ICE Clear Credit LLC Commingling and Portfolio Margining Petitions

Introduction and Summary

ICE Clear Credit formally filed separate but related Commingling / Portfolio Margining Petitions with the CFTC and SEC on October 4, 2011. (ICE Clear Credit previously filed drafts of its Petitions with the CFTC and SEC on May 23, 2011.) Subject to the required regulatory approvals from both the CFTC and SEC, ICE Clear Credit hopes to be in a position to offer commingling and portfolio margining relief with respect to customer-related cleared CDS transactions by the end of 2011.

In summary, the ICE Clear Credit Petitions request that the CFTC and SEC issue exemptive orders, in accordance with Section 713(a) of Dodd-Frank, exempting ICE Clear Credit and its Participants from Section 15(c)(3) of the Exchange Act and Rule 15c3-3 thereunder, in order to allow broker-dealers registered under the Securities Exchange Act and that are also registered as futures commission merchants pursuant to the Commodity Exchange Act (BD/FCMs) to: (i) hold customer positions in credit default swaps (CDS) that include both broad-based index CDS that are regulated by the CFTC as commodity swaps, and single-name CDS that are regulated by the SEC as security-based swaps, in a customer commingled omnibus account at ICE Clear Credit that is subject to Section 4d(f) of the CEA and subject to Subchapter IV of Chapter 7 of Title 11 of the United States Code and the rules and regulations thereunder; (ii) calculate margin for the commingled account pursuant to a portfolio margining program approved by the CFTC and SEC; and (iii) provide similar relief for BD/FCMs that maintain clearing accounts for their customers at ICE Clear Credit.

By requiring CDS to be centrally cleared, Congress is calling for a significant change to the risk management of the swaps marketplace. Unless the relief requested by ICE Clear Credit's Petitions is provided, BD/FCMs clearing such transactions on behalf of customers will be required to maintain separate customer accounts subject to different margin rules, and will not be in a position to provide margin relief with respect to correlated commodity swap and security-based swap positions. A customer who sells single-name CDS to offset the risk of a correlated Index CDS will, in the absence of portfolio margining, have to post full margin for both assets, which will require a significantly greater and unnecessary capital outlay that will discourage participation in the U.S. swap market and potentially add to systemic risk during times of stress.

ICE encourages interested market participants to communicate directly with the CFTC and SEC to express their support of comingling and portfolio margining in order to ensure customers have equal and open access to clearing.

Background

- ICE Clear Credit currently clears certain index CDS that constitute commodity-based swaps regulated by the CFTC for both house positions and customer-related positions. ICE Clear Credit also currently clears certain single-name CDS that constitute security-based swaps regulated by the SEC for house positions.

- ICE Clear Credit does not currently clear single-name CDS for customer-related positions.

- ICE Clear Credit currently clears the house index and single-name CDS positions in a commingled house account because of the greater operational and economic efficiency afforded by the account structure.

- On May 17, 2011, ICE Clear Credit received a "no objection" from the FRBNY with respect to ICE Clear Credit's portfolio margining methodology.

- On July 12, 2011, ICE Clear Credit received a "no objection" from the New York State Banking Department with respect to ICE Clear Credit's portfolio margining methodology.

- ICE Clear Credit is targeting early December of 2011 as the implementation date for portfolio margining related to positions in the house account for self-clearing members.

- As noted above, subject to the required regulatory approvals from both the CFTC and SEC, ICE Clear Credit hopes to be in a position to offer commingling and portfolio margining relief with respect to customer-related cleared CDS positions by the end of 2011.

Description of Relief / Petition

- ICE Clear Credit is seeking an order from the CFTC permitting: (1) ICE Clear Credit and (2) ICE Clear Credit's clearing participants that are BD/FCMs:

    1. Commingle Customer Funds – hold and commingle customer positions in CDS, including broad-based index CDS, narrow-based index CDS and single-name CDS (i.e., both swaps and security-based swaps) and the customer funds used to margin, secure or guarantee such CDS instruments, in a swap customer account subject to the customer segregation requirements of Section 4d(f) of the CEA and the rules promulgated by the CFTC thereunder and subject to the commodity broker insolvency provisions of the Bankruptcy Code and the CFTC's Part 190 Rules regarding commodity broker liquidation, and

    2. Portfolio Margin - calculate margin for the commingled swap customer account of ICE Clear Credit's participants on a portfolio margin basis, under which ICE Clear Credit could offset security-based CDS contracts and broad-based index CDS that are correlated on a risk management and economic basis when calculating margin requirements.

- ICE Clear Credit is simultaneously seeking an exemption from the SEC under Exchange Act Section 36(a) granting relief from the application of Securities Exchange Act Section 15(c)(3), and Rule 15c3-3 thereunder, with respect to the commingling and portfolio margining of broad-based index CDS, narrow-based index CDS and single-name CDS in a CEA Section 4d(f) account for customers and allowing certain affiliates of clearing participants to be excluded from the definition of "customer" for purposes of Rules 8c-1 and 15c2-1 to allow such affiliates' CDS positions to be comingled with proprietary assets of a clearing participant in the house account of such clearing participant.

- Specifically, ICE Clear Credit seeks an exemptive order from the SEC permitting BD/FCMs that are clearing participants of ICE Clear Credit: (1) to hold customer assets used to margin, secure or guarantee customer positions consisting of CDS, including broad-based index CDS, narrow-based index CDS and single-name CDS and the eligible types of the foregoing CDS in a single omnibus account at ICE Clear Credit that is subject to Section 4d(f) of the CEA and subject to the commodity broker insolvency provisions of the Bankruptcy Code and the rules and regulations

thereunder; (2) to calculate margin for the account on a portfolio margin basis pursuant to ICE Clear Credit's portfolio margining program; (3) to provide similar relief for BD/FCMs that maintain clearing accounts for their customers related to positions cleared at ICE Clear Credit; and (4) to hold positions for certain of their affiliates in a commingled house account.

Conclusion

It is essential for ICE Clear Credit to be granted exemptive relief, as called for by Section 713 of the Dodd-Frank Act for it to act as a central counterparty for BD/FCMs clearing on behalf of their customers.

- The respective Commission's grant of the requested exemptive relief will provide participants in the CDS market the incentive and capital efficiency necessary to make the central clearing of CDS through ICE Clear Credit, as contemplated in Dodd-Frank, economically feasible.

- The grant of the requested exemptive relief will reduce the likelihood of regulatory arbitrage.

- The requested exemptive relief will foster a marked reduction of systemic risk by encouraging participants to maintain hedged portfolios of CDS positions through ICE Clear Credit's proposed portfolio margining program.

- If ICE Clear Credit is not granted such relief, it will not be in a position operationally to clear single-name CDS for customers.

- Market participants have indicated to ICE Clear Credit that in the absence of portfolio margin treatment, they have no intent to clear single-name CDS or index CDS prior to the implementation of the mandatory clearing requirement.

- ICE Clear Credit currently clears house origin positions (clearing participant proprietary positions) in a commingled account that will soon utilize portfolio margining. **It would be unfair and inconsistent with the Dodd-Frank principles of equal and open access, if customers are not granted similar treatment.**

- The mandated margin requirements for cleared swaps may be greater than the collateral requirements applicable to bilateral swaps in the pre-Dodd-Frank regulatory environment, for which there were no regulatory margin requirements. Unless the relief requested herein is provided, allowing for the commingling of index CDS and single-name CDS contracts, BD/FCMs clearing such transactions on behalf of customers will be required to maintain separate customer accounts subject to different margin rules, and will not be able to provide needed and appropriate margin relief with respect to correlated CDS positions.

- Many customers hedge index CDS positions with single-name CDS. In the absence of a portfolio margining program, clearing will be capital inefficient (relative to the margin on the bilateral OTC contracts) and will thus limit the amount of clearing that customers will do for all types of CDS instruments. Such a result would be inconsistent with the intent of the Dodd-Frank Act, and may have a significant impact on the swap marketplace by preventing BD/FCMs from clearing CDS for their customers in an efficient manner through a centralized clearinghouse.

