, the Master Agreement, and the applicable Schedule that is entered into by ICE Clear Europe and each CDS Clearing Member. These terms supersede any previous "Transaction Rights and Obligations" (as defined in the Rules) which are terminated upon acceptance of a new Contract by ICE Clear Europe (Rule 402(b). This step is necessary in order to eliminate any documentation basis risk, and consequent financial risk, to ICE Clear Europe (and, indirectly, to CDS Clearing Members) that could arise if, as a result of multilateral netting, the documentation terms governing opposite sides of offsetting CDS positions to which ICE Clear Europe is central counterparty are not consistent.

Multilateral netting will significantly reduce the outstanding notional amount of each CDS Clearing Member's CDS portfolio. By eliminating all offsetting positions, ICE Clear Europe will reduce not only the gross outstanding notional amount of cleared CDS, but also the counterparty credit risk and operational risks associated with the redundant positions that are extinguished through the multilateral netting process.

As a central counterparty, ICE Clear Europe will also offer its CDS Clearing Members operational efficiencies. Because ICE Clear Europe acts as the central counterparty to all cleared CDS of a CDS Clearing Member, that Clearing Member's positions will be netted down to a single exposure to ICE Clear Europe. ICE Clear Europe's ability to provide a single net exposure figure to each CDS Clearing Member will (i) provide each CDS Clearing Member with a clear snapshot of its aggregate cleared CDS positions and related position risk and (ii) greatly simplify the CDS Clearing Member's cash flow and related operational responsibilities, since each such CDS Clearing Member faces only a single counterparty (ICE Clear Europe) and payments due on different CDS contracts can be netted to a single daily payment obligation or entitlement. ICE Clear Europe anticipates that these operational and credit risk reduction benefits will provide an incentive for the CDS Clearing Members to clear their eligible CDS transactions through ICE Clear Europe. Finally, by leveraging Deriv/SERV's matched trade

submission platform, ICE Clear Europe's clearing system will help to further reduce processing backlogs with respect to the CDS cleared though ICE Clear Europe.

2. Deriv/SERV Trade Information Warehouse

ICE Clear Europe will maintain complete and accurate information for each cleared CDS that remains outstanding on its books. In addition to maintaining its own information, position data on each cleared CDS will be recorded in Deriv/SERV's Trade Information Warehouse, which will maintain a duplicate registry of all open CDS positions that have been accepted for clearance by ICE Clear Europe. Deriv/SERV's Coupon Payment Facility will then be available to Participants to administer the calculation and transfer of periodic payments owed by protection buyers to ICE Clear Europe and from ICE Clear Europe to protection sellers under outstanding ICE Trust-cleared CDS contracts.

D. Credit Support Framework

In addition to reducing the outstanding notional amount of ICE Clear Europe-cleared CDS, ICE Clear Europe will further mitigate counterparty risk to ICE Clear Europe, the CDS Clearing Members and the CDS market generally through its margin, guaranty fund and credit support framework, as set forth in the Rules.

As the central counterparty to each of the CDS Clearing Members, ICE Clear Europe will have exposure to the risk of defaults by CDS Clearing Members. To address this counterparty credit risk, ICE Clear Europe (i) will require the CDS Clearing Members to provide credit support (known as margin) for their obligations under cleared CDS transactions and (ii) has established rules that mutualize (as described below) within certain parameters the risk of a CDS Clearing Member default across all CDS Clearing Members to the extent that any exposure is not covered by a defaulting CDS Clearing Member's margin. ICE Clear Europe will mitigate counterparty risk through a six-tiered waterfall consisting of: membership criteria, initial margin, mark-to-market margin, intra-day risk monitoring, guaranty fund, and a one-time power of assessment. ICE Clear Europe's risk management infrastructure and related risk metrics have been structured specifically for the CDS products that ICE Clear Europe clears (and are already operational in relation to energy contracts). Each CDS Clearing Member's credit support obligations will be governed by a uniform credit support framework and applicable Rules.

1. Credit Support Requirements

ICE Clear Europe will maintain strict risk-based margin and guaranty fund requirements. As described in Section IV, these requirements are subject to extensive and ongoing regulation and supervision by the FSA. ICE Clear Europe's margin and guaranty fund requirements are consistent with clearing industry practice, and with international standards established for central counterparties in the form set out in the BIS IOSCO CCP Recommendations.[22] The amount of

[22] All collateral (including margin and guaranty fund contributions) is transferred outright by Clearing Members to ICE Clear Europe pursuant to a "title transfer financial collateral arrangement" for purposes of

margin and guaranty fund contribution required of each CDS Clearing Member will be continuously monitored and periodically adjusted as required to reflect the size and profile of, and risk associated with, the CDS Clearing Member's cleared CDS transactions (and related market factors).

Each CDS Clearing Member's margin requirement will consist of two components: (i) initial margin, reflecting a risk-based calculation of potential loss on outstanding CDS positions in the event of a significant adverse market movement, and (ii) mark-to-market margin, based upon an end-of-day mark-to-market of outstanding positions. At any time when a requirement for initial margin falls due and insufficient permitted cover is held, the CDS Clearing Member must initially transfer cash. Thereafter, a CDS Clearing Member may substitute such cash margin with other permitted cover by delivery of the replacement permitted cover to ICE Clear Europe.[23] Mark-to-market margin payments, however, may be made by ICE Clear Europe or a CDS Clearing Member only in cash. CDS Clearing Members will be required to cover any end-of-day margin deficit with Euros (or such other currency as may be permitted under the proposed CDS finance procedures) by the following morning, and ICE Clear Europe will have the discretion to require and collect additional margin, both at the end of the day and intraday, as it deems necessary.[24]

ICE Clear Europe will maintain a guaranty fund in respect of CDS Clearing Members ("CDS Guaranty Fund") that can be applied upon a CDS Clearing Member's default on cleared CDS transactions. The CDS Guaranty Fund would only be applied where the loss resulting from any default exceeds the amount of margin provided to ICE Clear Europe by the defaulting CDS Clearing Member.[25]

Three separate "default waterfalls" will apply to determine the order of application of assets on a default occurring, depending upon whether a Clearing Member is a Clearing Member for CDS only contracts, energy contracts or both, set out in Rule 1103 (as proposed to be amended). In the event of default of a CDS Clearing Member, only the CDS Guaranty Fund will be available to cover losses from a default. In the event of a default of an energy-only Clearing Member, only the Energy Guaranty Fund will be available to cover losses from a default. In the

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the Directive 2002/47/EC on Financial Collateral Arrangements. Use of such a collateral structure results in ICE Clear Europe having an unencumbered property right in all collateral provided to it, subject only to an obligation to return excess collateral or such collateral as remains unexpended following a close out on a default. Collateral provided under a financial collateral arrangement further takes the benefit of exclusions from security registration in the European Union and insolvency law protections allowing close-out netting which supplement the protections under the Companies Act 1989 and Settlement Finality Regulations.

23 The full list of permitted cover is set out in ICE Clear Europe circulars. The most recent circular in this respect is available at: https://www.theice.com/publicdocs/clear_europe/circulars/C09015_att.pdf

24 An ICE Clear Europe CDS Clearing Member will be permitted to withdraw mark-to-market margin amounts credited to its account to the extent not required to satisfy its initial margin requirement.

25 For its Energy Clear Members, ICE Clear Europe currently maintains a guaranty fund for its existing Clearing Members ("Energy Guaranty Fund") to cover losses arising from any existing Energy Clearing Member's default.

event of a default of a Clearing Member that is active in both CDS and energy contracts, the Clearing Member's margin and guaranty fund are available to cover any loss but the CDS Guaranty Fund deposits of the non-defaulting CDS Clearing Members can only be applied as against losses in CDS contracts and the Energy Guaranty Fund deposits of the non-defaulting Energy Clearing Members can only be applied against losses in energy contracts.

CDS Clearing Members are liable to make and maintain CDS Guaranty Fund Contributions ("Guaranty Fund Contribution"). The total amount of the CDS Guaranty Fund will be expressed in Euros and will be reviewed daily by ICE Clear Europe ("Guaranty Fund Period"). If ICE Clear Europe determines that the total amount in the CDS Guaranty Fund is to change, Clearing Members will be given notice and will be required to deposit their new contribution prior to the open of business on the next business day. As a result, the CDS Guaranty Fund will grow in proportion to the position risk associated with the aggregate volume of CDS cleared by ICE Clear Europe.

Each CDS Clearing Member will be required to contribute a minimum of 15 million Euros to the CDS Guaranty Fund initially when it becomes a CDS Clearing Member and additional amounts based on its actual and anticipated CDS position exposures plus such other amount as ICE Clear Europe at its discretion determines is necessary based on projected clearing activity. Any such Guaranty Fund Contributions by a new Clearing Member shall not result in any obligation on ICE Clear Europe to repay any Guaranty Fund Contributions to other CDS Clearing Members and the size of the CDS Guaranty Fund shall be increased accordingly until the end of the relevant Guaranty Fund Period.

