

## II. Notice of Filing

The Commission establishes Docket No. CP2009–53 for consideration of matters related to the contract identified in the Postal Service's Notice.

Interested persons may submit comments on whether the Postal Service's contract is consistent with the policies of 39 U.S.C. 3632, 3622 or 3642. Comments are due no later than August 3, 2009. The public portions of these filings can be accessed via the Commission's Web site (<http://www.prc.gov>).

The Commission appoints Paul L. Harrington to serve as Public Representative in this proceeding.

## III. Ordering Paragraphs

*It is ordered:*

1. The Commission establishes Docket No. CP2009–53 for consideration of the issues raised in this docket.

2. Comments by interested persons in these proceedings are due no later than August 3, 2009.

3. Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

**Judith M. Grady,**

*Acting Secretary.*

[FR Doc. E9–18029 Filed 7–28–09; 8:45 am]

**BILLING CODE 7710–FW–P**

## SECURITIES AND EXCHANGE COMMISSION [REMOVED PRIVATE FIELD]

### Submission for OMB Review; Comment Request

*Upon Written Request, Copies Available*

From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

*Extension:*

Rule 17a–6; OMB Control No. 3235–0489; SEC File No. 270–433.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 17a–6 (17 CFR 240.17a–6) under the Securities Exchange Act of 1934 (15

U.S.C. 78a *et seq.*) permits national securities exchanges, national securities associations, registered clearing agencies, and the Municipal Securities Rulemaking Board (collectively, "SROs") to destroy or convert to microfilm or other recording media records maintained under Rule 17a–1, if they have filed a record destruction plan with the Commission and the Commission has declared such plan effective.

There are currently 27 SROs: 17 National securities exchanges, 1 national securities association, and 9 registered clearing agencies. Of the 27 SROs, 2 SRO respondents have filed a record destruction plan with the Commission. The staff calculates that the preparation and filing of a new record destruction plan should take 160 hours. Further, any existing SRO record destruction plans may require revision, over time, in response to, for example, changes in document retention technology, which the Commission estimates will take much less than the 160 hours estimated for a new plan. Thus, the total annual compliance burden is estimated to be 60 hours per year. The approximate cost per hour is \$305, resulting in a total cost of compliance for these respondents of \$18,300 per year (60 hours @ \$305 per hour).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an e-mail to [Shagufta\\_Ahmed@omb.eop.gov](mailto:Shagufta_Ahmed@omb.eop.gov) and (ii) Charles Boucher, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or by sending an e-mail to [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov). Comments must be submitted within 30 days of this notice.

Dated: July 23, 2009.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. E9–17943 Filed 7–28–09; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

**Federal Register Citation of Previous Announcement [74 FR 36281, July 22, 2009]**

**STATUS:** Closed Meeting.

**PLACE:** 100 F Street, NE., Washington, DC.

**DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING:** Friday, July 24, 2009 at 8 a.m.

**CHANGE IN THE MEETING:** Time Change.

The Closed Meeting scheduled for Friday, July 24, 2009 at 8 a.m. has been changed to Friday, July 24, 2009 at 9 a.m.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 551–5400.

Dated: July 23, 2009.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. E9–17989 Filed 7–28–09; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60373; File No. S7–17–09]

### Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of Eurex Clearing AG Related to Central Clearing of Credit Default Swaps, and Request for Comments

July 23, 2009.

#### I. Introduction

In response to the recent turmoil in the financial markets, the Securities and Exchange Commission ("Commission") has taken multiple actions to protect investors and ensure the integrity of the nation's securities markets, including actions<sup>1</sup> designed to address concerns related to the market in credit default swaps ("CDS").<sup>2</sup> The over-the-counter

<sup>1</sup> See generally Securities Exchange Act Release No. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009) (temporary exemption in connection with CDS clearing by Chicago Mercantile Exchange Inc.), Securities Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009) (temporary exemption in connection with CDS clearing by ICE US Trust LLC), Securities Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (temporary exemption in connection with CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.) and other Commission actions discussed therein.

<sup>2</sup> A CDS is a bilateral contract between two parties, known as counterparties. The value of this

("OTC") market for CDS has been a source of concern to us and other financial regulators, and we have recognized that facilitating the establishment of central counterparties ("CCPs") for CDS can play an important role in reducing the counterparty risks inherent in the CDS market, and thereby can help mitigate potential systemic impacts.<sup>3</sup> Thus, taking action to help foster the prompt development of CCPs, including granting conditional exemptions from certain provisions of the federal securities laws, is in the public interest.

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

financial contract is based on underlying obligations of a single entity or on a particular security or other debt obligation, or an index of several such entities, securities, or obligations. The obligation of a seller under a CDS to make payments under a CDS contract is triggered by a default or other credit event as to such entity or entities or such security or securities. Investors may use CDS for a variety of reasons, including to offset or insure against risk in their fixed-income portfolios, to take positions in bonds or in segments of the debt market as represented by an index, or to capitalize on the volatility in credit spreads during times of economic uncertainty. In recent years, CDS market volumes have rapidly increased. See Semiannual OTC derivatives statistics at end-December 2008, Bank for International Settlement ("BIS"), available at <http://www.bis.org/statistics/otcder/dt1920a.pdf>.

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

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

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

conditional exemptions from certain requirements of the Exchange Act.

The Commission believes that using well-regulated CCPs to clear transactions in CDS would provide a number of benefits, by helping to promote efficiency and reduce risk in the CDS market and among its participants, requiring maintenance of records of CDS transactions that would aid the Commission's efforts to prevent and detect fraud and other abusive market practices, addressing concerns about counterparty risk—through the novation process—by substituting the creditworthiness and liquidity of the CCP for the creditworthiness and liquidity of the counterparties to a CDS,<sup>5</sup> contributing generally to the goal of market stability, and reducing CDS risks through multilateral netting of trades.<sup>6</sup>

In this context, Eurex Clearing AG ("Eurex") has requested that the Commission grant exemptions from certain requirements under the Exchange Act with respect to its proposed activities in clearing and settling certain CDS, as well as the proposed activities of certain other persons, as described below.<sup>7</sup>

Based on the facts presented and the representations made in the request on behalf of Eurex,<sup>8</sup> and for the reasons discussed in this Order, the Commission temporarily is exempting, subject to certain conditions, Eurex from the requirement to register as a clearing agency under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS transactions. The Commission also temporarily is

<sup>5</sup> "Novation" is a "process through which the original obligation between a buyer and seller is discharged through the substitution of the CCP as seller to buyer and buyer to seller, creating two new contracts." Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissioners, *Recommendations for Central Counterparties* (November 2004) at 66. Through novation, the CCP assumes counterparty risk.