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Ms. Elizabeth Murphy
Secretary
Securities and Exchange Commission
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Re: Request for Exemptive Relief from the Application of Section 15(c)(3) of the Securities Exchange Act of 1934 and Rule 15c3-3 Thereunder to Allow Broker-Dealers Registered Under Section 15(b) of the Exchange Act that are Dually Registered as Futures Commission Merchants Pursuant to Section 4(f)(a)(1) of the Commodity Exchange Act To (i) Hold Customer Assets Used to Margin, Secure or Guarantee Customer Positions Consisting of Broad-Based Index Credit Default Swaps that are Regulated by the Commodity Futures Trading Commission, and Narrow-Based Index and Single-Name Credit Default Swaps that are Regulated by the Securities and Exchange Commission in a Commingled Customer Omnibus Account at ICE Clear Credit LLC Subject To Section 4d(f) of the Commodity Exchange Act and Subject To Subchapter IV of Chapter 7 of Title 11 of the United States Code and the Rules and Regulations Thereunder; (ii) To Calculate Margin for the Commingled Customer Omnibus Account On A Portfolio Margin Basis Pursuant to ICE Clear Credit LLC's Portfolio Margining Methodology; (iii) To Provide Similar Relief for the Customers of BD/FCMs That Maintain Clearing Accounts at ICE Clear Credit LLC; and (iv) To Hold Positions for Certain of Broker Dealer/Futures Commission Merchants Affiliates in Proprietary Accounts.

Request for Exemptive Relief from the Application of Parts of Certain Rules that relate to Rule 15c3-3: Rules 8c-1; 15c2-1; Rule 15c3-1; Rule 17a-3; Rule 17a-4; Rule 17a-5; and Rule 17a-11(c)(2).

Dear Ms. Murphy:

As counsel to ICE Clear Credit LLC ("**ICE Clear Credit**"), a registered securities clearing agency ("**CA**")[1] and derivatives clearing organization ("**DCO**"),[2] we are submitting this

[1] The term "clearing agency" as used herein shall have the meaning ascribed to it in Section 3(a)(23) of the Exchange Act. CA registration requirements are set forth in Section 17A(b)(3) of the Exchange Act.

The Exhibit Index can be found on Page 63.

letter to respectfully request that the Securities and Exchange Commission (the "**SEC**" or the "**Commission**") grant, under the circumstances and subject to the conditions and representations set forth in this letter, certain exemptive relief to ICE Clear Credit and to certain clearing members of ICE Clear Credit ("**Participants**") that are broker-dealers ("**BDs**") registered under Section 15(b) of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), and that are also registered as futures commission merchants ("**FCMs**") pursuant to Section 4f(a)(1) of the Commodity Exchange Act, as amended (the "**CEA**") (such dually registered entities referred to herein as "**BD/FCMs**") in connection with certain transactions involving Swaps and Security-Based Swaps, as such terms are defined in Article VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**")[3] entered into by the customers[4] of such Participants and submitted by such Participants to ICE Clear Credit for clearance and settlement in its capacity as a registered DCO and CA, as described herein.

Specifically, ICE Clear Credit requests that the Commission provide, as called for in Section 713(a) of the Dodd-Frank Act, by rule, regulation or order pursuant to Exchange Act Section 36(a)(1), exemptive relief from the application of Exchange Act Section 15(c)(3), and Rule 15c3-3 thereunder, to allow BD/FCMs that are Participants of ICE Clear Credit: (i) to hold customer assets used to margin, secure or guarantee customer positions consisting of Credit Default Swaps ("**CDSs**"), including both Broad-Based Index CDSs that are regulated by the Commodity Futures Trading Commission (the "**CFTC**") and narrow-based Index CDSs and single-name CDSs that are regulated by the SEC, and the eligible types of the foregoing CDSs that are identified in this request (collectively, the "**Eligible Products**"), in a Commingled Customer Omnibus Account (the "**Account**") at ICE Clear Credit that is subject to Section 4d(f) of the CEA and subject to Subchapter IV of Chapter 7 of Title 11 of the United States Code and the rules and regulations thereunder;[5] (ii) to calculate margin for the Account on a portfolio margin basis pursuant to ICE Clear Credit's proprietary portfolio margining methodology;[6] (iii) to provide similar relief for BD/FCMs that maintain clearing accounts for their customers at ICE Clear Credit; and (iv) to hold positions for certain affiliates of BD/FCMs in proprietary

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[2] The term "derivatives clearing organization" as used herein shall have the meaning ascribed to it in Section 1a(15) of the CEA. DCO registration requirements and core principles are set forth in Section 5b of the CEA.

[3] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[4] The term "**customer**" as used herein shall have the same meaning as in Exchange Act Rule 15c3-3.

[5] ICE Clear Credit will also commingle the proprietary Index CDS and Security-Based CDS positions of its Participants in a single proprietary account at ICE Clear Credit. Based upon Section 713 of Dodd-Frank and our discussions with members of the staff of the Division of Trading and Markets (the "**Staff**"), we do not believe that specific relief is required with respect to commingling swaps that are collectively subject to dual regulation by the Commission and the CFTC in the proprietary account of a clearing member.

[6] A copy of the ICE Clear Credit's portfolio margining methodology, which contains (i) "Quantitative RM Approach to CDS Market Risk Factor Requirement," (ii) "Quantitative RM Approach to CDS Market: Portfolio Approach," and (iii) "Guaranty Fund Size and Allocation Approach," is attached hereto as Confidential Exhibit F.

Accounts. ICE Clear Credit believes that Section 713 of the Dodd-Frank Act provides a clear Congressional mandate for the Commission to grant the requested relief.

ICE Clear Credit further requests that the Commission provide, via rule, regulation or order pursuant to Section 36(a) of the Exchange Act, exemptive relief allowing certain affiliates of Participants ("**Affiliates**") to be excluded from the definition of "customer" for purposes of Rules 8c-1 and 15c2-1 to allow such Affiliates' CDS positions to be comingled with proprietary assets of a Participant in the proprietary Account of such Participants.[7]

Except as provided in Section VII below, this request is made without prejudice to, and is not intended to limit the eligibility for, or the right or ability of any person to rely on, any other statutory or regulatory basis for relief from the provisions of the Exchange Act or the Securities Act of 1933, as amended, in connection with the activities contemplated by this request.

I. Background Regarding ICE Clear Credit's Current Operations

A. ICE Clear Credit's Regulatory Status

Until July 16, 2011, ICE Clear Credit (formerly known as ICE Trust U.S., LLC or "**ICE Trust**") was a New York-chartered limited purpose trust company and member of the Federal Reserve System, acting as a central counterparty for the CDS market. It was subject to direct supervision and examination by the New York State Banking Department (the "**NYSBD**") and the Board of Governors of the Federal Reserve System (the "**FRB**"), specifically the Federal Reserve Bank of New York (the "**FRBNY**").[8] It was also subject to examination by the SEC.[9]

On July 16, 2011, ICE Trust converted its corporate structure and regulatory status. ICE Trust converted from a NYSBD regulated bank to a Delaware Limited Liability Company and changed its legal name to ICE Clear Credit LLC. Also on that date, ICE Clear Credit, by operation of law, became registered under Section 725(b) of the Dodd- Frank Act with the CFTC as a DCO with respect to the clearing of Index CDS, and under Section 763(b) of the Dodd-

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[7] ICE Clear Credit is also requesting exemptive relief from the application of parts of certain rules that relate to Rule 15c3-3: Rules 8c-1; 15c2-1; Rule 15c3-1; Rule 17a-3; Rule 17a-4; Rule 17a-5; and Rule 17a-11(c)(2).

[8] Board of Governors of the Federal Reserve System, Order Approving Application for Membership of ICE US Trust LLC, effective Mar. 4, 2009.

[9] *See* Order Granting Temporary Exemptions Under the Exchange Act on Behalf of ICE US Trust LLC, Exchange Act Release No. 59527 (Mar. 6, 2009) (the "**ICE Trust March 2009 Order**"); *see also* Order Extending and Modifying Temporary Exemptions Under the Exchange Act for ICE Trust U.S. LLC, Exchange Act Release No. 61119, (Dec. 4, 2009) (the "**ICE Trust December 2009 Order**").

ICE Clear Credit operates pursuant to an exemption issued by the Treasury Department with respect to certain matters involving government securities broker-dealer registration and regulation. *See* Order Granting Temporary Exemptions from Certain Government Securities Act Provisions and Regulations in Connection With a Request from ICE Clear Credit LLC (Formerly ICE Trust U.S. LLC) Related to Central Clearing of Credit Default Swaps, and Request for Comments, 76 Fed. Reg. 43,376 (Jul. 20, 2011).

Frank Act as a CA with the Commission with respect to the clearing of Security-Based CDS. It no longer operates as a trust company and is no longer regulated by the FRB or the NYSBD.