In order to calculate the initial margin and mark-to-market margin requirements, as well as the appropriate Guaranty Fund Contribution for a CDS Clearing Member, ICE Clear Europe, leveraging off the methodology developed by ICE Trust, has developed a sophisticated and robust set of risk metrics to measure and determine these amounts. In each case, the amount of margin to be posted or contribution to be made will be calculated separately for each type of CDS cleared by a CDS Clearing Member, subject to applicable risk offsets recognized pursuant to ICE Clear Europe's Procedures. Initial margin will be calculated in accordance with ICE Clear Europe's Procedures and will be based on (a) the largest probable loss likely to be sustained by the CDS Clearing Member over a specified time period due to adverse movements in credit spreads, (b) the degree to which the CDS Clearing Member's long and short positions exhibit offsetting risk characteristics and (c) the CDS Clearing Member's position concentration relative to the size of the market for the relevant CDS. Mark-to-market margin calculations will be made by ICE Clear Europe on each business day.

The aggregate amount of the Guaranty Fund will be calculated using stress test scenarios that rely on a combination of quantitative and qualitative considerations to calculate the magnitude of portfolio losses. The size of the Guaranty Fund will be set at the sum of the maximum scenario stress test uncollateralized losses for (a) the CDS Clearing Member with the largest long credit protection profile (*i.e.*, the CDS Clearing Member that has bought the most

credit protection) and (b) the two CDS Clearing Members with the largest short protection profiles (*i.e.*, the two CDS Clearing Members that have sold the most credit protection).

2. Mutualization

Mutualization is designed to provide additional protection to ICE Clear Europe from losses arising from a CDS Clearing Member's default by making other CDS Clearing Members' contributions to the Guaranty Fund available to cover the defaulting CDS Clearing Member's losses.

Under Part 11 of the Rules, in the event of a CDS Clearing Member's default, ICE Clear Europe may look to the margin posted by such CDS Clearing Member, such CDS Clearing Member's Guaranty Fund Contribution and, if applicable, any recovery from a parent guarantor. At its discretion, ICE Clear Europe will be authorized to use, to the extent needed, other CDS Clearing Members' Guaranty Fund Contribution to satisfy any obligations of the defaulting CDS Clearing Member.[26]

In the event that the non-defaulting CDS Clearing Members' Guaranty Fund Contribution is less than the remaining loss resulting from a default, ICE Clear Europe is entitled to require an additional contribution of up to an amount equal to each CDS Clearing Member's guaranty fund contribution by non-defaulting CDS Clearing Members pursuant to "Powers of Assessment" under proposed new Rule 1106(h). However, a CDS Clearing Member can limit the amount of this additional assessment to an amount equal to such Clearing Member's Guaranty Fund Contribution immediately prior to the relevant default by contributing such amount and terminating its membership from ICE Clear Europe, with the withdrawal effective three months after notice, pursuant to Rule 1106(h).

These margin and credit support requirements will help to mitigate the counterparty credit risk that ICE Clear Europe faces as a central counterparty, and will also help to mitigate counterparty credit risk more broadly within those portions of the CDS market that are cleared through ICE Clear Europe. The use of dynamic margin requirements is intended to ensure that each CDS Clearing Member is sufficiently collateralized at any point in time based on prevailing market conditions and CDS Clearing Member position risk. Moreover, the Guaranty Fund and the mutualization protocol are intended to ensure that, in the unlikely event of an occurrence of an extreme multiple-counterparty default scenario where margin is insufficient, ICE Clear Europe will have adequate credit support and resources to contain the resulting risk and to maintain the integrity of the cleared CDS market. Ongoing supervision by the FSA will help to ensure that ICE Clear Europe maintains robust risk management systems and controls that are reasonably designed to achieve compliance with FSA rules relating to CDS clearing.

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[26] Rule 1102(k).

E. Daily Mark-to-Market Prices

ICE Clear Europe will calculate a daily mark-to-market price for each type of CDS cleared by it based on end-of-day prices submitted to it by CDS Clearing Members. On a daily basis, each CDS Clearing Member will be required to provide to ICE Clear Europe (either directly or through a designated third-party) an accurate end-of-day price (in either credit spread or price format according to product convention, and either in mid-point or bid/offer terms) for each type of cleared CDS in which such CDS Clearing Member has a cleared position. ICE Clear Europe will determine from time to time, with input from the relevant CDS Clearing Members, an agreed upon default bid/offer range to be applied to mid-point submissions and a notional amount for each type of cleared CDS based on then-current market conditions.

For each end-of-day price that is submitted as a credit spread, ICE Clear Europe will utilize an industry standard model to derive a price-based format. Once in a price-based format, ICE Clear Europe will apply the agreed upon bid/offer range to all midpoint submissions. For each end-of-day price that is submitted as a bid/offer spread greater than the agreed upon range, ICE Clear Europe will determine the mid-point price of the submitted bid/offer spread and apply the agreed upon bid/offer range to that mid-point price.

ICE Clear Europe will independently rank these bid and ask prices by highest bid and lowest ask. The mark-to-market price will be determined by pairing any locking or crossing bid/ask prices to reveal the first non-crossed, non-locked bid/offer pair ("Best Bid-Best Offer" or "BBO"), and determining the point at which the most trade volume will occur within the BBO range.

If ranking of bids and offers does not result in any crossed or locked interests, then the daily mark-to-market price will be the mid-point of the BBO range. If ICE Clear Europe determines it appropriate under the circumstances to protect the interests of ICE Clear Europe and the CDS Clearing Members, ICE Clear Europe may establish a mark-to-market price that deviates from this outcome.

Further, as part of the CDS clearing process and in order to enhance the reliability of the submitted end-of-day prices, CDS Clearing Members whose prices lock or cross will periodically be required to trade at prices determined pursuant to the methodology for determining the mark-to-market price.[27]

F. Liquidation of a Defaulting CDS Clearing Member

ICE Clear Europe's default rules are drafted to comply with and work in the context of insolvency legislation applicable in the UK, particularly Part VII of the Companies Act 1989 and

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[27] For the avoidance of doubt, ICE Clear Europe intends that the relief requested herein include an exemption from registration as an exchange or compliance with Regulation ATS as a result of the mark-to-market trading requirement described above. Substantially similar relief was granted by the Commission in the ICE Trust Order: See the ICE Trust Order at page 19- 20, 74 Fed. Reg. at 10796.

the Settlement Finality Regulations.

Pursuant to provisions of the Companies Act 1989 and Settlement Finality Regulations, various otherwise mandatory insolvency laws applicable in the UK and Europe are not applied in favor of the default rules and proceedings of a clearing house, payment instructions made by a clearing house, contracts with clearing members for the transfer of a security and the use of collateral by a clearing house pursuant to its default rules. ICE Clear Europe has the full benefit of these provisions as a result of being both an RCH and a designated system under the Settlement Finality Regulations. As a result, various laws which would allow an insolvency practitioner to disclaim certain transactions or which result in a moratorium on transactions following an insolvency will not restrict the operation of ICE Clear Europe's default rules.

The Recognition Requirements are designed to ensure that the default rules of the clearing house are capable of being effective in light of UK insolvency laws, such that they are consistent with the regime established under the Companies Act 1989. Part IV, Paragraph 24 of the Schedule to the Recognition Requirements requires that a clearing house must have default rules, which, in the event of a member being or appearing to be unable to meet its obligations in respect of one or more market contracts, enable action to be taken in respect of the unsettled market contracts to which the clearing house is a party. Such rules must provide for these unsettled market contracts to be discharged and for any sums payable to be paid. Such rules must further provide for sums payable in respect of different contracts to be aggregated or set off and to be set off against any property provided as cover for margin so as to produce a net sum; or if the sum is payable by the clearing house, to be aggregated with any property provided by the member as cover for margin. Finally, ICE Clear Europe must certify the sum finally payable or (if applicable) the fact that no sum is payable. ICE Clear Europe's default rules are set out in Parts 9 and 11 of the Rules.

Rule 901 specifies what an event of default is under the Rules, which includes a CDS Clearing Member actually being unable or appearing to be unable to meet its obligations under the Rules or any contract (Rule 901(a)(ii)). Upon an event of default under Rule 901, various rights and powers are available to ICE Clear Europe, including, pursuant to Rule 903, the right to close out the CDS Clearing Member's position in relation to all unsettled market contracts to which it is a party. The method for closing out is described in detail in Rule 903.