<sup>6</sup> See generally actions referenced in note 1, *supra*.

<sup>7</sup> See Letter from Paul Architzel, Alston & Bird LLP, to Elizabeth M. Murphy, Secretary, Commission, July 23, 2009.

<sup>8</sup> See *id.* The exemptions we are granting today are based on representations made in the request on behalf of Eurex. We recognize, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if any of these exemptions were to become unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in non-excluded CDS associated with persons subject to those unavailable exemptions would remain unchanged, but no new positions could be established pursuant to the exemptions until all of the underlying representations were again accurate.

exempting eligible contract participants and others from certain Exchange Act requirements with respect to non-excluded CDS cleared by Eurex.<sup>9</sup> The Commission's exemptions are temporary and will expire on April 23, 2010.<sup>10</sup>

## II. Discussion

### A. Description of Eurex's Proposal

The exemptive request on behalf of Eurex describes how its proposed arrangement for central clearing of CDS would operate, and makes representations about the safeguards associated with those arrangements, as described below:

#### 1. Eurex Organization

Eurex is a stock corporation formed and incorporated under the laws of Germany. It is a wholly-owned subsidiary of Eurex Frankfurt AG ("Eurex Frankfurt"), a German stock corporation that is itself wholly-owned by Eurex Zürich AG ("Eurex Zürich"), a Swiss stock corporation. Eurex Zürich has two 50 percent parents: Deutsche Börse AG ("DBAG"), a German stock corporation listed on the Frankfurt Stock Exchange, and the SIX Swiss Exchange ("SIX").

Eurex is regulated as a CCP under the German Banking Act ("Banking Act"), which explicitly treats the provision of central counterparty services as a banking activity. Operation of a banking institution requires prior written authorization from the German Federal Financial Supervisory Authority ("BaFin"). On an annual basis, BaFin requires Eurex to undergo an audit that covers financial requirements and risk management.

<sup>9</sup> This Order, however, does not provide exemptive relief in connection with Eurex's clearing of certain customer CDS transactions; specifically, customer CDS transactions cleared through U.S. clearing members (other than registered broker-dealers), and CDS transactions by U.S. customers cleared through non-U.S. clearing members. The Commission is considering the issues raised by that type of customer clearing activity—particularly with respect to the segregation of customer funds and securities that customers post with members as collateral, and the protection and transfer of those customer assets in the event of a member's insolvency. The Commission is working toward the goal of being able to provide exemptive relief to facilitate the central clearing, by Eurex, of these customer CDS transactions.

<sup>10</sup> To facilitate the operation of one or more CCPs for the CDS market, the Commission has also approved interim final temporary rules providing exemptions under the Securities Act of 1933 and the Exchange Act for non-excluded CDS. See Securities Act Release No. 8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009).

Further, the Commission has provided temporary exemptions in connection with Sections 5 and 6 of the Exchange Act for transactions in non-excluded CDS. See Securities Exchange Act Release No. 59165 (Dec. 24, 2008), 74 FR 133 (Jan. 2, 2009).

Eurex received permission to act as a CCP from BaFin on December 12, 2006. Eurex is supervised by BaFin cooperatively with the Deutsche Bundesbank, the German Federal Bank. BaFin is Eurex's principal regulator and is responsible for all sovereign measures, including licensing, monitoring, and closing individual institutions. BaFin also can issue general instructions, including principles and regulations that establish rules for carrying out banking business, providing financial services, and limiting risk. The Deutsche Bundesbank is responsible for current, ongoing oversight and supervision with respect to the safety and soundness of the institution's operations. In the U.K., Eurex is a Recognised Overseas Clearing House ("ROCH"), subject to regulation by the U.K. Financial Services Authority.

## 2. Eurex Central Counterparty Services for CDS

Eurex's CDS clearance and settlement services will accept for clearing bilateral CDS transactions within the product scope of its rules and that are recorded in the Depository Trust & Clearing Corporation's ("DTCC") Deriv/SERV Trade Information Warehouse ("TIW").<sup>11</sup> Eurex will act as a central counterparty for entities that are CDS clearing members of Eurex in connection with clearing of CDS transactions by assuming, through novation, the obligations of all eligible CDS transactions accepted by it for clearing and collecting margin and other credit support from CDS clearing members to collateralize their obligations to Eurex. Eurex's trade submission process is designed to ensure that it maintains a matched book of offsetting CDS contracts.

Operationally, for a transaction to clear through Eurex, it must first be recorded in Deriv/SERV's Trade Information Warehouse ("TIW"). Eurex will leverage the Deriv/SERV infrastructure in operating its CDS clearing services by establishing an interface to DTCC's Deriv/SERV TIW to

capture matched and confirmed trades.<sup>12</sup>

Under Eurex rules, each bilateral CDS contract between CDS clearing members that is submitted to and accepted by Eurex for clearing will be novated. At the time of novation, each bilateral CDS contract submitted to Eurex will be terminated and replaced by two CDS contracts between Eurex and each of the original counterparties. As central counterparty to each novated CDS contract, Eurex will be able to net offsetting positions on a multilateral basis, which will significantly reduce the outstanding notional amount of each CDS clearing member's CDS portfolio.