ICE Clear Credit currently clears Index CDS and Security-Based CDS. A list of currently cleared Index CDS products is attached hereto as Exhibit A and a list of currently cleared Security-Based CDS is attached hereto as Exhibit B. ICE Clear Credit anticipates expanding the slate of Eligible Products that it clears to include additional Index CDS and Security-Based CDS products, such as (a) sovereign CDS, (b) high yield corporate CDS, and (c) narrow-based CDS indices. ICE Clear Credit (as ICE Trust) began clearing CDS in March 2009, pursuant to a temporary conditional exemption from CA registration together with other exemptions provided by the SEC.[10] At that time, its clearing business was limited to providing CDS clearing services for its Participants' proprietary accounts. In December 2009, ICE Trust expanded its operations to provide Index CDS clearing services to customer accounts of Participants.[11]

ICE Clear Credit's regulatory status is affected by Title VII of the Dodd-Frank Act, which divides the universe of CDS currently cleared by ICE Clear Credit into two separate categories. Index CDS, such as broad-based CDS indices are defined as "Swaps,"[12] while Security-Based CDS, such as single-name CDS and narrow-based CDS indices, are defined as "Security-Based Swaps."[13] Security-Based Swaps are specifically defined as securities within the meaning of the Exchange Act.[14] As a result, primary regulatory authority over Swaps and Security-Based Swaps is split between the CFTC and the Commission, respectively, and such

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[10] The ICE Trust March 2009 Order provided temporary conditional exemptions for ICE Trust and its Participants, effective until December 7, 2009. *See* ICE Trust March 2009 Order. The SEC's order of December 4, 2009, extended such relief until March 7, 2010. *See* ICE Trust December 2009 Order. The SEC's order of March 5, 2010, extended such relief until November 30, 2010. *See* Order Extending and Modifying Temporary Exemptions Under the Exchange Act for ICE Trust U.S. LLC, Exchange Act Release No. 61662, (Mar. 5, 2010) (the "**ICE Trust March 2010 Order**"). That relief was extended to July 16, 2011, *see* Order Extending and Modifying Temporary Exemptions Under the Exchange Act for ICE Trust U.S. LLC, Exchange Act Release No. 63387, (Nov. 29, 2010) (the "**ICE Trust November 2010 Order**"), and has now been extended until the earliest compliance date set forth in any of the final rules regarding the registration of security-based swap execution facilities. *See* Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revision of the Definition of "Security" to Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 64795 (July 1, 2011).

[11] *See* ICE Trust December 2009 Order.

[12] CEA § 1a(47)(B)(iii)(XV). See also joint proposed rules and proposed interpretations of the CFTC and SEC defining the terms "swap" and "security-based swap." Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29818, 29888 (proposed April 29, 2011) (to be codified at 17 C.F.R. pt. 1).

[13] 15 U.S.C. 78c(a)(68).

[14] Dodd-Frank Act Section 761(a)(2) and Section 3(a)(10) of the Exchange Act, which includes Security-Based Swaps under the definition of the term "security."

instruments are subject to parallel regulatory regimes. Accordingly, the CFTC has jurisdiction over ICE Clear Credit in its capacity as a DCO under Section 5b of the CEA and over Participants that are FCMs registered pursuant to Section 4f(a)(1) of the CEA, while the Commission has jurisdiction over ICE Clear Credit in its capacity as a registered CA under Section 17A(1) of the Exchange Act and over Participants that are registered as BDs pursuant to Section 15(b)(1) of the Exchange Act.

B. ICE Clear Credit's Current Commingled CDS Customer Account Structure

The reduction of systemic risk through the centralized clearing of over-the-counter ("**OTC**") derivatives, including CDS, is a major goal of the Dodd-Frank Act.[15] ICE Clear Credit is currently operating as a central counterparty for CDS and both it and its Participants have expended considerable resources to become fully operational. As of September 16, 2011, ICE Clear Credit has cleared 157,945 Index CDS trades with a gross notional value of $12.18 trillion (of which $8.11 billion has been cleared for customers of Participants) and 154,051 single-name CDS trades with a gross notional value of $1.09 trillion, and holds open interest with a gross notional value of $413 billion in Index CDS and $366 billion in single-name CDS.

Since it began clearing single-name CDS, ICE Clear Credit has cleared products now classified as Swaps and Security-Based Swaps, and associated margin assets, that belong to the proprietary account in a commingled proprietary account (i.e., "one pot") because of the greater operational and economic efficiency afforded by a single clearing account as opposed to a multiple account structure.[16] At present, ICE Clear Credit provides Index CDS clearing services for its Participants' customer accounts and proprietary accounts, and single-name CDS clearing services for its Participants' proprietary accounts. ICE Clear Credit and its Participants have been successfully clearing Index CDS and security-based CDS in commingled proprietary accounts since ICE Clear Credit began clearing Security-Based CDS. It is crucial for ICE Clear Credit, its Clearing Participants, and its Clearing Participants' customers to be able to seamlessly continue and extend this operating model to customer-related accounts. To successfully expand the availability of the recognized benefits of central clearing to a broader universe of Participants and customers, ICE Clear Credit must be able to clear Index CDS and Security-Based CDS in a commingled omnibus account on behalf of its Participants that clear for customers.

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[15] "Centralized clearing of standardized OTC products is a key component of efforts to mitigate [such] systemic risk." *See* S. Comm. on Banking, Housing and Urban Affairs, The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176, at 32 (2010) (quoting A. Patricia White, Associate Director, Division of Research and Statistics for the FRB, testimony before the Subcommittee on Securities, Insurance, and Investment of the Senate Committee on Banking, Housing, and Urban Affairs, July 9, 2008).

[16] To date, ICE Clear Credit has not provided any portfolio margining benefits to the commingled single names and indices, but instead has margined them separately for purposes of calculating initial margin requirements.

C. ICE Clear Credit's Current Portfolio Margining Proposal

While ICE Clear Credit has been commingling Index CDS and Security-Based CDS in its Participants' proprietary accounts since it began offering single-name CDS clearing, ICE Clear Credit does not currently portfolio margin such instruments. The addition of portfolio margining is an important step toward furthering the goals of the Dodd-Frank Act. Prior to ICE Clear Credit becoming a DCO and CA, ICE Trust submitted a proposal for a "one pot" portfolio margining program to the FRB and the NYSBD in an effort to provide a more efficient portfolio approach to margining a Participant's positions in Index CDS instruments and its positions in Security-Based CDS instruments. On May 17, 2011, ICE Trust received a notice of "no objection" from the FRBNY with respect to its portfolio margining methodology, and received a notice of "no objection" of that methodology from the NYSBD on July 12, 2011. ICE Clear Credit also has submitted a request to the CFTC for approval of its portfolio margining methodology. Upon the implementation of portfolio margining, ICE Clear Credit intends to provide for the clearing of Security-Based CDS for customer accounts.[17] Customers have indicated that they are interested in clearing Security-Based CDS. Market participants have indicated to ICE Clear Credit, however, that in the absence of portfolio margin treatment, they do not intend to clear Security-Based CDS or Index CDS prior to implementation of a mandatory clearing requirement.

D. ICE Clear Credit's Proposed Commingled CDS Customer Account Structure and Portfolio Margining Program

ICE Clear Credit proposes to permit the current customer account, which now holds Index CDS, to also hold Security-Based CDS, subject to Section 4d(f) of the CEA. Additionally, ICE Clear Credit proposes to permit portfolio margining of the positions held in such commingled customer account, subject to the necessary portfolio margining approvals from the CFTC and the SEC. The commingled 4d(f) portfolio margining account will allow ICE Clear Credit to offer the greatest benefit to the market and market participants by providing its BD/FCM Participants and their customers with greater operational efficiencies, capital efficiency, and a more comprehensive offering of products that can be cleared.

Effective July 16, 2011, Participants clearing CDS for customers on ICE Clear Credit were required to become BD/FCMs or transition such customer clearing functions to Participants that are BD/FCMs. BD/FCMs that clear Swaps and Security-Based Swaps for customers are subject to both SEC Rule 15c3-3 and Section 4d(f) of the CEA and the CTFC rules promulgated thereunder. Absent relief from the CFTC and the SEC, BD/FCMs would be unable to use ICE Clear Credit's commingled customer account for clearing all categories of CDS transactions on behalf of customers. Thus, it is essential for ICE Clear Credit to be granted exemptive relief, as

[17] ICE Clear Credit also entered into discussions with the Financial Industry Regulatory Authority ("FINRA"), which resulted in FINRA Release 11-31 (effective July 16, 2011), extending FINRA Rule 4240 to CDS cleared by ICE Clear through January 17, 2012. Rule 4240 established an Interim Pilot Program through which FINRA approved the use, on an interim basis, of ICE Clear Credit's margin methodology in its central clearing counterparty services.

called for by Section 713 of the Dodd-Frank Act, in order for it to act as a central counterparty for BD/FCMs clearing on behalf of their customers. If ICE Clear Credit is not granted such relief, it will not be in a position operationally to clear Security-Based CDS for customers. In addition, as noted above, market participants have indicated to ICE Clear Credit that, in the absence of portfolio margin treatment, they do not intend to clear single-name CDS or Index CDS prior to implementation of a mandatory clearing requirement. Because many market participants hedge Index CDS positions with single-name CDS, the inability to offer clearing of single-name CDS will mean that clearing will be an inefficient use of capital because of the need to use more capital to maintain positions in compliance with margin requirements (relative to the margin on the bilateral OTC contracts). As a result, the amount of clearing that customers will do for all types of CDS instruments will be limited, resulting in a less economically efficient and systemically riskier market. Such a result would be inconsistent with the intent of the Dodd-Frank Act, and may have a significant negative impact on the swap marketplace by preventing BD/FCMs from clearing CDS for their customers in an efficient manner through a centralized clearinghouse.