Following a default by an ICE Clear Europe Clearing Member, ICE Clear Europe has a number of tools available to it under the Rules to ensure an orderly liquidation and unwinding of the open positions of such defaulting ICE Clear Europe Clearing Member. In the first instance, upon determining that a default has occurred, ICE Clear Europe will have the ability to immediately enter into replacement CDS transactions with other CDS Clearing Members that are designed to mitigate, to the greatest extent possible, the market risk of the defaulting CDS Clearing Member's open positions. It can also seek to sell or transfer positions to other CDS Clearing Members (Rule 902(a)). For open positions in which there is no liquid trading market, ICE Clear Europe may enter into covering CDS transactions for which there is a liquid market and that are most closely correlated with such illiquid open positions. Such cover transactions

will help to minimize increases in the losses with respect to a defaulting CDS Clearing Member's illiquid open positions while ICE Clear Europe is seeking to close out these open positions.

ICE Clear Europe will seek to close out any remaining open positions of the defaulting CDS Clearing Member by using one or more auctions or other commercially reasonable unwind processes allowed under Part 9 of the Rules. ICE Clear Europe may close out its position through auctions, open market processes, or by allocating replacement transactions to non-defaulting CDS Clearing Members at the floor price established by ICE Clear Europe.[28]

At any time following a default by a CDS Clearing Member, ICE Clear Europe is empowered to use the margin, Guaranty Fund Contributions and any other permitted cover held by it with respect to such defaulting CDS Clearing Member (including such defaulting CDS Clearing Member's contributions to the Guaranty Fund) and any amounts recovered from a parent guarantor or letter of credit issuer in respect of such CDS Clearing Member to satisfy any remaining obligations of the CDS Clearing Member to ICE Clear Europe, including any costs incurred by ICE Clear Europe in liquidating the margin and credit support of such defaulting CDS Clearing Member. ICE Clear Europe has the right to liquidate, convert currency, and apply any such property as may be necessary to satisfy such obligations. In addition, at its discretion, ICE Clear Europe may draw on the contributions of other CDS Clearing Members to the Guaranty Fund, as described in Section II.D.2.

The final step of the default proceedings required under the Rules is the calculation of a net sum as due to payable to or from ICE Clear Europe from or to the CDS Clearing Member. This step will take place once all of the contracts of the defaulter have been liquidated. All the costs, expenses and income from the close-out process, together with all margin on account, will be taken into account in determining the final amount due or payable. Pursuant to the Companies Act 1989, such a net sum, once declared by a RCH, is definitive and can be proved in UK insolvency proceedings.

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We believe that the above described clearing services to be offered by ICE Clear Europe will reduce many of the credit and operational risks faced by the major clearing members in the cleared CDS market and make a significant contribution to the efficacy and efficiency of the CDS market and the mitigation of systemic risk.

## III. Regulatory Status of Credit Default Swaps

### A. Current Regulatory Status of CDS

ICE Clear Europe's supervision and regulation by the FSA as an RCH will include regulation of its CDS clearing service, as CDSs (as well as existing futures and options cleared

[28] Rule 903(a).

by ICE Clear Europe) fall within the scope of investments supervised by the FSA.[29] This section below focuses on the regulatory status of CDS in the United States.

It is uniformly accepted that CDS transactions, as currently conducted, qualify as "security-based swap agreements" under Section 206B of the GLBA, and therefore are not "securities" for purposes of the Acts.[30] As a result, CDS transactions are generally not subject to regulation under either of the Acts, with the exception of certain specifically enumerated anti-fraud, insider trading, short swing profit and anti-manipulation provisions.[31] As described below, the consequences of clearing CDS through ICE Clear Europe raise a potential question regarding the status of CDS as security-based swap agreements.

As a threshold matter, under Section 206B of the GLBA, in order for a CDS to qualify as a security-based swap agreement, it must be a "swap agreement" as defined in GLBA Section 206A.[32] Under Section 206A(a) of the GLBA, a "swap agreement" includes:

> "any agreement, contract, or transaction . . . the material terms of which (other than price and quantity) are subject to individual negotiation, and that —
>
> * * *
>
> (2) provides for any purchase, sale, payment or delivery (other than a dividend on an equity security) that is dependent on the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence; [or]
>
> (3) provides on an executory basis for the exchange, on a fixed or contingent basis, of one or more payments based on the value or level of one or more… securities, instruments of indebtedness, indices… or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates

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29 All CDSs fall within the definitions of one the following investments in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO"): (i) options (Article 83, RAO), where there is a physical delivery obligation; (ii) contracts for differences, etc. (Article 85, RAO), where the CDS is cash-settled; and (iii) rights to, or interests in, investments (Article 89, RAO) in relation to any entitlements to CDS which arise under the Rules. All such matters fall within the scope of the FSA's jurisdiction pursuant to sections 19 and 21 of the Financial Services and Markets Act 2000.

30 See Exchange Act Section 3A(b) and Securities Act Section 2A(b) (security-based swap agreements are not securities under the Acts).

31 15 U.S.C. §§ 78c-1(b), 77b-1(b), 78c Note and 78c(a)(10), respectively.

32 GLBA Section 206C.

> the financial risk so transferred, including any such agreement, contract, or transaction commonly known as a..., credit default swap[.]"[33] (Emphasis added.)

Because CDS – whether physically settled or cash-settled – involve a payment or delivery that is dependent on the occurrence of a credit event, it is clear that CDS are covered under Section 206A(a)(2). It is equally clear from the highlighted language at the end of Section 206A(a)(3) that Congress specifically intended credit default swaps to qualify as swap agreements.[34]

We note that GLBA Section 206A(b) excludes a number of transactions that would otherwise meet the requirements of Section 206A(a) from the definition of swap agreement.[35] Based on the plain meaning of these provisions, Congress's clear intent and applicable principles of statutory construction, we believe that none of the exclusions in Section 206A(b) operates to carve out CDS from the definition of swap agreement. [36]

A security-based swap agreement is defined, in turn, under GLBA Section 206B as a "swap agreement" of which a material term is based "on the price . . . of any security or any group or index of securities, or any interest therein."[37] In the case of CDS that provide for the potential delivery of a debt security against a specified payment amount, or a cash payment based on the value of a debt security, many market participants have assumed that such CDS may be regarded as security-based swap agreements. To the extent CDS are not security-based swap agreements under Section 206B, they would constitute non-security-based swap

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33 GLBA Section 206A(a).

34 We note that in 2000, credit default swaps included both physically-settled and cash-settled CDS.

35 GLBA Section 206A(b)(1) (carving out securities options) and Section 206A(b)(4) (carving out any agreement, contract, or transaction providing on a contingent basis for the delivery of securities but *specifically* preserving transactions providing for purchases or sales of securities predicated on contingencies that might reasonably be expected to affect or be affected by the creditworthiness of a party other than a party to the transaction).

36 As noted in footnote 35, Section 206A(b)(1) excludes from the definition of swap agreement various securities options, including puts, calls and options on securities. While CDS can resemble certain types of securities options, we believe, based on long-settled and well-established principles of statutory construction, that this provision does not exclude CDS from the definition of swap agreement. Courts, confronted with the need to reconcile a general provision that is in conflict with a more specific provision in the same statute, have consistently held that the more specific provision governs, to the extent of the conflict. See, e.g., Ginsberg & Sons v. Popkin, 285 U.S. 204 (1932); Kepner v. U.S., 195 U.S. 100 (1904); Maiatico v. United States, 302 Fed. 2d 880 (DC Cir. 1962). It seems clear that the exception for agreements involving credit-based contingencies contained in Section 206A(b)(4) is significantly more specific and narrowly focused than the more general exception for securities options contained in Section 206A(b)(1). Similarly, in Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995), the Supreme Court held that, "the Court will avoid a reading [of a statute] which renders some words absolutely redundant." Id. at 574. Accord, Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998); U.S. v. Alaska, 521 U.S. 1 (1997); Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 837 (1988); U.S. v. Menasche, 348 U.S. 528, 536-537 (1955). If the securities option exclusion in Section 206A(b)(1) were read to exclude CDS, this would render certain provisions from Sections 206A(a)(3) and 206A(b)(4), effectively meaningless and redundant.

37 GLBA Section 206C.

agreements under GLBA Section 206C ("non-security-based swap agreement means any swap agreement . . . that is not a security-based swap agreement . . . .").[38]

Notwithstanding the foregoing, for purposes of Section 206A(a) of the GLBA, in order for a CDS to be considered a swap agreement, it is not sufficient that the CDS falls within one of the enumerated clauses of that section. It is also necessary that the "material terms" of the CDS (other than price and quantity) be "subject to individual negotiation".[39] As noted above, currently, market participants individually negotiate the terms of the ISDA Schedule, Confirmation and (if applicable) CSA that will govern individual CDS based on each party's own assessment of its needs and requirements and the counterparty risk presented by the other party.