## 3. Eurex Risk Management

Eurex represents that it will maintain strict, objectively determined, risk-based margin and clearing fund requirements, which will be subject to ongoing regulation and oversight by the BaFin. These requirements will also be consistent with clearing industry practice and international standards established for central counterparties as articulated in the Committee on Payment and Settlement Systems/ International Organization of Securities Commissions ("CPSS-IOSCO") *Recommendations for Central Counterparties* ("RCCP").<sup>13</sup> Eurex has a multilevel system to mitigate counterparty risk. The amount of margin and guaranty fund required of each Eurex clearing member will be continuously monitored and periodically adjusted as required to reflect the size and profile of, and risk associated with, the Eurex clearing member's cleared CDS transactions (and related market factors). An initial level of protection is provided by a system of collateral margining. The margining system is supplemented by (i) mandatory contributions to the Eurex

CDS clearing fund ("CDS Clearing Fund") and (ii) reserves maintained by Eurex.

Eurex will calculate the amount of up-front margin required for cleared CDS transactions based upon the overall risk exposure of the CDS clearing member. The CDS clearing member's risk exposure will be based on five components: (i) Mark-to-market margin, based on the difference between the net present values based on the CDS spread in the agreement and the most recently observed market spread; (ii) next day margin, which accounts for the decay in value in liquidating outstanding positions of a defaulting member; (iii) liquidity margin, which takes into account the time necessary to unwind a position that is in default; (iv) accrued premium margin,<sup>14</sup> which represents the daily value of the spread the protection buyer pays to the protection seller; and (v) credit event margin.<sup>15</sup> Acceptable margin includes cash in currencies deemed acceptable by Eurex, currently the U.S. dollar, the Euro, the Swiss franc, and British pound, and securities in accordance with existing eligibility criteria.<sup>16</sup> The total margin requirement for CDS covers the market risk of the positions held by a CDS clearing member so that, should a CDS clearing member default, Eurex would have sufficient margin to cover losses to at least the 99 percent confidence interval without recourse to other financial resources.

Eurex will also maintain a clearing fund to cover losses arising from a Eurex CDS clearing member's default on cleared CDS transactions that exceed the amount of margin held by Eurex from the defaulting Eurex CDS clearing member. Each Eurex CDS clearing member will be required to contribute five percent of their margin requirement to the clearing fund, subject to a minimum of €50 million. Since the size of the clearing fund will grow in relation to the volume of each CDS clearing member's open positions, it is designed to maintain adequate, liquid resources to enable Eurex to handle a default in which the defaulting CDS clearing member's margin requirement is insufficient to cover the loss.

Eurex will also establish rules that mutualize the risk of a Eurex CDS clearing member default across all Eurex CDS clearing members. In the event of a Eurex CDS clearing member's default,

<sup>11</sup> Eurex will offer CDS clearance and settlement services on the iTraxx Europe (Main), iTraxx HiVol, and iTraxx Europe Crossover CDS Indices. It will also offer CDS clearance and settlement services on single-name reference entities that are the constituents of those indices. Once it has offered clearance and settlement services for CDS transactions on the iTraxx indices and their constituents, Eurex will accept bilateral transactions on the CDX Index. Eventually, depending on market demand, Eurex may offer clearance and settlement services on single-name reference entities on the CDX constituents.

<sup>12</sup> Major market participants frequently use the Deriv/SERV comparison and confirmation service of DTCC when documenting their CDS transactions. This service creates electronic records of transaction terms and counterparties. As part of this service, market participants separately submit the terms of a CDS transaction 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 Deriv/SERV TIW, which serves as the primary registry for submitted transactions.

<sup>13</sup> The RCCP was drafted by a joint task force ("Task Force") composed of representative members of IOSCO and CPSS and published in November 2004. The Task Force consisted of securities regulators and central bankers from 19 countries and the European Union. The U.S. representatives on the Task Force included staff from the Commission, the Federal Reserve Board of Governors, and the Commodity Futures Trading Commission.

<sup>14</sup> Accrued premium margin is applicable to CDS protection buyers only.

<sup>15</sup> Credit event margin is applicable to CDS protection sellers only.

<sup>16</sup> See [http://www.eurexclearing.com/risk/parameters\\_en.html](http://www.eurexclearing.com/risk/parameters_en.html) for admission criteria and current acceptable collateral.

Eurex will look to the following resources, in order: (i) The defaulting CDS clearing member's margin; (ii) the defaulting CDS clearing member's contribution to the clearing fund; (iii) Eurex's reserve fund; (iv) non-defaulting CDS clearing members' contribution to the clearing fund; and (v) a one-time assessment to non-defaulting CDS clearing members.

Eurex will conduct routine stress testing periodically throughout the trading day to ensure that it can meet its obligations as a CCP in normal and extreme market conditions to a 99.9 percent confidence level. Each CDS clearing member's risk exposure will be stress-tested against a comprehensive set of scenarios for all product groups that it clears. Stress-testing scenarios include the worst historical observations experienced in each of the product groups as well as Eurex's expectation on worst potential future price movements. Potential losses based on stress scenarios are compared to each CDS clearing member's additional margin. Losses beyond additional margin are then compared to the clearing fund. As soon as the consumption of the clearing fund by any CDS clearing member—irrespective of the CDS clearing member's credit quality—breaches a defined threshold, Eurex will take risk-mitigating actions. These risk-mitigating actions may be CDS clearing member-specific, such as imposing extra margin requirements, or general, such as calling for additional clearing fund contributions by all CDS clearing members.

#### 4. Member Default

Following a default by a CDS clearing member, Eurex would follow a procedure to help ensure an orderly liquidation and unwinding of the open positions of the defaulting member. First, the defaulting CDS clearing member is required to close its existing cleared CDS contracts and notify its customers so that they can transfer their transactions to another Eurex CDS clearing member. If the Eurex CDS clearing member does not close or transfer cleared CDS contracts within a reasonable period of time, Eurex can close the positions on behalf of the defaulting CDS clearing member. If Eurex is unable to close the cleared CDS contracts within a reasonable period, it may use a voluntary auction process to liquidate the defaulting CDS clearing member's position as a whole or in meaningful amounts. Finally, Eurex may assign any remaining positions to non-defaulting CDS clearing members on a pro rata basis.