II. Customer Protection Regimes

Exchange Act Section 15(c)(3) and CEA Section 4d each provide for the protection of customers in the event of the potential insolvency of a registered BD or FCM, respectively. SEC Rule 15c3-3, and CFTC Rules 1.3, 1.20-1.30, 1.32 and 1.36, respectively, give effect to these customer protection goals. Although the requirements under these rules differ in their approach and operation, each provides a generally comparable scheme for safeguarding customer assets held by the entities to which they apply, and serve to ensure that such assets are protected from loss in the event of such an entity's insolvency.[18] The CFTC has yet to promulgate rules for Swaps; the above-cited CTFC rules apply by their terms to exchange-traded futures, not to Swaps. However, it is generally expected that the CFTC will promulgate rules under Section 4d(f) that will be parallel and substantively identical to the above-cited futures rules. DCOs are likewise expected to adopt rules for cleared Swaps that effectively parallel the CTFC regulations.[19]

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[18] *Compare* Michael P. Jamroz, The Customer Protection Rule, 57 Bus. Law. 1069, 1069 (2001-2002) ("The Customer Protection Rule is an integral part of the Commission's financial responsibility program, which is designed to protect customers who entrust their investment assets to registered broker-dealers from monetary losses and delays that can occur when that firm fails"), *with* Philip McBride Johnson & Thomas Lee Hazen, Derivatives Regulation § 3.08(1) (Aspen 2004) ("The duty imposed by the [CEA] to segregate customer funds from those of the FCM is a key element of the overall scheme of financial protection . . . in the event of the FCM's financial collapse, the customer funds are more safely insulated as an identifiable separate pool and, as such, will not be treated as FCM assets available for distribution to creditors.").

[19] Section 763(d) of the Dodd-Frank Act adds new Section 3E to the Exchange Act which specifically provides for the segregation of customer property for security-based swaps. Exchange Act § 3E(b)(1). However, the Commission has yet to promulgate rules regarding these new requirements and thus it is unclear how BDs will be required to comply with the provisions of SEC Rule 15c3-3 for purposes of security-based swap transactions on behalf of customers.

A. Who Must Comply With Each Regime

Rule 15c3-3 applies to "any BD that has responsibility for the custody of funds or securities of 'customers.'"[20] Specifically, Rule 15c3-3 provides that "a broker or dealer shall promptly obtain and shall thereafter maintain the physical possession or control of all fully-paid securities and excess margin securities carried by a broker or dealer for the account of customers."[21] Rule 15c3-3 further provides for the segregation of this portion of customer assets. It is from this segregation requirement that ICE Clear Credit is seeking relief pursuant to Rule 15c3-3(k)(3).[22]

FCMs, on the other hand, are subject to the segregation requirements of CEA Section 4d with respect to "all money, securities, and property received by such [FCM] to margin, secure the trades or contracts of any customer." Pursuant to Section 4d(a)(2), an FCM must separately account for customer funds and may not commingle customer funds with the funds of the FCM or use a particular customer's funds to margin or guarantee the trades or contracts of any other customer or of the FCM.[23]

B. Who is a "Customer" for Purposes of Each Regime

Each of the foregoing customer protection regimes restricts how a BD or FCM, as the case may be, treats customer assets. A "customer" for purposes of SEC Rule 15c3-3 is "any person from whom or on whose behalf a broker or dealer has received or acquired securities or holds funds or securities for the account of that person."[24] Excluded from this definition are "general partners, directors or principal officers, or persons, whose claim for property or funds are subordinated to the claims of creditors or is part of the capital of the broker-dealer."[25]

Under CFTC regulations, the owner or holder of a "proprietary account" is excluded from the definition of customer.[26] A proprietary account is defined as an account in which one or

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[20] There are a number of exemptions under the Rule for BDs whose business is limited in scope such that they have no need to hold or receive customer funds or securities. *See* Jamroz, *supra* note 18, at 1075.

[21] 17 C.F.R. § 240.15c3-3(b)(1).

[22] Rule 15c3-3(k)(3) provides that, "[u]pon written application by a [BD], the Commission may exempt such [BD] from the provisions of [the] rule, either unconditionally or on specified terms and conditions, if the Commission finds that the [BD] has established safeguards for the protection of funds and securities of customers comparable with those provided for by this rule and that it is not necessary in the public interest or for the protection of investors to subject the particular [BD] to the provisions of [the] rule." 17 C.F.R. § 240.15c3-3(k)(3).

[23] CEA § 4d(a)(2).

[24] 17 C.F.R. § 240.15c3-3(a)(1).

[25] Jamroz, *supra* note 18, at 1077 (citing 17 C.F.R. § 240.15c3-3(a)(1)). These parties are sometimes referred to as "non-customer customers."

[26] *See* 17 C.F.R. § 1.3(k).

more of the following entities owns at least a 10 percent share of the assets of either: (i) the FCM; (ii) a general partner of the FCM; (iii) a limited partner or a special partner of the FCM if it is a limited partnership; (iv) an officer, director, or owner of at least 10 percent of the capital stock of an FCM if it is incorporated; (v) "an employee having duties of the nature of limited or special partners"; (vi) a spouse or minor dependent if they are living in the home of any of the preceding persons; (vii) "a controlling business affiliate of the FCM"; or (8) "a business affiliate controlled or under common control by the FCM."[27] Thus, an FCM that only handles proprietary accounts is not subject to the requirements of Section 4d(f).[28]

One difference of note between the two regimes is that the CFTC requires positions owned by an FCM's affiliates to be held in a proprietary account, whereas the Commission has only in limited circumstances allowed for such "non-customer customer" positions to be treated as proprietary (i.e., non-customer) positions.[29] ICE Clear Credit therefore respectfully requests that the Commission provide exemptive relief from the application of Rule 15c3-3, as well as from Rules 8c-1 and 15c2-1, so that such positions may be held in the proprietary account of a BD/FCM pursuant to the applicable conditions set forth in this application.[30]

C. The Requirements of Each Rule

While there are some differences in the entities that are regulated and the parties that are protected by each regime, the most notable difference between the SEC and CFTC customer protection regimes are with respect to the segregation of customer assets, which is the principal subject of our request for relief.

SEC Rule 15c3-3 achieves the goal of segregating customer property through two general requirements: (i) the requirement to maintain physical possession or control of customer securities with defined characteristics; and (ii) the requirement to set aside customer funds in a "Special Reserve Bank Account for the Exclusive Benefit of Customers" (the "**Reserve Bank Account**"). The requirement to maintain physical possession or control of customer securities applies to securities that have been fully paid for and for "**excess margin securities.**"[31] Excess margin securities are defined as margin securities "carried for the account of a customer having a market value in excess of 140 percent of the total of the debit balances in the customer's account" or securities held in a margin account that the BD identifies as not being margin securities.[32] A security is deemed to be in the BD's physical possession or control if it is: (i)

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[27] Johnson & Hazen, *supra* note 18, at § 3.08(3) (citing 17 C.F.R. § 1.3(y)).

[28] 17 C.F.R. § 3.10(c).

[29] *See* Options Clearing Corp., SEC No-Action Letter, Re: Definition of "Customer" for Purposes of the Hypothecation Rules (June 15, 2000).

[30] *See* Section VI, below.

[31] 17 C.F.R. § 240.15c3-3(b).

[32] 17 C.F.R. § 240.15c3-3(a)(5).