B. Legal Uncertainty Raised by Central Counterparty Clearing Structure

In order to reduce its counterparty risk, it is essential that ICE Clear Europe, as a central counterparty, maintain an exactly matched book of CDS positions at all times. In addition, in order to reduce documentation risk (and therefore market and credit risk), all of the CDS that are cleared and settled through ICE Clear Europe must be subject to similar credit risk mitigation and collateral terms and must be governed by uniform terms. The practical effect of this is that the bilaterally negotiated terms of all CDS transactions submitted to ICE Clear Europe for clearing will be superseded by standardized terms mandated pursuant to the Rules. The provisions of the Rules relating to margin and the CDS Guaranty Fund will contain uniform credit support and contractual terms applicable to each similar CDS and to all CDS Clearing Members, irrespective of any single CDS Clearing Member's unique position or requirements. As a result, there arises some uncertainty as to whether the terms of the CDS cleared and settled through ICE Clear Europe are "subject to individual negotiation" within the meaning of GLBA Section 206A(a).

As a threshold matter, we note that we are aware of no legislative history or judicial precedent construing the individual negotiation requirement of GLBA Section 206A(a). It is clear from the text of the provision, however, that this prong of the swap agreement definition looks to the circumstances prevailing at the time a transaction's terms are negotiated by the parties. Even though the material terms of CDS submitted to ICE Clear Europe for clearing are superseded by a uniform set of rules, CDS Clearing Members, at the time they enter into a CDS transaction, are free to specify any terms they may wish to negotiate, including the economic terms of the CDS and whether or not to submit the relevant transaction to ICE Clear Europe for clearing.

Although the framework for the regulation of securities broker-dealers has been effective for traditional securities activities, we believe that it has not provided a commercially practical

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[38] GLBA Section 206C.

[39] GLBA Section 206A(a).

framework for the conduct of broad categories of OTC derivatives activities.[40] Given that CDS Clearing Members will be the most sophisticated derivatives market participants, will be acting solely for their own accounts (acting to the extent relevant through their CM Affiliates) and will be limited to firms who are subject to regulation or consolidated supervision by other financial regulators, we believe little would be gained by subjecting these CDS Clearing Members and CM Affiliates to regulation as securities dealers.

On the other hand, requiring dealer regulation and imposing the Exchange Act's securities regime on cleared CDS would create a significant and burdensome dislocation of this market and, of greatest concern, would almost certainly present a significant obstacle to the adoption of clearing for the CDS market. We believe the imposition of such additional regulation and regulatory constraints would be unwarranted, would not constitute an efficient allocation of regulatory resources, and would not serve the public interest. Equally important, however, given the size and significance of the CDS market, proceeding in the face of any material legal uncertainty as to the regulatory status of CDS cleared through ICE Clear Europe would be unacceptable both to market participants and the official sector. Either outcome would produce undesirable consequences and jeopardize the important benefits that the introduction of clearing for CDS can provide.

We believe that an optimal result can be achieved, without any need to resolve the status of cleared CDS, through the issuance by the Commission of an order granting exemptive relief to ICE Clear Europe, CDS Clearing Members, CM Affiliates and IDBs, for the avoidance of legal uncertainty, on terms and conditions that would, in effect, permit ICE Clear Europe, CDS Clearing Members, CM Affiliates and IDBs to continue to conduct business in cleared CDS on the basis that such transactions would be treated as security-based swap agreements under the Exchange Act. We believe such relief would be consistent with the public interest and the standards for the issuance of exemptive relief under the Acts as described in Section IV below.

## IV. Proposed Exemptive Relief

### A. Clearing Agency Relief

#### 1. Regulatory Supervision

To qualify as an RCH in the UK, a clearing house must demonstrate that it satisfies the Recognition Requirements. Furthermore, the UK antitrust body, the Office of Fair Trading ("OFT") must issue a report to Her Majesty's Treasury ("HMT") as to whether any regulatory

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[40] Although qualifying banks are eligible for exemption from registration as dealers under the Exchange Act for dealing activities involving securities that qualify as "swap agreements" under GLBA Section 206, this definition also includes a requirement that the relevant agreement be "individually negotiated," raising a question that is essentially identical to that raised under the swap agreement definition in GLBA Section 206A(a).

provisions[41] in the application have a significantly adverse effect on competition (alone or in combination with other regulatory provisions);[42] and HMT must approve the making of the Recognition Order.[43]

ICE Clear Europe has been granted recognition as an RCH under the UK Financial Services and Markets Act 2000 ("FSMA") by the FSA on May 12, 2008. ICE Clear Europe is also a "designated system" under the Settlement Finality Regulations. ICE Clear Europe is subject to a regulatory regime in the UK, including supervision by its primary regulator, the FSA. Furthermore, ICE Clear Europe has been granted the status of a MCO by the CFTC for its energy OTC products.

As a RCH, ICE Clear Europe is subject to the FSMA and the Recognition Requirements and the FSA Guidance and Notification Rules set out in the FSA's "Recognised Investment Exchanges and Recognised Clearing Houses" ("REC") Sourcebook.[44] Thus, ICE Clear Europe is subject to the ongoing supervision of the FSA and must continue to satisfy the FSMA Recognition Requirements for Investment Exchanges and Clearing Houses Regulations 2001 if it is to remain a UK RCH.[45] The UK regulatory regime and ICE Clear Europe must also continue to satisfy appropriate standards applicable to MCOs in order for ICE Clear Europe to continue providing energy contract clearing services to Clearing Members in the United States.

The Recognition Requirements include provisions on, among others: (i) financial resources; (ii) suitability; (iii) systems and controls; (iv) general safeguards for investors; (v) access to facilities; (vi) settlement and clearing services; (vii) transaction recording; (viii) financial crime and market abuse; (ix) custody; (x) promotion and maintenance of standards; (xi) rules and consultation; (xii) discipline; (xiii) complaints; and (xiv) default rules.

Accordingly, the FSA has a regulatory supervision relationship with ICE Clear Europe. On an annual basis, the FSA will undertake a risk assessment of ICE Clear Europe pursuant to which the FSA determines whether the relevant regulatory obligations continue to be met and whether the activities of ICE Clear Europe pose any risk to the FSA's statutory objectives, including maintaining market confidence and providing customer protection. The FSA approves the business continuity plans of ICE Clear Europe. There are also extensive FSA reporting and notification obligations applicable to ICE Clear Europe.

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41 Defined in section 302 FSMA: (a) the rules of a … clearing house; (b) any guidance issued by a … clearing house; … and (d) the arrangements or criteria in [the required particulars, *i.e.* particulars of the clearing arrangements it makes or proposes to make with a recognised investment exchange; or if the clearing house proposes to provide clearing services for persons other than recognised investment exchanges, particulars of the criteria which it will apply when determining to whom it will provide those services].

42 Section 303 FSMA.

43 Section 290 FSMA.

44 Section 157 FSMA.

45 Section 286 FSMA.

The FSA is tasked with giving guidance on such information and advice as it considers appropriate with respect to the operation of FSMA and any rules made under it, any matters relating to the FSA's functions and regulatory objectives, or on any other matters where the FSA deems desirable.[46] The FSA focuses on those areas of ICE Clear Europe's operations that are likely to generate the most risk (including operational risk, counterparty risk and credit risk) to the financial sector and the general public.

Moreover, as a private limited company organized under the laws of England and Wales, ICE Clear Europe must meet the statutory annual audit requirements applicable to such companies.

2. Statutory Criteria for Exemption from Registration as a Clearing Agency

Under Section 17A(b)(1) of the Exchange Act, the Commission may "exempt any clearing agency ... from any provisions of this section or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of this section, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds."[47] The Commission has stated that in order to ensure that the fundamental goals of Section 17A are met "applicants requesting exemption from clearing agency registration are required to meet standards substantially similar to those required of registrants under Section 17A."[48] As a result, any entity, including ICE Clear Europe, that seeks an exemption from registration as a clearing agency must have rules and procedures that are substantially equivalent to those required of clearing agencies registered under Section 17A of the Exchange Act.

ICE Clear Europe's Rules, its CDS Procedures and agreements were subject to substantial review by the FSA for it to demonstrate that it would, and continues to comply with the Recognition Requirements. These requirements are buttressed by over 200 FSA requirements, set out in REC, covering a broad range of issues including outsourcing, custody, margin, risk management, consultation processes, disciplinary procedures, complaints procedures, confidentiality, conflicts of interest, governance, money laundering, market abuse, financial resources and the contents of default rules (a summary of which are annexed to this memorandum). ICE Clear Europe has been found to satisfy these requirements, following a 9-month long regulatory process from July 2007 until May 2008 (when recognition was granted for its energy clearing service). The Recognition Requirements, the Rules and the CDS Procedures that ICE Clear Europe will apply to CDS clearing will ensure that ICE Clear Europe is in substantial compliance with the requirements of Section 17A of the Exchange Act.

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46 Section 157 FSMA.