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

Section 17A of the Exchange Act sets forth the framework for the regulation and operation of the U.S. clearance and settlement system, including CCPs. Specifically, Section 17A directs the Commission to use its authority to promote enumerated Congressional objectives and to facilitate the development of a national clearance and settlement system for securities transactions. Absent an exemption, a CCP that novates trades of non-excluded CDS that are securities and generates money and settlement obligations for participants is required to register with the Commission as a clearing agency.

Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.<sup>17</sup>

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until April 23, 2010 to Eurex from Section 17A of the Exchange Act, solely to perform the functions of a clearing agency for Cleared CDS,<sup>18</sup>

<sup>17</sup> 15 U.S.C. 78mm.

<sup>18</sup> For purposes of this exemption, and the other exemptions addressed in this Order, "Cleared CDS" means a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to Eurex, that is offered only to, purchased only by, and sold only to eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which: (1) 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; or (v) an asset-backed security issued or guaranteed by the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), or the Government National Mortgage Association ("Ginnie Mae"); or (2) the reference index is an index in which 80% or more of the index's weighting is comprised of the

subject to the conditions discussed below.

Our action today balances the aim of facilitating the prompt establishment of Eurex as a CCP for non-excluded CDS transactions—which should help reduce systemic risks—with ensuring that important elements of Commission oversight are applied to the non-excluded CDS market. In doing so, we are mindful that applying the full scope of the Exchange Act to transactions involving non-excluded CDS could deter the prompt establishment of Eurex as a CCP to settle those transactions.

While we are acting so that the prompt establishment of Eurex as a CCP for non-excluded CDS will not be delayed by the need to apply the full scope of Exchange Act Section 17A's requirements that govern clearing agencies, the relief we are providing is temporary and conditional. The limited duration of the exemptions will permit the Commission to continue to gain more direct experience with the non-excluded CDS market after Eurex becomes operational, giving the Commission the ability to oversee the development of the centrally cleared non-excluded CDS market as it evolves. During the exemptive period, the Commission will closely monitor the impact of the CCPs on the CDS market. In particular, the Commission will seek to assure itself that the CCPs do not act in an anticompetitive manner or indirectly facilitate anticompetitive behavior with respect to fees charged to members, the dissemination of market data and the access to clearing services by independent CDS exchanges or CDS trading platforms. The Commission will take that experience into account in future actions.

Moreover, this temporary exemption in part is based on Eurex's representation that it meets the standards set forth in the CPSS-IOSCO RCCP report. The RCCP establishes a framework that requires a CCP to have: (i) the ability to facilitate the prompt and accurate clearance and settlement of CDS transactions and to safeguard its users' assets; and (ii) sound risk management, including the ability to appropriately determine and collect clearing fund and monitor its users' trading. This framework is generally consistent with the requirements of Section 17A of the Exchange Act.

entities or securities described in subparagraph (1). As discussed above, the Commission's action today does not affect CDS that are swap agreements under Section 206A of the Gramm-Leach-Bliley Act. See note 4, *supra*. The Commission's action today also does not affect activities in CDS that are outside the jurisdiction of the United States.

In addition, this Order is designed to assure that—as represented in the request on behalf of Eurex—information will be available to market participants about the terms of the CDS cleared by Eurex, the creditworthiness of Eurex or any guarantor, and the clearing and settlement process for the CDS. Moreover, to be within the definition of Cleared CDS for purposes of this exemption (as well as the other exemptions granted through this Order), a CDS may only involve a reference entity, a reference security, an issuer of a reference security, or a reference index that satisfies certain conditions relating to the availability of information about such persons or securities. For non-excluded CDS that are index-based, the definition provides that at least 80 percent of the weighting of the index must be comprised of reference entities, issuers of a reference security, or reference securities that satisfy the information conditions. The definition does not prescribe the type of financial information that must be available or the location of the particular information, recognizing that eligible contract participants have access to information about reference entities and reference securities through multiple sources. The Commission believes, however, that it is important in the CDS market, as in the market for securities generally, that parties to transactions should have access to financial information that would allow them to appropriately evaluate the risks relating to a particular investment and make more informed investment decisions.<sup>19</sup> Such information availability also will assist Eurex and the buyers and sellers in valuing their Cleared CDS and their counterparty exposures. As a result of the Commission's actions today, the Commission believes that information should be available for market participants to be able to make informed investment decisions, and value and evaluate their Cleared CDS and their counterparty exposures.

This temporary exemption is subject to a number of conditions that are designed to enable Commission staff to monitor Eurex's clearance and settlement of CDS transactions, cooperate with BaFin, and help reduce risk in the CDS market. These conditions require that Eurex: (i) Make

available on its Web site annual audited financial statements; (ii) preserve records of all activities related to the business of Eurex as a CCP for Cleared CDS for at least five years (in an easily accessible place for the first two years); (iii) supply information relating to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission and provide access to the Commission to conduct on-site inspections of facilities, records and personnel related to its Cleared CDS clearance and settlement services;<sup>20</sup> (iv) notify the Commission about material disciplinary actions taken against any of its members with respect to Cleared CDS clearance and settlement services, and about the involuntary termination of the membership of an entity using those services; (v) notify the Commission not less than one day prior to implementation or effectiveness of changes to its rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services, or, in exigent circumstances, as promptly as reasonably practicable under the circumstances; (vi) provide the Commission with reports prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements<sup>21</sup> and its annual audited financial statements prepared by independent audit personnel; and (vii) report all significant systems outages to the Commission.