"represented by certificates in the custody or control of clearing corporations or certain custodian banks" for which the BD does not need to make a payment in order to take possession, and the BD maintains a record that identifies the customer entitled to receive a specific quantity of securities;[33] (ii) carried "for the account" of any customer by a [BD] . . . free of any charge, lien, or claim of any kind in favor of such carrying [BD]"; (iii) "the subject of bona fide items of transfer"; (iv) held by a foreign entity that the Commission, upon application, has designated as a satisfactory location; (v) in the custody of a bank, provided that the BD is not required to make a payment in order to obtain possession; (vi) in transit between offices of the BD or is held by a corporate subsidiary of the BD; or (vii) held in another location that the Commission has deemed adequate to protect the securities of the customer.[34] A BD does not need to maintain possession or control of securities that are purchased by customers on margin.[35] To the extent that a customer is indebted to the BD, the BD may encumber that customer's securities that are not fully paid or excess margin securities. Moreover, under Rules 8c-1 and 15c2-1, if a customer consents, a BD may treat those funds as its own and hypothecate, lend, or commingle them.

The second requirement of Rule 15c3-3 is that certain customer funds be set aside in the Reserve Bank Account.[36] The Commission has explained, that "[o]ne of the purposes of the Reserve Formula is to ensure that customers' funds held by a [BD] are deployed only in areas of the [BD]'s business related to servicing its customers [(reflected as debits in the Reserve Formula)] or, to the extent that the funds are not deployed in these limited areas, that they are deposited in a Reserve Bank Account."[37] In order to determine the amount of money that must be deposited in the Reserve Bank Account, the BD looks to the Reserve Formula contained in Rule 15c3-3a, which lists a number of defined "credits" and "debits."[38] The BD nets the credits against the debits and, if there is a net credit amount, then the BD must deposit that amount in

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[33] 7 Louis Loss, Joel Seligman & Troy Paredes, Securities Regulation ch. 8, subsec. B(1)(c)(iv) at 3162 (3d ed. Aspen 2003) (citing 17 C.F.R. § 240.15c3-3(c)).

[34] 17 C.F.R. § 240.15c3-3(c)(1)-(7).

[35] 17 C.F.R. § 240.15c3-3(a)(3); *see also* Jamroz, *supra* note 18, at 1081 ("If the customer owed the [BD] an unsecured balance in a margin account, the [BD] would not be required to deliver fully-paid securities to that customer to the extent the value of those securities was reasonably related to the amount owed.").

[36] 17 C.F.R. § 240.15c3-3(e)(1) ("Every [BD] shall maintain with a bank or banks at all times when deposits are required or hereinafter specified a 'Special Reserve Bank Account for the Exclusive Benefit of Customers' . . . and it shall be separate and apart from other bank accounts of the [BD].").

[37] Loss, Seligman & Paredes, *supra* note 33, at 3168-69 (quoting Customer Protection Rule, Exchange Act Release No. 34-22499, 50 Fed. Reg. 41,337 (Oct. 10, 1985)).

[38] 17 C.F.R. 240.15c3-3(e). For example, SEC Rule 15c3-2 allows BDs to use a customer's free credit balance if certain reporting requirements are met. *See* 17 C.F.R. § 240.15c3-2. However, "outstanding drafts payable to customers which have been applied against free credit balances" are listed as a credit in the reserve formula in SEC Rule 15c3-3a and, less any applicable debits, must be deposited in the Reserve Bank Account.

the Reserve Bank Account. If there is a net debt amount, no deposit is required.[39] The BD must also obtain a written acknowledgment from the bank at which the Reserve Bank Account is held that it has been informed that the funds in the account are held for the exclusive benefit of the BD's customers.[40] Finally, the funds deposited in the account can only be held as cash or certain "**qualified securities**."[41] A qualified security is a "security issued by the United States or a security in respect of which the principal and interest are guaranteed by the United States."[42] A calculation of the funds necessary for the Reserve Bank Account must be made on a weekly basis.[43]

BD net capital requirements pursuant to SEC Rule 15c3-1 are as important a part of the SEC's customer protection regime as is Rule 15c3-3, and the operation of the two rules is interrelated. Under Rule 15c3-1(a)(1), a BD must not allow its "**aggregate indebtedness**" to exceed 1500 percent of its net capital.[44] However, the term "aggregate indebtedness" specifically exempts "[a]mounts payable to the extent funds and qualified securities are required to be on deposit and are deposited in a Reserve Bank Account."[45] As an alternative to complying with the ratio requirements of Rule 15c3-1(a)(1), a BD may choose to be subject to Rule 15c3-1(a)(2), which prohibits net capital from being below the greater of $250,000 or 2 percent of debit items contemplated in the reserve formula in 15c3-3a. (The BD/FCMs that clear CDSs through ICE Clear Credit and the BD/FCMs that clear CDSs on behalf of their customers will be subject to this alternative standard.) A BD that chooses to be subject to Rule 15c3-1(a)(2) must also make adjustments to its reserve calculation for purposes for Rule 15c3-3(e).[46] Consequently, in order for BD/FCMs to accurately calculate net capital, we respectfully request that the Commission grant relief from the application of Rule 15c3-3 to the reserve calculation in order to allow Participants and the BD/FCMs that clear through them to be able to make their reserve calculation based on the assets held in the Account, as if such assets were held in an account subject to Rule 15c3-3.[47]

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[39] *See* Loss, Seligman & Paredes, *supra* note 332, at 3168-69 (quoting Customer Protection Rule, Exchange Act Release No. 34-22499, 50 Fed. Reg. 41,337).

[40] Loss, Seligman & Paredes, *supra* note 33, at 3169.

[41] *Id.*

[42] 17 C.F.R. § 240.15c3-3(a)(6).

[43] 17 C.F.R. § 240.15c3-3(e)(3).

[44] 17 C.F.R. § 240.15c3-1(a)(1).

[45] 17 C.F.R. § 240.15c3-1(c)(1)(vii).

[46] 17 C.F.R. §§ 240.15c3-1(a)(1)(ii)(A)-(D).

[47] As a condition to the relief requested in this letter, ICE Clear Credit will implement the following requirements for Participants in order for such Participants and BD/FCMs that clear through them to comply with other rules that are affected by the relief: (i) for purposes of the reserve fund calculation, customer assets held in the

As noted above, it is expected that the CFTC's customer protection regime for Swaps, once adopted, will parallel its current regime for the protection of customers in the futures markets. The CFTC regime, as it applies to futures, provides for the separation of "money, securities, and property received by [an FCM] to margin, guarantee, or secure the trades or contracts of any customer of such [FCM], or accruing to such customer as the result of such trades or contracts."[48] Furthermore, when an FCM receives funds resulting from customer trades, such funds also must be segregated in a customer account.[49] For convenience, the FCM may deposit all customer funds in a single commingled account;[50] however, the funds of one customer may not be used to margin or guarantee the funds of another customer.[51] Whenever funds are deposited into the segregated account, the FCM must obtain an acknowledgment from the institution holding the account that the funds are customer property.[52] Finally, the FCM may deposit its own funds into the customer segregated account in order to ensure that it contains adequate funds,[53] but the FCM may not withdraw those deposited funds "if the effect would be to cause one customer's funds to carry another customer's trades."[54] Indeed, under the CFTC

Account should be treated as if they were held in an account subject to Rule 15c3-3; (ii) for purposes of the notification requirements under Rule 17a-11(c)(2), customer assets held in the Account should be treated as if they were held in an account subject to Rule 15c3-3; (iii) for purposes of the broker-dealer reporting requirements under Rule 17a-5, that the Account shall be treated as if it were subject to Rule 15c3-3; and (iv) for purposes of the recordkeeping requirements under Rules 17a-3 and 17a-4 of the Exchange Act, maintain books and records with respect to the Account as if the Account were subject to Rule 15c3-3.

As an alternative to the requested relief, we would respectfully request that the Commission take a similar position with respect to CDSs as it has with certain mixed swaps in its proposed Rule 3a68-4(b) which treats mixed swaps that "(1) [are] neither executed on nor subject to the rules of a designated contract market, national securities exchange, swap execution facility, security-based swap execution facility, or foreign board of trade; [and] (2) . . . will not be submitted to a derivatives clearing organization or registered or exempt clearing agency to be cleared" as subject to the capital and reporting rules of the CEA. Product Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 29818, at 29893-94 (May 23, 2011) (to be codified at 17 C.F.R. pt. 240). We believe that similar treatment for CDS products would be appropriate as CDSs pose many of the same problems for market participants as do mixed swaps. A mixed swap is both a Security-Based Swap and a Swap and thus, "dually-registered market participants may be subject to potentially conflicting or duplicative regulatory requirements when they engage in mixed swap transactions." *See id.* at 173. Likewise, should the Commission allow single-name and Index CDSs to be commingled in a single account, dually-registered market participants would face similar conflicting or duplicative regulatory requirements with respect to the account.