47 Exchange Act Section 17A(b)(1).

48 Securities Exchange Act Release No. 38589, 62 FR 26833 (Notice of filing of application for exemption from registration as a clearing agency) (the "Euroclear Notice") at 26839.

Significantly, the Commission has itself previously noted that the Recommendations for Central Counterparty "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."[49]

i. Safeguarding of Securities and Funds and Prompt and Accurate Clearance and Settlement

Sections 17A(b)(3)(A) and (F) of the Exchange Act require that a clearing agency be "so organized" and have the capacity to (i) "facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible," and (ii) adequately "safeguard securities and funds in its custody or control or for which it is responsible."[50]

Paragraph 18 of the Schedule to the Recognition Requirements similarly provides that: "[t]he clearing house must ensure that the systems and controls used in the performance of its functions are adequate, and appropriate for the scale and nature of its business. This requirement applies in particular to systems and controls concerning— (a) the transmission of information; (b) the assessment and management of risks to the performance of the clearing house's functions; (c) the operation of its clearing service; and (d) (where relevant) the safeguarding and administration of assets belonging to users of the clearing house's facilities." This requirement is expanded upon in REC 2.5 to include specific and detailed guidelines in relation to: (i) duties and responsibilities within the clearing house; staffing and resources; staff supervision; board oversight; (ii) information transmission (within the clearing house; and to members); (iii) risk management of general, operational, legal, market and counterparty risks (which will include a review of the risk department, frequency of monitoring and review of risk or exposure limits, arrangements for monitoring and assessing intra-day movements in exposures and risks, margin, and stress-testing etc.); (iv) monitoring of settlement arrangements; (v) safeguarding and administration of assets (including audit trail of assets and instructions); (vi) management of conflicts of interest (personal and structural); (vii) internal and external audit; and (viii) IT systems.

Paragraph 19(1) of the Schedule to the Recognition Requirements requires that a clearing house must ensure that its facilities are such as to afford proper protection to investors. FSA guidance in REC 2.6 expands on this to refer to the clearing house's rules, procedures and arrangements for monitoring and overseeing the use of its facilities to prevent the use of its facilities for abusive or improper purposes; and requires that the clearing house safeguard against fraud.[51] As a result, the Rules and the accompanying procedures adopted by ICE Clear Europe

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49 See the LCH.Clearnet Order, 74 Fed. Reg. at 144.

50 Exchange Act Sections 17A(b)(3)(A) and (F).

51 REC 2.6.4G.

will promote (i) the public interest (including the protection of investors), (ii) the prompt and accurate clearance and settlement of CDS transactions and (iii) the safeguarding of assets and funds of the CDS Clearing Members.

The Rules will facilitate prompt and accurate clearance by requiring (i) that all submitted trade confirmations for a specific type of CDS contain all the information necessary for accurate settlement and conform to a predetermined form (proposed new Rule 401(a)(ix) and 403); and (ii) that when ICE Clear Europe accepts matched trades for clearing, the daily statement of trades that submitting CDS Clearing Members receive will reflect these newly cleared trades (provided that no disagreement exists with respect to the terms of the trade confirmations submitted by such CDS Clearing Members and CM Affiliates) (pursuant to the recalculation of Open Contract Positions under Rule 406).

ICE Clear Europe has established arrangements that provide for the safeguarding of collateral provided by CDS Clearing Members to ICE Clear Europe. As noted above, all collateral is transferred outright to ICE Clear Europe. Cash can only be transferred to ICE Clear Europe using well-capitalized, appropriately experienced and regulated banks that are approved as "Approved Financial Institutions" and which are operationally linked to ICE Clear Europe's banking system (Rule 202(a)(xi)). Cash payment settlements (including for margin and guaranty fund contributions) are made only through such Approved Financial Institutions (Rule 302(a)). However, coupon payments for CDSs will be effected through Deriv/SERV's Coupon Payment Facility which is operated by CLS Bank International. ICE Clear Europe and Approved Financial Institutions use SWIFT secure messaging for all settlement and bank transfers (subject to contingency methods being required) (as set out in the Finance Procedures). Non-cash collateral is transferred to ICE Clear Europe and held with JPMorgan Chase Bank as nominee or custodian in segregated custody accounts (as set out in the proposed CDS finance procedures).

ii. CDS Clearing Member Criteria

Section 17A(b)(3)(B) of the Exchange Act requires that a clearing agency allow certain enumerated types of entities to become members. Section 17A(b)(4), however, permits a clearing agency to deny membership to any person if "such person does not meet such standards of financial responsibility, operational capability, experience, and competence as are prescribed by the rules of the clearing agency."[52] These membership standards must not be "designed to permit unfair discrimination in the admission of clearing members or among clearing members in the use of the clearing agency."[53]

Paragraph 19(2) of the Schedule to the Recognition Requirements provides that "the clearing house must ensure that access to the clearing house's facilities is subject to criteria designed to protect the orderly functioning of those facilities and the interests of investors." FSA Guidance in REC expands on this by (i) limiting access as a CCP member to persons over whom

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52 Exchange Act Section 17A(b)(3)(B) and 17A(b)(4).

53 Exchange Act Section 17A(b)(3)(F).

the CCP can with reasonable certainty enforce its rules contractually; who are competent and appropriate (in terms of size/nature of their business); and who have sufficient financial resources;[54] (ii) having objective and non-discriminatory membership criteria; [55] and (iii) having appropriate arrangements to permit electronic access (including procedures, controls, security governing members).[56]

Furthermore, Paragraph 21A of the Schedule to the Recognition Requirements provides that "[t]he clearing house must make transparent and non-discriminatory rules, based on objective criteria, governing access to central counterparty, clearing or settlement facilities provided by it. The rules must enable an investment firm or a credit institution authorised by the competent authority of another EEA State (including a branch established in the United Kingdom of such a firm or institution) to have access to those facilities on the same terms as a UK firm for the purposes of finalising or arranging the finalisation of transactions in financial instruments. The clearing house may refuse access to those facilities on legitimate commercial grounds."

Finally, the OFT is responsible for monitoring any competition (antitrust) effects of the membership criteria of ICE Clear Europe (sections 303, 304 FSMA), including fees charged by RCHs.

In accordance with these requirements, the Rules requires that each applicant (which would include regulated entities listed in Section 17A(b)(3)(B) of the Exchange Act), meets objective, non-discriminatory membership criteria described above under Section II.B.

iii. Fair Representation

Section 17A(b)(3)(C) of the Exchange Act requires that a clearing agency have rules that ensure that its "shareholders (or members) and participants" are fairly represented "in the selection of its directors and administration of its affairs."[57] Rather than prescribing a single method for determining what constitutes "fair representation", the Commission looks to ensure that the rules of the clearing agency give "a significant voice in the direction of the affairs of the clearing agency" to the clearing agency members and participants.[58]

Paragraph 17 of the Schedule to the Recognition Requirements provides that: "[t]he clearing house must be a fit and proper person to perform the functions of a recognised clearing house. In considering whether this requirement is satisfied, the Authority may … take into account all the circumstances, including the clearing house's connection with any person." FSA

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54 REC 2.7.3G(1).

55 REC 2.7.3G(2).

56 REC 2.7.4G.

57 Exchange Act Section 17A(b)(3)(C).

58 Euroclear Approval at 8237.

Guidance in REC 2.4.3(G)(6) expands on this to state that in assessing this requirement, the FSA will have regard, among others, to the size and composition of its governing body, including the number of members of the governing body who represent members of the UK recognized body or other persons and the types of person whom they represent.

Paragraph 21 of the Schedule to the Recognition Requirements provides that "[t]he clearing house must ensure that appropriate procedures are adopted for it to make rules, for keeping its rules under review and for amending them. The procedures must include procedures for consulting users of the clearing house's facilities in appropriate cases. The clearing house must consult users of its facilities on any arrangements it proposes to make for dealing with penalty income in accordance with paragraph 22(3) below (or on any changes which it proposes to make to those arrangements)."

Further, Paragraph 23 of the Schedule to the Recognition Requirements provides that "[t]he clearing house must have effective arrangements for the investigation and resolution of complaints arising in connection with the performance of, or failure to perform, any of its regulatory functions."

ICE Clear Europe believes that its Rules give the Clearing Members (including CDS Clearing Members) a significant voice in the administration of ICE Clear Europe's affairs. ICE Clear Europe will establish a CDS Risk Committee ("CDS Risk Committee") for CDS with similar competencies as those of the equivalent committee of ICE Trust.[59]

The CDS Risk Committee will advise ICE Clear Europe's Board of Directors ("Board") on the margin and Guaranty Fund Contribution requirements. This will provide a mechanism for user input[60] and will be comprised, including the Chairman, of up to twelve members: (i) the President and the Chief Operating Officer of ICE Clear Europe, (ii) up to nine CDS Clearing Member representatives ("Nominee Committee Members"). It will be chaired by one of the ICE Clear Europe Board's non-executive directors. The Board will appoint the Chairman, who will be a non-executive director of ICE Clear Europe, and the Deputy Chairman of the CDS Risk Committee.