In addition, this relief is conditioned on Eurex, directly or indirectly, making available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) all end-of-day settlement prices and any other prices with respect to Cleared CDS that Eurex may establish to calculate mark-to-market margin requirements for Eurex clearing members; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by Eurex. The Commission believes this is an appropriate condition for Eurex's exemption from registration as a

clearing agency. In Section 11A of the Exchange Act, Congress found that "[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure . . . the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities."<sup>22</sup> The President's Working Group on Financial Markets has stated that increased transparency is a policy objective for the over-the-counter derivatives market,<sup>23</sup> which includes the market for CDS. The condition is designed to further this policy objective of both Congress and the President's Working Group by requiring Eurex to make useful pricing data available to the public on terms that are fair and reasonable and not unreasonably discriminatory. Congress adopted these standards for the distribution of data in Section 11A. The Commission long has applied the standards in the specific context of securities market data,<sup>24</sup> and it anticipates that Eurex will distribute its data on terms that generally are consistent with the application of these standards to securities market data. For example, data distributors generally are required to treat subscribers equally and not grant special access, fees, or other privileges to favored customers of the distributor. Similarly, distributors must make their data feeds reasonably available to data vendors for those subscribers who wish to receive their data indirectly through a vendor rather than directly from the distributor. In addition, a distributor's attempt to tie data products that must be made available to the public with other products or services of the distributor would be inconsistent with the statutory requirements.<sup>25</sup> The Commission

<sup>22</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii). See also 15 U.S.C. 78k-1(a)(1)(D).

<sup>23</sup> See President's Working Group on Financial Markets, Policy Objectives for the OTC Derivatives Market (Nov. 14, 2008), available at <http://www.ustreas.gov/press/releases/reports/policyobjectives.pdf> ("Public reporting of prices, trading volumes and aggregate open interest should be required to increase market transparency for participants and the public."). See also Department of the Treasury, *Financial Regulatory Reform: A New Foundation*, available at [http://www.financialstability.gov/docs/regs/FinalReport\\_web.pdf](http://www.financialstability.gov/docs/regs/FinalReport_web.pdf), at p.48 ("[m]arket efficiency and price transparency should be improved in derivatives markets . . . by requiring development of a system for timely reporting of trades and prompt dissemination of prices and other trade information.").

<sup>24</sup> See Securities Exchange Act Release No. 42209 (Dec. 9, 1999), 64 FR 70613, 70621–70623 (Dec. 17, 1999) ("Market Information Concept Release") (discussion of legal standards applicable to market data distribution since Section 11A was adopted in 1975).

<sup>25</sup> See Securities Exchange Act Release No. 59039 (Dec. 2, 2008), 73 FR 74770, 74793 (Dec. 9, 2008).

<sup>19</sup> The Commission notes the recommendations of the President's Working Group on Financial Markets regarding the informational needs and due diligence responsibilities of investors. See Policy Statement on Financial Market Developments, The President's Working Group on Financial Markets, Mar. 13, 2008, available at: [http://www.ustreas.gov/press/releases/reports/pwgpolicystatementkturmoil\\_03122008.pdf](http://www.ustreas.gov/press/releases/reports/pwgpolicystatementkturmoil_03122008.pdf).

<sup>20</sup> The Commission's inspections shall be subject to cooperation with BaFin and upon terms and conditions agreed to between the Commission and BaFin in the bilateral MOU related to cooperation and information-sharing. "Memorandum of Understanding Concerning Consultation, Cooperation, and the Exchange of Information Related to Market Oversight and the Supervision of Financial Services Firms," Apr. 26, 2007.

<sup>21</sup> See Automated Systems of Self-Regulatory Organizations, Securities Exchange Act Release No. 27445 (Nov. 16, 1989), 54 FR 48703 (Nov. 24, 1989), and Automated Systems of Self-Regulatory Organizations, Securities Exchange Act Release No. 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991).

carefully evaluates any type of discrimination with respect to subscribers and vendors to assess whether there is a reasonable basis for the discrimination given, among other things, the Exchange Act objective of promoting price transparency.<sup>26</sup> Moreover, preventing unreasonable discrimination is a practical means to promote fair and reasonable terms for data distribution because distributors are more likely to act appropriately when the terms applicable to the broader public also must apply to any favored classes of customers.<sup>27</sup>

As a CCP, Eurex will collect and process information about CDS transactions, prices, and positions from all of its clearing members. With this information, a CCP will, among other things, calculate and disseminate current values for open positions for the purpose of setting appropriate margin levels. The availability of such information can improve fairness, efficiency, and competitiveness of the market—all of which enhance investor protection and facilitate capital formation. Moreover, with pricing and valuation information relating to Cleared CDS, market participants would be able to derive information about underlying securities and indexes. This may improve the efficiency and effectiveness of the securities markets by allowing investors to better understand credit conditions generally.

### C. Temporary General Exemption for Eurex and Certain Eligible Contract Participants

Applying the full panoply of Exchange Act requirements to participants in transactions in non-excluded CDS likely would deter some participants from using CCPs to clear CDS transactions. At the same time, it is important that the antifraud provisions of the Exchange Act apply to

transactions in non-excluded CDS; indeed, OTC transactions subject to individual negotiation that qualify as security-based swap agreements already are subject to these antifraud provisions.<sup>28</sup>

We thus believe that it is appropriate in the public interest and consistent with the protection of investors temporarily to apply substantially the same framework to transactions by market participants in non-excluded CDS that applies to transactions in security-based swap agreements. Applying substantially the same set of requirements to participants in transactions in non-excluded CDS as apply to participants in OTC CDS transactions will avoid deterring market participants from promptly using CCPs, which would detract from the potential benefits of central clearing.

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until April 23, 2010 from certain requirements under the Exchange Act. This temporary exemption in part applies to Eurex, and to any Eurex U.S. Clearing Member<sup>29</sup> or Eurex non-U.S. Clearing Member<sup>30</sup> that

<sup>28</sup> While Section 3A of the Exchange Act excludes “swap agreements” from the definition of “security,” certain antifraud and insider trading provisions under the Exchange Act explicitly apply to security-based swap agreements. See (a) paragraphs (2) through (5) of Section 9(a), 15 U.S.C. 78i(a), prohibiting the manipulation of security prices; (b) Section 10(b), 15 U.S.C. 78j(b), and underlying rules prohibiting fraud, manipulation or insider trading (but not prophylactic reporting or recordkeeping requirements); (c) Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices; (d) Sections 16(a) and (b), 15 U.S.C. 78p(a) and (b), which address disclosure by directors, officers and principal stockholders, and short-swing trading by those persons, and rules with respect to reporting requirements under Section 16(a); (e) Section 20(d), 15 U.S.C. 78t(d), providing for antifraud liability in connection with certain derivative transactions; and (f) Section 21A(a)(1), 15 U.S.C. 78u-1(a)(1), related to the Commission’s authority to impose civil penalties for insider trading violations.