[48] CEA § 4d(f).

[49] 17 C.F.R. § 1.21.

[50] Johnson & Hazen, *supra* note 18, at § 3.08(4).

[51] 17 C.F.R. § 1.22.

[52] Johnson & Hazen, *supra* note 18, at § 3.08(5) *citing* 17 C.F.R. § 1.20(a).

[53] 17 C.F.R. § 1.23.

[54] Johnson & Hazen, *supra* note 18, at § 3.08(5).

regime, "[i]t is commonplace for FCMs to deposit extra funds in the customer-segregated account due to the fact that there is frequently a lag of several days between the time when a particular customer account becomes undermargined and the customer answers a margin call."[55] However, if the FCM does deposit its own funds into the customer account, those funds are deemed to belong to the customers until the funds are withdrawn.[56]

Unlike Rule 15c3-3, under which the funds in the Reserve Bank Account are calculated on a weekly basis, the amount of funds necessary for segregation under the CFTC regime must be determined on a daily basis.[57] Furthermore, unlike the SEC regime, under which a BD need only deposit customer funds that amount to a net credit against debits pursuant to the Rule 15c3-3a Reserve Formula, "the FCM may not deposit customer funds in its own account and, thereafter, transfer those funds to a segregated account."[58] Customer funds must at all times be kept entirely separate from the funds of the FCM and customer trades must be cleared separately as well.[59] The calculation of segregation requirements "consists basically of calculating amounts that the FCM would owe to customers if all trades were liquidated at the then-current market price."[60] As with Rule 15c3-3(e)(1), segregated customer funds may be invested in certain limited investments,[61] and any proceeds from such investments must be returned to the customer account.[62]

Unfortunately, while similar in their goals and result, the two regimes require different conduct in the handling of customers' collateral, and it creates significant capital inefficiencies for a BD/FCM to comply with both simultaneously.[63] Similarly, this regulatory divide would make it impossible for customers of ICE Clear Credit to hold all of their CDS positions in a single account. Consequently, ICE Clear Credit will not be able to offer customer clearing for CDS products in a manner that efficiently manages customer capital, discouraging market participants from centrally clearing their CDS positions.

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[55] *Id.*

[56] Johnson & Hazen, *supra* note 18, at § 3.08(9) (citing 17 C.F.R. § 1.23).

[57] 17 C.F.R. § 1.32.

[58] Johnson & Hazen, *supra* note 18, at § 3.08(9).

[59] *Id.*

[60] *Id.*

[61] 17 C.F.R. § 1.25(a).

[62] Johnson & Hazen, *supra* note 18, at § 3.08(7).

[63] *See* Anthony J. Leitner and James R. McDaniel, "Recent Developments in Cross-margining", Futures Industry Association Law & Compliance Division Workshop, Panel on Portfolio Margining at p. 6 (May 10-12, 2006).

There is a clear benefit to customers to be derived from holding all CDS positions in a single account, allowing them to avoid margin calls when they hold off-setting Swap and Security-Based Swap positions. This benefit may have the greatest impact on systemic risk during times of heightened financial stress, as it would reduce a customer's demands on liquid capital. Regulatory relief allowing ICE Clear Credit to hold all customer CDS products in a single account, when combined with the benefits of portfolio margining, would enable it to offer clearing services that would be economically beneficial to customers, encouraging greater participation in central clearing by market participants and more fully realizing the Congressional mandate for central clearing.

III. The Dodd-Frank Act's Effect on Commingling and Portfolio Margining

A. CFTC and SEC Jurisdiction Over Swaps and Security-Based Swaps

As a result of the bifurcation of regulatory authority over the swap market, Index CDS cleared on behalf of Participants' customers are subject to the cleared swaps customer protection regime of Section 4d(f) of the CEA and the rules and regulations promulgated by the CFTC thereunder.[64] Conversely, Security-Based Swaps cleared on behalf of Participants' customers are subject to Section 15(c)(3) of the Exchange Act and, in particular, SEC Rule 15c3-3 thereunder. Importantly for purposes of this request, this split in regulatory authority results in different and in some ways inconsistent customer protection regimes for Swaps and Security-Based Swaps. This request seeks to ameliorate the negative effects of that disparate treatment by subjecting all Eligible Products cleared by ICE Clear Credit pursuant to a uniform and consistent customer protection regime under Section 4d(f) of the CEA and the commodity broker insolvency provisions of the U.S. Bankruptcy Code.

B. Dodd-Frank Act Enables the SEC and the CFTC to Permit Commingling and Portfolio Margining in a Futures Account

Congress provided a solution to the split in regulatory treatment of Swaps and Security-Based Swaps. The Dodd-Frank Act authorizes the CFTC and the SEC to allow commingling

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[64] The CFTC has yet to finalize regulations implementing §4d(f), however, the CFTC published proposed regulations (Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 76 Fed. Reg. 29818, at 29893-94 (May 23, 2011) (to be codified at 17 CFR Parts 22 and 190)) that would impose requirements on FCMs and DCOs with respect to the treatment of cleared swaps customer contracts and related collateral. In the rule proposal release, the CFTC indicated that the proposed regulations implementing §4d(f) would likely be positive with respect to portfolio margining programs. Id at 33828. Pending the adoption by the CFTC of final regulations implementing Section 4d(f), ICE Clear Credit has adopted amendments to ICE Clear Credit Rule 406(c) and (d), which effectively incorporate by reference current CFTC futures customer segregation requirements set forth in CFTC regulations 1.20-1.30 for futures accounts subject to Section 4d(a) of the CEA and apply such requirements to cleared swaps customer segregated accounts. ICE Clear Credit would amend such rules as necessary to conform to the requirements of the CFTC regulations implementing Section 4d(f) when such CFTC regulations become effective.

and portfolio margining of cleared Swaps and Security-Based Swaps.[65] Congress recognized the need for futures and securities, or Swaps and Security-Based Swaps, respectively, to be held in a single customer account to facilitate portfolio margining by BD/FCMs. Section 713(a) of the Dodd-Frank Act amended Section 15(c)(3) of the Exchange Act to grant BD/FCMs the right to hold cash and "securities," a term that includes Security-Based Swaps, in a portfolio margining account that is carried as a futures account[66] subject to regulation by the CFTC pursuant to a portfolio margining program approved by the CFTC.[67] The SEC must give effect to this right either pursuant to an exemption granted under Section 36 of the Exchange Act or pursuant to a rule or regulation.[68]

C. The Dodd-Frank Act Authorizes the CFTC to Permit Commingling and Portfolio Margining of Swaps and Security-Based Swaps

Congress contemplated a segregated customer account for cleared swaps and the ability of the Commission to permit commingling of other customer assets in such account. Dodd-Frank Act Section 724 added subsection (f)(3)(B) to Section 4d of the CEA, which provides that:

> . . . in accordance with such terms and conditions as the [CFTC] may prescribe by rule, regulation, or order, any money, securities, or property of the swaps

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[65] *See* Dodd-Frank Act § 713. Pursuant to Section 4d(a) of the CEA, the CFTC has previously issued orders permitting the adoption of non-customer cross-margining programs by FCMs. *See, e.g.*, Order of the Commodity Futures Trading Commission dated November 5, 2004, "In the Matter of the Options Clearing Corporation Proposal to Implement Non-Proprietary Cross-Margining Program"; Order of the Commodity Futures Trading Commission dated February 29, 2008, "In the Matter of ICE Clear US, Inc. Non-Proprietary Cross-Margining Agreement with the Options Clearing Corporation."

[66] Section 1.3(vv) of the CFTC's regulations defines "futures account" as "an account that is maintained in accordance with the segregation requirements of section 4d of the Commodity Exchange Act and the rules thereunder." SEC Rule 15c3-1(a)(15) contains an almost identical definition of the term "futures account," but also notes parenthetically that a "futures account" is also referred to as "commodity account." Section 4d encompasses both Section 4d(a)(2), which provides for the segregation of customer funds related to transactions effected on a contract market, and Section 4d(f), which provides for the segregation of customer cleared swaps. Because Congress referred broadly to a "futures account," which is a term previously defined consistently by the CFTC and SEC, the term "futures account" should be read to give effect to the Congressional intent to permit commingling of Security-Based Swaps and Swaps in a 4d(f) "futures account" subject to CFTC regulation to facilitate portfolio margining of such products.