Nominee Committee Members will be appointed or re-appointed on an annual basis by the Chairman of the CDS Risk Committee and the President of ICE Clear Europe. Nominee Committee Members that cease to be employed by a CDS Clearing Member will be obliged to resign from the CDS Risk Committee. A Nominee Committee Member who does not attend the CDS Risk Committee for two consecutive meetings may be asked to resign by the Chairman of the CDS Risk Committee.

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59 ICE Clear Europe currently has a risk committee as a committee of its Board of Directors with a majority of Clearing Member representatives for energy which advises the board on risk management such as margin and guaranty fund parameters.

60 REC 2.4.3G(6)(a).

A quorum will be five members, to include at least two Nominee Committee Members and the Chairman or Deputy Chairman of the Committee. Should there be a vote on any matter and should the numbers of votes cast for and against be equal, the Chairman shall be entitled to a casting vote in addition to any other vote he may have.

The role of the CDS Risk Committee is limited to the clearing of CDS contracts and the CDS clearing membership and is responsible, on behalf of the CDS clearing membership as a whole, to ensure ICE Clear Europe maintains and implements agreed procedures, processes and controls which are designed to protect the integrity of the CDS Guaranty Fund and to ensure that ICE Clear Europe can successfully handle the insolvency of a CDS Clearing Member. The CDS Risk Committee is responsible for advising the Board on the continued adequacy of the key policies and controls designed to manage counterparty risk and to cover market risk for CDS contracts. ICE Clear Europe is responsible for implementing those policies and controls and for the handling of defaults among the CDS clearing membership. In exercising its responsibilities the CDS Risk Committee will, as advised by the President of ICE Clear Europe, take into account the commercial and competitive position of ICE Clear Europe.

The CDS Risk Committee will:

- Consider and approve applications for CDS clearing membership.
- Review any decision of ICE Clear Europe to suspend or terminate CDS clearing membership other than on an event of default.
- Consider modifications to these terms of reference.
- Approve and undertake at least annual reviews of the continued adequacy of ICE Clear Europe's CDS risk policies to manage and mitigate credit and market risks, including:

    - On a quarterly basis, the adequacy of ICE Clear Europe's CDS Guaranty Fund and other financial resources available in the event of default;
    - ICE Clear Europe's policies and processes for managing potential and actual CDS Clearing Member defaults;
    - ICE Clear Europe's CDS risk management policies and methodology, including the processes and methodologies used for setting CDS margin rates and intra-day margining, and any material changes proposed to such policies;
    - The procedures and statistical measures used in CDS stress testing, and the results of such stress testing;
    - Changes to the terms of existing and/or new, CDS contracts to be cleared; and
    - CDS clearing membership criteria.

- Be provided with any internal or external audit findings that relate to the effective implementation of the CDS risk policies. The CDS Risk Committee may also, if it believes it to be prudent, request that certain CDS Procedures or risk processes are included in the annual internal audit plan.

- In the course of its work the CDS Risk Committee may obtain external legal or other independent advice and secure the attendance of third parties with relevant experience and expertise if it considers this necessary.
- The CDS Risk Committee will also consider any other issues that may be referred to it by the Board.

Meetings will be held as needed, and at least quarterly. Any member of the CDS Risk Committee, the Secretary of the CDS Risk Committee, or both, may, through the Chairman of the CDS Risk Committee, request additional meetings if they consider this necessary.

Further under Rule 109, ICE Clear Europe must, prior to the proposed Rule change taking effect, either (i) issue a consultation paper by circular or (ii) consult with a smaller number of CDS Clearing Members selected by ICE Clear Europe at its discretion. ICE Clear Europe will in these cases seek to provide at least 14 days for CDS Clearing Members and any other Persons to respond to the consultation. Responses to any consultation may be made publicly available by ICE Clear Europe unless it receives a request for confidentiality. These procedures are required by the Recognition Requirements and are designed to ensure that the CDS Clearing Members will be fairly represented with respect to the administration of ICE Clear Europe and that any significant changes to the rules and procedures are consistent with the objectives of the CDS Clearing Members. The proposed rule changes for CDS are currently subject to a consultation process with all Clearing Members and were published on ICE Clear Europe's Web site on May 1, 2009.[61]

The Board is composed of a non-executive chairman, the president of ICE Clear Europe, three independent non-executive directors, and two ICE representatives. Two additional non-executive directors with CDS expertise will be added. Members of the Board and key individuals who have not previously been subject to ICE Group or predecessor vetting procedures will only be appointed following an assessment of their integrity in accordance with the ICE Clear Europe's vetting procedures.

In addition, details of key individual appointments, elections or resignations will be notified to the FSA in accordance with REC 3.4.2R.

iv. Capacity to Enforce Rules and Discipline CDS Clearing Members as Required by English Law

Section 17A(b)(3)(A) of the Exchange Act requires that a clearing agency have the capacity to enforce "compliance by its participants with the rules of the clearing agency."[62] In addition, Sections 17A(b)(3)(G) and (H) require that a clearing agency have a system to

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61 www.theice.com/publicdocs/clear_europe/circulars/C09023%20ICE_Clear_Europe_Clearing_Rules.pdf

62 Exchange Act Section 17A(b)(3)(A).

discipline participants that violate its rules and that the procedures for disciplining a participant be fair and equitable.[63] The Commission has further required that:

> "a clearing agency should have available and should employ an array of sanctions appropriate to the violations the clearing agency may encounter. Also, the clearing agency's rules should establish the agency's authority and procedures respecting interpretation of its rules and the bringing of charges where rule violations appear to have occurred, and the rules should describe the manner in which disciplinary authority is to be exercised."[64]

Paragraph 22 of the Schedule to the Recognition Requirements provides that "[t]he clearing house must have effective arrangements for monitoring and enforcing compliance with its rules. The arrangements must include procedures for (a) investigating complaints made to the clearing house about the conduct of persons in the course of using the clearing house's facilities; and (b) the fair, independent and impartial resolution of appeals against decisions of the clearing house. Where the arrangements include provision for requiring the payment of financial penalties, they must include arrangements for ensuring that any amount so paid is applied only in one or more of the following ways (a) towards meeting expenses incurred by the clearing house in the course of the investigation of the breach in respect of which the penalty is paid, or in the course of any appeal against the decision of the clearing house in relation to that breach; (b) for the benefit of users of the clearing house's facilities; (c) for charitable purposes."

ICE Clear Europe has a detailed and transparent disciplinary and appeals process that complies with the Recognition Requirements and FSA rules in REC, set out in Part 10 of the Rules. Furthermore, under the Rules, if ICE Clear Europe, in its discretion, considers it appropriate or if it is otherwise compelled to do so under any applicable law, the ICE Clear Europe may refer the matter or make a report on the matter to a market, regulatory authority or governmental authority.

Although the clearing house will not be a self-regulatory organization ("SRO") as that term is defined in Section 3(a)(26) of the Exchange Act,[65] a number of Rules empower the clearing house variously to discipline, fine or charge, or to suspend, limit the activities of or terminate the participation of, any CDS Clearing Member who fails to comply with applicable Rules and such powers are required to be established and enforced pursuant to English law.

### v. Clearing Fund

The Standards Release requires that a registered clearing agency establish a clearing fund that: "(i) is composed of contributions based on a formula applicable to all users, (ii) is in cash or

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63 Exchange Act Section 17A(b)(3)(G) and (H).

64 Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920 (the "Standards Release"), p. 10.

65 15 U.S.C. § 78c(a)(26).

highly liquid securities, and (iii) is limited in the purposes for which it may be used."[66] The Commission has in the past exempted from registration a clearing agency that did not have a clearing fund, but instead had "financial and operational risk management mechanisms ... and other operational safeguards to substantially reduce the risk of financial loss" to the clearing system and its clearing members.[67]

Paragraph 18 of the Schedule to the Recognition Requirements provides that: "The clearing house must ensure that the systems and controls used in the performance of its functions are adequate, and appropriate for the scale and nature of its business. This requirement applies in particular to systems and controls concerning— ... (b) the assessment and management of risks to the performance of the clearing house's functions." This is expanded upon considerably in REC 2.5 to allow the FSA to assess the measures and control of different types of risk (REC 2.5.6G(2)) and "the robustness of the arrangements for calculating, collecting and holding margin payments and the allocation of losses (REC 2.5.7G(5)). As a result of these requirements, both domestic clearing houses in the UK operate default funds. Published amendments to the Companies Act 1989 and Recognition Requirements, which will take effect in second quarter of 2009, will require RCHs to refer to the application of default funds in their default rules.