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

<sup>29</sup> For Purposes of this Order, a “Eurex U.S. Clearing Member” means any U.S. clearing member of Eurex that submits Cleared CDS to Eurex for clearance and settlement exclusively (i) for its own account or (ii) for the account of an affiliate that controls, is controlled by, or is under common control with the U.S. clearing member of Eurex.

<sup>30</sup> For Purposes of this Order, a “Eurex non-U.S. Clearing Member” means any Eurex clearing member, other than a clearing member that is a U.S. person, that submits Cleared CDS to Eurex for

clearance and settlement exclusively (i) for its own account, (ii) for the account of an affiliate (including a U.S. affiliate) that controls, is controlled by, or is under common control with the non-U.S. clearing member of Eurex, or (iii) for the account of any other person except a U.S. person. Consistent with these definitions of “Eurex U.S. Clearing Member” and “Eurex non-U.S. Clearing Member,” this exemption is available to Eurex members that clear CDS transactions for themselves and their affiliates, or, in the case of non-U.S. members of Eurex, that clear CDS transactions on behalf of non-U.S. customers. The exemption otherwise does not extend to persons who engage in customer clearing activities on Eurex (e.g., customer clearing by a U.S. member of Eurex for any persons, or customer clearing by a non-U.S. member of Eurex for U.S. persons). See note 9, *supra*.

Under this temporary exemption, and solely with respect to Cleared CDS,

clearance and settlement exclusively (i) for its own account, (ii) for the account of an affiliate (including a U.S. affiliate) that controls, is controlled by, or is under common control with the non-U.S. clearing member of Eurex, or (iii) for the account of any other person except a U.S. person.

Consistent with these definitions of “Eurex U.S. Clearing Member” and “Eurex non-U.S. Clearing Member,” this exemption is available to Eurex members that clear CDS transactions for themselves and their affiliates, or, in the case of non-U.S. members of Eurex, that clear CDS transactions on behalf of non-U.S. customers. The exemption otherwise does not extend to persons who engage in customer clearing activities on Eurex (e.g., customer clearing by a U.S. member of Eurex for any persons, or customer clearing by a non-U.S. member of Eurex for U.S. persons). See note 9, *supra*.

The exemptive relief for Eurex non-U.S. Clearing Members is intended to provide legal certainty for these non-U.S. persons in those circumstances when their activities in Cleared CDS are within the jurisdiction of the United States. The exemptive relief is not necessary for these non-U.S. persons when their activities in Cleared CDS are not otherwise subject to the federal securities laws.

<sup>31</sup> This exemption in general applies to eligible contract participants, as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order, other than persons that are eligible contract participants under paragraph (C) of that section.

<sup>32</sup> Solely for purposes of this requirement, an eligible contract participant would not be viewed as receiving or holding funds or securities for purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons, if the other persons involved in the transaction would not be considered “customers” of the eligible contract participant under the analysis used for determining whether certain persons would be considered “customers” of a broker-dealer under Exchange Act Rule 15c3-3(a)(1). For these purposes, and for the purpose of the definition of “Cleared CDS,” the terms “purchasing” and “selling” mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing the rights or obligations under, a Cleared CDS, as the context may require. This is consistent with the meaning of the terms “purchase” or “sale” under the Exchange Act in the context of security-based swap agreements. See Exchange Act Section 3A(b)(4).

<sup>33</sup> A separate temporary exemption addresses the Cleared CDS activities of registered broker-dealers. See Part II.D, *infra*. Solely for purposes of this Order, a registered broker-dealer, or a broker or dealer registered under Section 15(b) of the Exchange Act, does not refer to someone that would otherwise be required to register as a broker or dealer solely as a result of activities in Cleared CDS in compliance with this Order.

(“NYSE ArcaBook Order”) (“[S]ection 6 and Exchange Act Rule 603(a) require NYSE Arca to distribute the ArcaBook data on terms that are not tied to other products in a way that is unfairly discriminatory or anticompetitive.”).

<sup>26</sup> See Market Information Concept Release, 64 FR at 70630 (“The most important objectives for the Commission to consider in evaluating fees are to assure (1) the wide availability of market information, (2) the neutrality of fees among markets, vendors, broker-dealers, and users, (3) the quality of market information—its integrity, reliability, and accuracy, and (4) fair competition and equal regulation among markets and broker-dealers.”).

<sup>27</sup> See NYSE ArcaBook Order, 73 FR at 74794 (“[T]he proposed fees for ArcaBook data will apply equally to all professional subscribers and all non-professional subscribers . . . The fees therefore do not unreasonably discriminate among types of subscribers, such as by favoring participants in the NYSE Arca market or penalizing participants in other markets.”).

these persons generally are exempt from the provisions of the Exchange Act and the rules and regulations thereunder that do not apply to security-based swap agreements. Those persons thus would still be subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements.<sup>34</sup> In addition, all provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions would remain applicable.<sup>35</sup> In this way, the temporary exemption would apply the same Exchange Act requirements in connection with non-excluded CDS as apply in connection with OTC credit default swaps.