[67] "[P]ursuant to an exemption granted by the Commission under section 36 of this title or pursuant to a rule or regulation, cash and securities may be held by a broker or dealer registered pursuant to subsection (b)(1) and also registered as a futures commission merchant pursuant to Section 4f(a)(1) of the Commodity Exchange Act, in a portfolio margining account carried as a futures account subject to Section 4d of the Commodity Exchange Act and the rules and regulations thereunder, pursuant to a portfolio margining program approved by the Commodity Futures Trading Commission, and subject to subchapter IV of chapter 7 of title 11 of the United States Code and the rules and regulations thereunder." Dodd-Frank Act Section 713(a).

[68] *Id.*

> customers of a futures commission merchant described in paragraph (2) may be commingled and deposited in customer accounts with any other money, securities, or property received by the futures commission merchant and required by the [CFTC] to be separately accounted for and treated and dealt with as belonging to the swaps customer of the futures commission merchant.

Additionally, Section 713(a) of the Dodd-Frank Act amended Section 15(c)(3) of the Exchange Act to require the SEC to adopt rules that permit securities to be held in a portfolio margining account that is regulated as a futures account "*pursuant to a portfolio margining program approved by the Commodity Futures Trading Commission*" (emphasis added). Congress clearly intended for the CFTC to have the authority to approve DCO rules providing for portfolio margining of Swaps and Security-Based Swaps in a Section 4d(f) cleared customer swaps account.

Further, Dodd-Frank Act Section 725(c) amended Section 5b(c)(2) of the CEA to set forth core principles with which a DCO must comply to be registered and to maintain registration as a DCO. The Dodd-Frank Act amended DCO Core Principle F (Treatment of Funds) to provide as follows:

> (i) REQUIRED STANDARDS AND PROCEDURES.—Each derivatives clearing organization shall establish standards and procedures that are designed to protect and ensure the safety of member and participant funds and assets.
>
> (ii) HOLDING OF FUNDS AND ASSETS.—Each derivatives clearing organization shall hold member and participant funds and assets in a manner by which to minimize the risk of loss or of delay in the access by the derivatives clearing organization to the assets and funds.

Read together, Dodd-Frank Act Sections 724, 713(a) and 725(c) clearly authorize the SEC and the CFTC to take steps to facilitate the ability of BD/FCMs to hold CFTC-regulated Swaps and SEC-regulated Security-Based Swaps, and related assets supporting such instruments in a single portfolio margin account subject to Section 4d(f) of the CEA.[69] In furtherance of the statutory

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[69] The CFTC has previously issued Orders under Section 4d of the CEA in various customer account commingling contexts, including the commingling of cleared OTC derivatives with exchange traded futures in a Section 4d account, and the commingling of exchange-traded futures listed on a foreign board of trade with exchange-traded futures listed on a designated contract market. *See* Order of the Commodity Futures Trading Commission dated June 20, 2001, regarding "Treatment of Customer Funds [by certain designated members of the Chicago Mercantile Exchange]"; Orders of the Commodity Futures Trading Commission dated March 30, 2002 and February 10, 2004, regarding "Treatment of Funds Held in Connection with the Clearing of Over-the-Counter Products by The New York Mercantile Exchange"; Order of the Commodity Futures Trading Commission dated October 21, 2004, regarding "Treatment of Funds Held in Connection with the Clearing by The Clearing Corporation of Euro-Denominated Contracts Executed on Eurex Deutschland, AG"; Order of the Commodity Futures Trading Commission dated September 6, 2005, regarding "Treatment of Funds Held in Connection with Clearing by The New York Mercantile Exchange of Contracts Traded on NYMEX Europe"; Order of the Commodity Futures Trading Commission dated March 3, 2006, regarding "Treatment of Funds Held in Connection with the Clearing of Over-the-Counter Products by Chicago Mercantile Exchange, Inc.; Order of the Commodity

provisions authorizing commingling and portfolio margining, and in furtherance of DCO Core Principle F, the CFTC has proposed regulations that would permit a DCO to commingle customer positions in Security-Based Swaps and Swaps pursuant to DCO rules that have been approved by the CFTC.[70] Proposed Regulation 39.15(b)(2)(i) would permit a DCO to commingle, and permit BD/FCMs to commingle, customer positions in Swaps, and any money, securities, or property received to margin, guarantee, or secure such positions, in a cleared swap account subject to the requirements of Section 4d(f) of the CEA. A Security-Based Swap that is held in a Section 4d(f) account pursuant to a portfolio margining program approved by the CFTC and SEC would constitute a security that has been received to margin, guarantee or secure a Swap, and therefore the Security-Based Swap would be eligible to be commingled and portfolio margined with the Swap under the proposed regulation.

D. Treatment of the Commingled 4d(f) Account Under Part 190 of the CFTC Regulations

Cleared swaps, like exchange-traded futures, are "commodity contracts" under the U.S. Bankruptcy Code. Section 724(b) of the Dodd-Frank Act amends Section 761(4)(F) of the U.S. Bankruptcy Code to provide that the term "commodity contract" includes: "(i) any other contract, option, agreement or transaction referred to in this paragraph; and (ii) with respect to a futures commission merchant or a clearing organization, any other contract, option, agreement, or transaction, in each case, that is cleared by a clearing organization." Moreover, Section 724(a) of the Dodd-Frank Act added new Section 4d(f)(5) of the CEA, which provides:

> A swap cleared by or through a derivatives clearing organization shall be considered to be a commodity contract as such term is defined in section 761 of title 11, United States Code, with regard to all money, securities, and property of any swaps customer received by a futures commission merchant or a derivatives

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Futures Trading Commission dated May 23, 2007, regarding "Treatment of Funds Held in Connection with the Clearing by the New York Mercantile Exchange, Inc. of Contracts Traded on the Dubai Mercantile Exchange Limited"; Order of the Commodity Futures Trading Commission dated April 30, 2008, regarding "Treatment of Funds Held in Connection with the Clearing by the New York Mercantile Exchange, Inc. of Contracts Traded on the Dubai Mercantile Exchange Limited"; Order of the Commodity Futures Trading Commission dated September 26, 2008, regarding "Treatment of Funds Held in Connection with the Clearing of Over-the-Counter Products by The Chicago Mercantile Exchange"; Order of the Commodity Futures Trading Commission dated September 16, 2011, regarding "Treatment of Funds Held in Connection with the Clearing by the New York Mercantile Exchange, Inc. of Contracts Traded on the Dubai Mercantile Exchange Limited"; Order of the Commodity Futures Trading Commission dated December 12, 2008, ". . . Permitting Certain Customer Positions in [Certain Over-The-Counter Agricultural] Swaps and Associated Property to be Commingled With Other Property Held in Segregated Accounts"; and Order of the Commodity Futures Trading Commission dated March 18, 2009, ". . . Permitting Customer Positions in Such Cleared-Only Contracts and Associated Funds to be Commingled with Other Positions and Funds Held in Customer Segregated Accounts." Additionally, the CFTC has permitted the commingling of securities and exchange traded futures and the portfolio margining of such positions. *See* Footnote 65, *above*.

[70] Risk Management Requirements for Derivatives Clearing Organizations, 76 Fed. Reg. 3,698, 3,723 (proposed Jan. 20, 2011) (to be codified at 7 C.F.R. pt. 39).

clearing organization to margin, guarantee, or secure the swap (including money, securities or property accruing to the customer as a result of the swap).

Congress, therefore, intended to provide customers trading cleared swaps with the same protections under the U.S. Bankruptcy Code afforded to customers trading exchange-traded futures in the event of an FCM insolvency.

The customer segregation provisions of the Exchange Act were amended by section 763(d) of the Dodd-Frank Act to provide that a Security-Based Swap is a security for purposes of the broker-dealer liquidation provisions of the U.S. Bankruptcy Code, and any account holding Security-Based Swaps is deemed a securities account. Security-Based Swaps held in customer accounts of a dual registered BD/FCM entity therefore generally would be subject to liquidation proceedings under the Securities Investor Protection Act of 1970, as amended ("**SIPA**"). Nonetheless, section 763(d) provides an exception for securities in approved portfolio margining programs referred to in section 15(c)(3)(C) of the Exchange Act. Section 713(c) of the Dodd-Frank Act provides that the CFTC must exercise its discretion to ensure that securities (e.g., Security-Based Swaps) held in an account subject to an approved portfolio margining program subject to CFTC regulations are held as customer property of an FCM, not a BD, and liquidated under the commodity broker liquidation provisions of the U.S. Bankruptcy Code.