In accordance with these requirements, ICE Clear Europe will establish a strict margin, guaranty fund and credit support regime as further described above under Section II.D of the submission.

vi. Dues, Fees and Charges

Section 17A(b)(3)(D) of the Exchange Act requires that a clearing agency allocate equitably among its participants "reasonable dues, fees, and other charges."[68] In addition, the Commission has said that "rules providing for dues, fees or other charges must be designed to meet the other objectives of Section 17A(b)(3) of the Exchange Act."[69]

Paragraph 21A of the Schedule to the Recognition Requirements provides that ICE Clear Europe must "make transparent and non-discriminatory rules, based on objective criteria, governing access to central counterparty, clearing or settlement facilities provided by it." The FSA monitors fees in this respect. Any changes in fees are potentially subject to consultation under Rule 109 and must be notified to the FSA under REC 3.9.

Pursuant to Paragraph 22 of the Schedule to the Recognition Requirements, additional restrictions exist on fine income: "[w]here the arrangements include provision for requiring the payment of financial penalties, they must include arrangements for ensuring that any amount so

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66 Standards Release, p. 16.

67 Euroclear Approval, p. 8236.

68 Exchange Act Section 17A(b)(3)(D).

69 Standards Release, p. 20.

paid is applied only in one or more of the following ways - (a) towards meeting expenses incurred by the [UK RCH] in the course of the investigation of the breach in respect of which the penalty is paid, or in the course of any appeal against the decision of the [UK RCH] in relation to that breach; (b) for the benefit of users of the [UK RCH's] facilities; or (c) for charitable purposes."

Based on this, any dues, fees or charges that ICE Clear Europe charges to the CDS Clearing Members will be required by the FSA and OFT to be fair and non-discriminatory and not contrary to the public interests served by Section 17A.

vii. Changes in Rules

Section 19(b) of the Exchange Act requires that a registered clearing agency file with the Commission all proposed amendments, additions or changes to the rules and procedures of the registered clearing agency.[70] In addition, under Section 19(b), the Commission is generally required to approve or disapprove any proposed rule change. The Commission may approve the proposed rule change only if "it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations thereunder applicable to such organization."[71]

Under section 293(5) of the FSMA, ICE Clear Europe must notify any changes to its rules to the FSA. ICE Clear Europe is required as a general matter to show compliance with the Recognition Requirements and any rule changes would be assessed in this context. In addition, the FSA has powers to take action against "excessive regulatory provisions" made by RCHs. Under section 300A of the FSMA, certain rule changes are notifiable and can be made only subject to FSA approval. The FSA has the power to disallow any "excessive regulatory provision" and such rule changes are not allowed without prior FSA approval. Any changes to the default rules of an RCH are subject to a 14-day prior notice and FSA review period under section 157 of the Companies Act 1989. The FSA has the power to direct an RCH not to proceed with any proposal to amend its default rules under that provision.

B. Exemption of Clearing Members from the Provisions of the Exchange Act Governing Securities Transactions

Under Exchange Act Section 36(a)(1), the Commission may "exempt any person ... or transaction, or any class or classes of persons ... or transactions, from any provision or provisions of" the Exchange Act "or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors".[72] Any request for exemptive relief under Section 36(a)(1) must (i) "state the basis

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70 Exchange Act Section 19(b).

71 Exchange Act Section 19(b)(2).

72 Exchange Act Section 36(a)(1).

for the relief sought" and (ii) "identify the anticipated benefits for investors and any conditions or limitations the applicant believes would be appropriate for the protection of investors."[73]

Congress, in granting the Commission this broad exemptive authority, intended to "incorporate flexibility into the ... regulatory scheme to reflect a rapidly changing marketplace."[74] The Commission has specifically noted that this exemptive authority will allow it to address persons and transactions that "do not fit neatly into the existing regulatory framework."[75]

As noted above, ICE Clear Europe will be supervised by the FSA applying a regulatory framework that the Commission has itself recognized as substantially similar to the framework administered by the Commission under Section 17A.[76] Additionally, ICE Clear Europe's investors and Clearing Members are among the most sophisticated market professionals.

We believe it is significant that the activities of CDS Clearing Members and CM Affiliates in connection with cleared CDS will not be fundamentally different from those currently undertaken, and that will continue to be undertaken, in relation to CDS that are not submitted to ICE Clear Europe for clearing. The only significant difference will be the risk mitigating benefits afforded by participation within a prudently organized clearing system. None of the important public policy objectives that are fostered by regulations – such as those governing disclosure, registration, listing, customer confirmations, customer account statements, rehypothecation, custody and control, and the like – are implicated by participation in ICE Clear Europe.

Imposition of these requirements, on the other hand, would be unwarranted and burdensome on CDS Clearing Members. The requirement to transfer these activities to a registered dealer alone carries with it the need to re-document all of the hundreds and thousands of trading relationships CDS Clearing Members have or, possibly worse, to re-document significant numbers of them and bifurcate their cleared CDS activities from other CDS and related OTC derivatives activities. Not only do we see little or no benefit accruing to investors or the general public from such a requirement, we believe the resulting commitment of regulatory resources would be inefficient and would not be justified by a cost-benefit analysis. Of greatest concern, however, is that the burdens such a requirement would entail would likely

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73 Securities Exchange Act Release No. 39624, 17 CFR Part 240 (Commission Procedures for Filing Application for Exemptive Relief pursuant to Section 36 of the Exchange Act) (the "Section 36 Procedures Release").

74 Securities Exchange Act Release No. 50311, 2004 WL 2609271 (Order granting application for a temporary conditional exemption pursuant to Section 36(a) of the Exchange Act by the National Association of Securities Dealers, Inc. Relating to the Acquisition of an ECN by the NASDAQ Stock Market) ("NASDAQ Order"), p. 5.

75 NASDAQ Order, p. 3.

76 CFTC has recognized (through its granting of MCO status) the FSA regulatory framework as substantially similar to the framework for designated clearing organizations in the United States.

erect a significant obstacle to achieving the benefits sought to be achieved by ICE Clear Europe's proposed CDS clearing initiative.

Clearly, capital adequacy and operational risk management competencies are an important component of the Exchange Act's regulatory framework and are particularly relevant to the efficacy of ICE Clear Europe's clearing initiative. The Rules will, however, directly address these issues by limiting CDS Clearing Members to those institutions that are the most highly capitalized and sophisticated financial institutions. Moreover, ICE Clear Europe will be subject to examination by sophisticated financial regulators, specifically with respect to the qualification of its CDS Clearing Members and the risks presented by their activities to ICE Clear Europe and to other CDS Clearing Members. Initially, the Rules will also limit CDS Clearing Members to institutions who have in place all necessary regulatory authorisations, licences, permissions and approvals in its country of origin, the UK and any other jurisdiction in which it conducts business.

Equally, protections against market abuses, such as market manipulation and insider trading, are important components of the investor and public interest protections afforded under the Acts and could be as relevant to cleared CDS as to other CDS. As an RCH, ICE Clear Europe is required to ensure, pursuant to Paragraph 19(2)(d) of the Schedule to the Recognition Requirements, that "appropriate measures are adopted to reduce the extent to which [its] facilities can be used for a purpose connected with market abuse or financial crime, and to facilitate their detection and monitor their incidence." In order to address these important regulatory objectives, ICE Clear Europe requests that the exemptive relief sought herein be limited in scope so that all provisions of the Exchange Act that are applicable to security-based swaps remain applicable to the activities of ICE Clear Europe, CDS Clearing Members and CM Affiliates in relation to CDS to be cleared by ICE Clear Europe.[77]

Based on these considerations and the conditions described in Section IV.D below, we believe the general exemptive relief sought herein pursuant to Section 36(a)(1) of the Exchange Act fully satisfies the relevant conditions for exemption under that Section.

Moreover, we do not believe that the relief sought herein under that Section or Section 17A(b)(1) of the Exchange Act requires or depends upon any resolution of the question presented by the status of cleared CDS under the swap agreement definition in GLBA Section 206A(a). On the contrary, we believe that the relief sought herein is warranted whether or not one regards cleared CDS as swap agreements under GLBA Section 206A(a) or as securities. We therefore respectfully request that the Commission issue the requested relief on the substantive merits of the relevant exemptive relief, for the purpose of eliminating legal uncertainty and promoting the public benefits to be derived from ICE Clear Europe's proposed clearing initiative, and without addressing or resolving any questions presented by the application of GLBA Section 206A(a) to cleared CDS.

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77 ICE Clear Europe acknowledges that future changes in the law applicable to CDS may affect the relief granted herein.