This temporary exemption, however, does not extend to Sections 5 and 6 of the Exchange Act. The Commission separately issued a conditional exemption from these provisions to all broker-dealers and exchanges.<sup>36</sup> This temporary exemption also does not extend to Section 17A of the Exchange Act; instead, Eurex is exempt from registration as a clearing agency under the conditions discussed above. In addition, this temporary exemption does not apply to Exchange Act Sections 12, 13, 14, 15(d) and 16;<sup>37</sup> eligible contract participants and other persons instead should refer to the interim final temporary rules issued by the Commission. Finally, this temporary exemption does not extend to the Commission's administrative proceeding authority under Sections 15(b)(4) and (b)(6),<sup>38</sup> or to certain

provisions related to government securities.<sup>39</sup>

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

The temporary exemptions addressed above—with regard to Eurex and certain eligible contract participants—are not available to persons that are registered as broker-dealers with the Commission (other than those that are notice registered pursuant to Section 15(b)(11)).<sup>40</sup> The Exchange Act and its underlying rules and regulations require broker-dealers to comply with a number of obligations that are important to protecting investors and promoting market integrity. We are mindful of the need to avoid creating disincentives to the prompt use of CCPs, and we recognize that the factors discussed above suggest that the full panoply of Exchange Act requirements should not immediately be applied to registered broker-dealers that engage in transactions involving Cleared CDS. At the same time, we also are sensitive to the critical importance of certain broker-dealer requirements to promoting market integrity and protecting customers (including those broker-dealer customers that are not involved with CDS transactions).

This calls for balancing the facilitation of the development and prompt implementation of CCPs with the preservation of certain key investor protections. Pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until April 23, 2010 from certain Exchange Act requirements. Consistent with the temporary exemptions discussed above, and solely with respect to Cleared CDS,

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

<sup>39</sup> This exemption specifically does not extend to the Exchange Act provisions applicable to government securities, as set forth in Section 15C, 15 U.S.C. 78o–5, and its underlying rules and regulations; nor does the exemption extend to related definitions found at paragraphs (42) through (45) of Section 3(a), 15 U.S.C. 78c(a). The Commission does not have authority under Section 36 to issue exemptions in connection with those provisions. See Exchange Act Section 36(b), 15 U.S.C. 78mm(b).

<sup>40</sup> Exchange Act Section 15(b)(11) provides for notice registration of certain persons that effect transactions in security futures products. 15 U.S.C. 78o(b)(11).

we are exempting registered broker-dealers in general from the provisions of the Exchange Act and its underlying rules and regulations that do not apply to security-based swap agreements. As above, we are not excluding registered broker-dealers from Exchange Act provisions that explicitly apply in connection with security-based swap agreements or from related enforcement authority provisions.<sup>41</sup> As above, and for similar reasons, we are not exempting registered broker-dealers from: Sections 5, 6, 12(a) and (g), 13, 14, 15(b)(4), 15(b)(6), 15(d), 16 and 17A of the Exchange Act.<sup>42</sup>

Further we are not exempting registered broker-dealers from the following additional provisions under the Exchange Act: (i) Section 7(c),<sup>43</sup> which addresses the unlawful extension of credit by broker-dealers; (ii) Section 15(c)(3),<sup>44</sup> which addresses the use of unlawful or manipulative devices by broker-dealers; (iii) Section 17(a),<sup>45</sup> regarding broker-dealer obligations to make, keep and furnish information; (iv) Section 17(b),<sup>46</sup> regarding broker-dealer records subject to examination; (v) Regulation T,<sup>47</sup> a Federal Reserve Board regulation regarding extension of credit by broker-dealers; (vi) Exchange Act Rule 15c3–1, regarding broker-dealer net capital; (vii) Exchange Act Rule 15c3–3, regarding broker-dealer reserves and custody of securities; (viii) Exchange Act Rules 17a–3 through 17a–5, regarding records to be made and preserved by broker-dealers and reports to be made by broker-dealers; and (ix) Exchange Act Rule 17a–13, regarding quarterly security counts to be made by certain exchange members and broker-dealers.<sup>48</sup> Registered broker-dealers

<sup>41</sup> See notes 28 and 35, *supra*. As noted above, broker-dealers also would be subject to Section 15(c)(1) of the Exchange Act, which prohibits brokers and dealers from using manipulative or deceptive devices, because that provision explicitly applies in connection with security-based swap agreements. In addition, to the extent the Exchange Act and any rule or regulation thereunder imposes any other requirement on a broker-dealer with respect to security-based swap agreements (e.g., requirements under Rule 17h–1T to maintain and preserve written policies, procedures, or systems concerning the broker or dealer's trading positions and risks, such as policies relating to restrictions or limitations on trading financial instruments or products), these requirements would continue to apply to broker-dealers' activities with respect to Cleared CDS.

<sup>42</sup> We also are not exempting those members from provisions related to government securities, as discussed above.

<sup>43</sup> 15 U.S.C. 78g(c).

<sup>44</sup> 15 U.S.C. 78o(c)(3).

<sup>45</sup> 15 U.S.C. 78q(a).

<sup>46</sup> 15 U.S.C. 78q(b).

<sup>47</sup> 12 CFR 220.1 *et seq.*

<sup>48</sup> Solely for purposes of this exemption, in addition to the general requirements under the

<sup>34</sup> See note 28, *supra*.

<sup>35</sup> Thus, for example, the Commission retains the ability to investigate potential violations and bring enforcement actions in the federal courts and administrative proceedings, and to seek the full panoply of remedies available in such cases.

<sup>36</sup> See note 10, *supra*. A national securities exchange that effects transactions in Cleared CDS would continue to be required to comply with all requirements under the Exchange Act applicable to such transactions. A national securities exchange could form subsidiaries or affiliates that operate exchanges exempt under that order. Any subsidiary or affiliate of a registered exchange could not integrate, or otherwise link, the exempt CDS exchange with the registered exchange including the premises or property of such exchange for effecting or reporting a transaction without being considered a "facility of the exchange." See Section 3(a)(2), 15 U.S.C. 78c(a)(2).

<sup>37</sup> 15 U.S.C. 78l, 78m, 78n, 78o(d), 78p.