C. Exemption of Inter-Dealer Brokers from the Provisions of the Exchange Act Governing Securities Transactions

As described in more detail in Section IV.B above, under Exchange Act Section 36(a)(1), the Commission may "exempt any person ... or transaction, or any class or classes of persons ... or transactions, from any provision or provisions of" the Exchange Act "or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors".[78] Any request for exemptive relief under Section 36(a)(1) must (i) "state the basis for the relief sought" and (ii) "identify the anticipated benefits for investors and any conditions or limitations the applicant believes would be appropriate for the protection of investors."[79]

IDBs potentially will have an important role in the efficient and effective implementation, and continued operation, of the CDS clearing services being offered by ICE Clear Europe. It is anticipated that ICE Clear Europe, as part of its regular day-to-day clearing procedures, will accept for clearing CDS transactions of its CDS Clearing Members submitted by a number of IDBs (who would be treated as "Representatives" of the CDS Clearing Members for purposes of Rule 101 and 102(j)). As is the case in other fixed income markets, CDS Clearing Members that want to enter into a CDS transaction that will subsequently be submitted to ICE Clear Europe, instead of themselves locating another CDS Clearing Member to transact with, may choose to submit one side of a CDS transaction to an IDB, who will then locate another CDS Clearing Member willing to take the opposite side of such CDS transaction. The ability of CDS Clearing Members to access IDBs for cleared CDS will ensure that a broader range of CDS transactions are submitted to and cleared by ICE Clear Europe in an orderly manner and will provide CDS Clearing Members with additional means through which to execute and submit CDS transactions for clearing.

As noted above, the IDBs for whom relief is sought herein would act in relation to ICE Clear Europe cleared CDS transactions only for CDS Clearing Members, who will be sophisticated and well-capitalized. Further, IDBs will only act in circumstances where they (a) do not handle funds or property of the CDS Clearing Members and CM Affiliates, and (b) intermediate transactions on an agency basis, and as result do not become parties to, and are therefore not subject to the credit and market risks associated with, the CDS transacted through them.

Based on the foregoing limitations and the practical and market benefits that would be afforded by expanding the types of CDS that may be accepted by ICE Clear Europe for clearance and settlement and the conditions described in Section IV.D below, we believe that the relief sought herein pursuant to Section 36(a)(1) of the Exchange Act is fully consistent with the standards for exemptive relief thereunder.

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78 Exchange Act Section 36(a)(1).

79 See the Section 36 Procedures Release.

D. Conditions to Exemptive Relief

As a condition to the exemptive relief requested herein, ICE Clear Europe represents to the Commission that at all times after the commencement of its CDS clearing service, ICE Clear Europe will continue to satisfy the standards for central counterparties set forth in the Recognition Requirements. ICE Clear Europe also covenants to the Commission that information will be available to all CDS Clearing Members regarding the terms of the CDS cleared by ICE Clear Europe, the creditworthiness of ICE Clear Europe, and the clearing and settlement process for CDS cleared by ICE Clear Europe, subject only to such limitations as may be imposed under applicable privacy or similar laws, for example under the UK's Data Protection Act 1998 and the UK's Freedom of Information Act 2000 and confidentiality requirements applicable on ICE Clear Europe pursuant to Rule 106. ICE Clear Europe understands that an exemptive order granting ICE Clear Europe relief sought herein would be subject to ICE Clear Europe's compliance with the conditions set out in a Commission exemptive order.

Further, ICE Clear Europe understands that an exemption under Section 17A of the Exchange Act would be subject to compliance with conditions specified in the order, which conditions may include the following:

i. ICE Clear Europe shall make available on its Web site its annual audited financial statements.

ii. ICE Clear Europe shall keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it relating to its 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.

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

iv. ICE Clear Europe shall notify the Commission, on a monthly basis, of any material disciplinary actions taken pursuant to Part 10 of the Rules against any of its members using its CDS clearance and settlement services, including the denial of services, fines, or penalties. ICE Clear Europe shall notify the Commission promptly when ICE Clear Europe terminates on an involuntary basis the membership of an entity that is using ICE

Clear Europe's cleared CDS clearance and settlement services. Both notifications shall describe the facts and circumstances that led to the ICE Clear Europe's disciplinary action.

v. ICE Clear Europe shall notify the Commission of all changes to rules, procedures, and any other material events affecting its CDS clearance and settlement services, including its fee schedule and changes to risk management practices, not less than one day prior to the effectiveness or implementation of such rule changes or, in exigent circumstances, as promptly as reasonably practicable under the circumstances. If ICE Clear Europe gives notice to, or seeks approval from, the FSA regarding any other changes to its rules regarding its CDS clearance and settlement services, ICE Clear Europe will also provide notice to the Commission. All such rule changes will be posted on ICE Clear Europe's Web site. Such notifications will not be deemed rule filings that require Commission approval.

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

vii. ICE Clear Europe shall provide notice to the Commission at the same time it provides notice to the FSA in accordance with FSA REC 3.15 and FSA REC 3.16 regarding the suspension of services or inability to operate its facilities in connection with the clearance and settlement of Cleared CDS.

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

In addition, ICE Clear Europe will only accept CDS for clearance through ICE Clear Europe that meet certain conditions defined in Section 8 of the CDS Procedures, including that:

i. The reference entity, the issuer of the reference security, or the reference security is one of the following: (i) an entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available; (ii) a foreign

private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States; (iii) a foreign sovereign debt security; (iv) an asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; (v) an asset-backed security issued or guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae; or (vi) independent indexes comprised of these entities or securities, provided that an index will not be disqualified if, in the aggregate, reference entities (or reference securities) comprising 80% or more of the index's weighting satisfy the above information conditions with regard to reference entities or reference securities.

ii. The CDS is offered and sold only to eligible contract participants, as defined in Section 1a(12) of the Commodity Exchange Act (other than paragraph (C) thereof) as in effect on the date of the order(s) granting the exemptive relief requested herein.

Also, ICE Clear Europe understands that any exemptive relief requested herein would be subject to compliance with conditions specified in the order, which conditions may include the following:

i. ICE Clear Europe shall report the following information with respect to the calculation of mark-to-market prices for cleared CDS to the Commission within 30 days of the end of each quarter, and preserve such reports during the life of the enterprise and of any successor enterprise: (A) The total dollar volume of transactions executed during the quarter, broken down by reference entity, security, or index; and (B) The total unit volume and/or notional amount executed during the quarter, broken down by reference entity, security, or index; and

ii. ICE Clear Europe shall establish 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 Clear Europe who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (B) implementing standards controlling employees of ICE Clear Europe trading for their own accounts. ICE Clear Europe must adopt and implement adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed.

V. Conclusion

Based on the foregoing, we respectfully request that the Commission:

(i) Grant an order pursuant to Exchange Act Section 17A(b)(1), for the avoidance of uncertainty, exempting ICE Clear Europe, CDS Clearing Members and CM Affiliates from any requirement that it register with the Commission as a clearing agency pursuant to Section 17A of the Exchange Act, to the extent otherwise applicable to ICE Clear Europe, on the terms and subject to the conditions described in Section IV.D above of this request;

(ii) Grant an order pursuant to Exchange Act Section 36(a)(1), for the avoidance of uncertainty, exempting ICE Clear Europe, CDS Clearing Members and CM Affiliates from any requirement that they comply with provisions of the Exchange Act governing securities transactions, to the extent otherwise applicable ICE Clear Europe, CDS Clearing Members and CM Affiliates, in connection with the offer, acceptance, execution, clearance, settlement, performance and related activities contemplated by the Rules and this request involving CDS transactions submitted (or executed on terms providing for submission) to ICE Clear Europe for clearance and settlement, subject to the condition that ICE Clear Europe, CDS Clearing Members and CM Affiliates comply with, and remain subject to, the provisions of the Exchange Act applicable to security-based swap agreements, and on the terms and subject to the conditions described in Section IV.D above of this request; and

(iii) Grant an order pursuant to Section 36(a)(1) of the Exchange Act, for the avoidance of uncertainty, exempting any IDB from any requirement that it comply with provisions of the Exchange Act governing securities transactions, to the extent such provisions would otherwise be applicable to such inter-dealer broker, in connection with the effectuation by such IDB of CDS transactions submitted to ICE Clear Europe for clearance and settlement, on the terms and subject to the conditions described in Section IV.D of this request.

We believe that the granting of the foregoing exemptive relief will foster an important and much needed innovation in the OTC CDS market that promises many risk mitigating benefits not only for the CDS Clearing Members directly involved but also for other financial market participants and investors generally. Moreover, we believe that these benefits can be provided without prejudicing the interests of any constituency or imposing inappropriate financial or regulatory risks. Accordingly, we believe that the requested relief is appropriate in the public interest and is consistent with the protection of investors.

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If you should have any questions or comments or require further information regarding this request for exemptive relief, please do not hesitate to contact any of the undersigned at (202) 508-8025 or at aarms@shearman.com.

Very truly yours,

Abigail Arms

cc: Hon. Mary Schapiro
Hon. Kathleen L. Casey
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