<sup>38</sup> Exchange Act Sections 15(b)(4) and 15(b)(6), 15 U.S.C. 78o(b)(4) and (b)(6), grant the Commission authority to take action against broker-dealers and associated persons in certain situations. Accordingly, while this exemption generally extends to persons that act as inter-dealer brokers in the market for Cleared CDS and do not hold funds or securities for others, such inter-dealer brokers may be subject to actions under Sections 15(b)(4) and (b)(6) of the Exchange Act.



should comply with these provisions in connection with their activities involving non-excluded CDS because these provisions are especially important to helping protect customer funds and securities, ensure proper credit practices and safeguard against fraud and abuse.<sup>49</sup>

#### *E. Solicitation of Comments*

The Commission is continuing to monitor closely the development of the CDS market and intends to determine to what extent, if any, additional regulatory action may be necessary. For example, as circumstances warrant, certain conditions could be added, altered, or eliminated. Moreover, because these exemptions are temporary, the Commission will in the future consider whether they should be extended or allowed to expire. The Commission believes it would be prudent to solicit public comment on its action today, and on what action it should take with respect to the CDS market in the future. The Commission is soliciting public comment on all aspects of these temporary exemptions, including:

1. Whether the length of this temporary exemption (until April 23, 2010) is appropriate. If not, what should the appropriate duration be?

2. Whether the conditions to these temporary exemptions are appropriate. Why or why not? Should other conditions apply? Are any of the present conditions to the temporary exemptions provided in this Order unnecessary? If so, please specify and explain why such conditions are not needed.

3. Whether Eurex ultimately should be required to register as a clearing agency under the Exchange Act. Why or why not?

Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/other.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-17-09 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number S7-17-09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. We will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/exorders.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 am and 3 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

#### **III. Conclusion**

*It is hereby ordered*, pursuant to Section 36(a) of the Exchange Act, that, until April 23, 2010:

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

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

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

(2) Eurex shall keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts and other such records as shall be made or received by it relating to its Cleared CDS clearance and settlement services. These records shall be kept for at least five years and for the first two years shall be held in an easily accessible place.

(3) Eurex shall supply information and periodic reports relating to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission, and shall provide access to the Commission to conduct on-site inspections of all facilities (including automated systems and systems environment), records, and personnel related to Eurex's Cleared CDS clearance and settlement services.

(4) Eurex shall notify the Commission, on a monthly basis, of any material disciplinary actions taken against any of its members using its Cleared CDS clearance and settlement services, including the denial of services, fines, or penalties. Eurex shall notify the Commission promptly when it

terminates on an involuntary basis the membership of an entity that is using Eurex's Cleared CDS clearance and settlement services. Both notifications shall describe the facts and circumstances that led to Eurex's disciplinary action.

(5) Eurex shall notify the Commission of all changes to its rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services, including its fee schedule and changes to risk management practices, not less than one day prior to effectiveness or implementation of such changes or, in exigent circumstances, as promptly as reasonably practicable under the circumstances. All such rule changes will be posted on Eurex's Web site. Such notifications will not be deemed rule filings that require Commission approval.

(6) Eurex 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. Eurex shall provide the Commission with annual audited financial statements for Eurex prepared by independent audit personnel.

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

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

(b) Exemption for Eurex, certain Eurex clearing members, and certain eligible contract participants.

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

- (i) Eurex;
- (ii) Any Eurex U.S. Clearing Member (as defined in paragraph (d)(2) of this Order) that is not a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof);

referenced Exchange Act sections, registered broker-dealers shall only be subject to the enumerated rules under the referenced Exchange Act sections.

<sup>49</sup> Indeed, Congress directed the Commission to promulgate broker-dealer financial responsibility rules, including rules regarding custody, the use of customer securities and the use of customers' deposits or credit balances, and regarding establishment of minimum financial requirements.



(iii) Any Eurex non-U.S. Clearing Member (as defined in paragraph (d)(3) of this Order) that is not a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof); and

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

(2) Scope of exemption.

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

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

(A) Paragraphs (42), (43), (44), and (45) of Section 3(a);

(B) Section 5;

(C) Section 6;

(D) Section 12 and the rules and regulations thereunder;

(E) Section 13 and the rules and regulations thereunder;

(F) Section 14 and the rules and regulations thereunder;

(G) Paragraphs (4) and (6) of Section 15(b);

(H) Section 15(d) and the rules and regulations thereunder;

(I) Section 15C and the rules and regulations thereunder;

(J) Section 16 and the rules and regulations thereunder; and

(K) Section 17A (other than as provided in paragraph (a)).

(c) Exemption for certain registered broker-dealers.

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

(1) Section 7(c);

(2) Section 15(c)(3);

(3) Section 17(a);

(4) Section 17(b);

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

(6) Rule 15c3-1;

(7) Rule 15c3-3;

(8) Rule 17a-3;

(9) Rule 17a-4;

(10) Rule 17a-5; and

(11) Rule 17a-13.

(d) Definitions.

For purposes of this Order:

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

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

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

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

(C) A foreign sovereign debt security;

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

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

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

(2) "Eurex U.S. Clearing Member" shall mean any U.S. clearing member of Eurex that submits Cleared CDS to Eurex for clearance and settlement exclusively (i) for its own account or (ii) for the account of an affiliate that

controls, is controlled by, or is under common control with the U.S. clearing member of Eurex.

(3) "Eurex non-U.S. Clearing Member" shall mean any clearing member of Eurex, other than a clearing member that is a U.S. person, that submits Cleared CDS to Eurex for clearance and settlement exclusively (i) for its own account, (ii) for the account of an affiliate (including a U.S. affiliate) that controls, is controlled by, or is under common control with the non-U.S. clearing member of Eurex, or (iii) for the account of any other person except a U.S. person.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60372; File No. S7-16-09]

### Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of Ice Clear Europe Limited Related to Central Clearing of Credit Default Swaps, and Request for Comments

July 23, 2009.

#### I. Introduction

In response to the recent turmoil in the financial markets, the Securities and Exchange Commission ("Commission") has taken multiple actions to protect investors and ensure the integrity of the nation's securities markets, including actions<sup>1</sup> designed to address concerns related to the market in credit default swaps ("CDS").<sup>2</sup> The over-the-counter

<sup>1</sup> See generally Securities Exchange Act Release No. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009) (temporary exemption in connection with CDS clearing by Chicago Mercantile Exchange Inc.), Securities Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009) (temporary exemption in connection with CDS clearing by ICE US Trust LLC), Securities Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (temporary exemption in connection with CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.) and other Commission actions discussed therein.

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