Section 713 authorizes the commingling of a customer's Security-Based Swaps with its cleared Swaps in a Section 4d(f) cleared Swap account and, provides that such account would not be deemed a securities account. Accordingly, the trustee in a commodity broker liquidation of a dually registered BD/FCM entity under the U.S. Bankruptcy Code would be authorized to liquidate Security-Based Swaps as customer property pursuant to Part 190 of the CFTC's Regulations and the CFTC net equity rules governing cleared OTC derivatives accounts. Moreover, the Dodd-Frank Act amended Section 20 of the CEA to require the CFTC to exercise its authority to ensure that securities held in a portfolio margining account as a futures account are customer property and the owners of those accounts are customers for purposes of the commodity broker insolvency provisions of the U.S. Bankruptcy Code.[71] To implement the mandate of Section 20, the CFTC has proposed amendments to Regulations 190.01(k) and 190.08(a)(1)(i) to ensure that securities held in a portfolio margining account as a futures account are customer property and that the owners of those accounts are customers for purposes of the commodity broker insolvency provisions of the U.S. Bankruptcy Code.[72]

E. Public Interest Considerations

As the CFTC has noted, "there can be benefits to commingling customer positions in futures, options on futures, and cleared swaps, primarily in the area of greater capital efficiency

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[71] Dodd-Frank Act §713(c).

[72] Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy, 75 Fed. Reg. 75,432 (proposed Nov. 19, 2010) (to be codified at 17 C.F.R. Parts 23 and 190).

due to margin reductions for correlated positions. The CFTC views this form of portfolio margining as a positive step toward financial innovation within a framework of responsible oversight, and it believes that the public can benefit from such innovation."[73] Centralized clearing of the CDS market is a major goal of the Dodd-Frank Act. By requiring CDS to be centrally cleared, Congress is calling for a significant change to the risk-management of the swaps marketplace. The mandated margin requirements for cleared swaps will be considerably greater than the collateral requirements applicable to bilateral swaps in the pre-Dodd-Frank Act regulatory environment, for which there were no regulatory margin requirements. Unless the relief requested herein is provided, allowing for the commingling of Swap and Security-Based Swap assets, BD/FCMs clearing such transactions on behalf of customers will be required to maintain separate customer accounts subject to different margin rules, and will not be able to net customers' offsetting or risk-reducing Swap and Securities-Based Swap positions. A trader who sells a single-name CDS to offset the risk of a highly correlated Index CDS will, in the absence of portfolio margining, have to post full margin for both assets, which will require a significant capital outlay that will discourage participation in the U.S. swap market and potentially add to systemic risk during times of stress.

In enacting the Dodd-Frank Act, Congress authorized the Commission to make available the benefits of portfolio margining, which include capital efficiency, operational efficiency, risk-management efficiency, greater uniformity of treatment for related products and greater regulatory and legal certainty. ICE Clear Credit's "one pot" model provides an effective and efficient means to provide those benefits. All of the CDS contracts cleared and settled through ICE Clear Credit would be subject to the same credit risk mitigation and collateral terms. Allowing ICE Clear Credit to implement its portfolio margining program in a single 4d(f) account would thus foster the risk mitigation goals of the Dodd-Frank Act and allow the marketplace to function more efficiently, while at the same time affording market participants the full protections contemplated by the Dodd-Frank Act reforms. As the Securities Industry and Financial Markets Association ("**SIFMA**") has noted, portfolio margining "enables effective cash management by corporate end-users, institutional investors, and financial institutions."[74] Market participants will be able to expend fewer resources on margin and will be able to improve their allocation of funds based off of their actual risk profile, as more of their assets will be held in a single location with built-in systems to determine the risk of their current portfolio. Consequently, portfolio margining can incentivize large customers trading in highly correlated products to take positions that reduce their overall risk, and in turn, the overall risk of the market, thus furthering the overall goals of the Dodd-Frank Act.

By granting the requested exemptive relief, the Commission will provide participants in the CDS market with the incentive and capital efficiency necessary to make the central clearing

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[73] Risk Management Requirements for Derivatives Clearing Organizations, 76 Fed. Reg. 3,698, 3,716 (proposed Jan. 20, 2011) (to be codified at 17 C.F.R. pt. 39).

[74] Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, Letter to David A. Stawick, Secretary, CFTC, Re: RIN 3038-AD99; 17 CFR Part 190 Protection of Cleared Swaps Customers Before and After Commodity Broker Bankruptcies (January 18, 2011) (the "**SIFMA Letter**").

of CDS, as contemplated in the Dodd-Frank Act, economically feasible. Moreover, the requested exemptive relief will foster the development of a CDS market that is characterized by a reduction of systemic risk by encouraging market participants to maintain hedged portfolios of CDS positions through ICE Clear Credit's proposed portfolio margining program. This will provide for uniform treatment of cleared Swaps and Security-Based Swaps carried in a commingled swap customer account and will result in greater legal certainty in the event of the insolvency of a BD/FCM carrying a portfolio of such cleared instruments for its customers. Related instruments should have consistent margin treatment and insolvency treatment. In the context of attempting to reduce systemic risk it does not make sense to have different outcomes for related products.

Portfolio margining and commingling of related instruments also will harmonize the processing and bookkeeping of Index CDS and single-name CDS onto single production and accounting systems, eliminating the operational risks associated with maintaining separate systems. The incorporation of portfolio margining into ICE Clear Credit's margining methodology, and the commingling of Security-Based CDS with Index CDS, will therefore help to reduce such operational and managerial inefficiencies, substantially enhancing ICE Clear Credit's and its Participants' risk management systems.

Finally, the International Swaps and Derivatives Association ("**ISDA**") has estimated the total outstanding notional amount of the global CDS market to be $26.3 trillion as of mid-year 2010.[75] Facilitating portfolio margining will enable U.S. market participants to better compete for a share of that market with offshore firms that are not subject to the complexity and additional costs associated with a dual regulatory system, and which currently enjoy the benefits of commingled accounts and efficient cross-product margining permitted in foreign jurisdictions. Portfolio margining will be a major step in creating a level playing field for domestic and foreign swap market participants.

IV. Commingling Index CDS with Security-Based CDS in ICE Clear Credit's Customer Cleared Swaps Account

The following is a detailed description of ICE Clear Credit's portfolio margining program, including a description of the products included, their risk characteristics, market factors and prices, and the controls and procedures to safeguard ICE Clear Credit and its Participants:

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[75] *See* ISDA, ISDA Market Survey - Notional amounts outstanding, semiannual data, all surveyed contracts, 1987-present, *available at* www.isda.org/statistics/pdf/ISDA-Market-Survey-historical-data.pdf.

A. An Identification of the Swaps and Security-Based Swaps that would be Commingled, Including Contract Specifications or the Criteria that would be Used to Define Eligible Products

1. Overview

CDS are swap contracts pursuant to which the buyer of the CDS makes a series of payments to the seller and, in exchange, receives a payoff if a credit instrument -- typically a bond or loan -- experiences a credit event (e.g., bankruptcy, failure to pay, obligation default or acceleration, repudiation or moratorium). Less commonly, a credit event can be triggered if a company restructures its debt.

A CDS contract is defined by the following:

1. Reference entity (the underlying entity on which one is buying/selling protection);
2. Reference obligation or seniority (the bond or loan that is being "insured");
3. Term/tenor;
4. Coupon (amount of periodic payments that the buyer must make);
5. Credit events (the specific events that trigger payment by the protection seller to the protection buyer);
6. Restructuring clause (a clause that defines the handling of restructurings as credit events); and
7. Currency.

The contract descriptions are set forth in Chapter 26 of the ICE Clear Credit Clearing Rules (the "**Clearing Rules**").[76] The complete and current list of CDS contracts that are cleared by ICE Clear Credit is available to the public on ICE Clear Credit's website.[77]

2. Security-Based CDS

Single-Name CDS

Single-name CDS instruments reference individual corporate or sovereign government debt instruments. ICE Clear Credit clears single-name CDS products that meet the following clearing criteria:

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[76] The Clearing Rules are attached hereto as Exhibit C.

[77] ICE Clear Credit Contract Roster, https://www.theice.com/publicdocs/ice_trust/ICE_Trust_Contract_Roster.xls.

(a) Must clear in a standardized coupon;

(b) Must be denominated in a supported currency;

(c) Must be in a supported restructuring clause;

(d) The Depository Trust & Clearing Corporation ("DTCC") Deriv/SERV Trade Information Warehouse[78] bilateral open interest must be of material value relative to that product class; and

(e) Open interest must be held by a sufficient number of Participants (as determined by the ICE Clear Credit Chief Risk Officer) to provide breadth of price discovery through the end-of-day settlement pricing process.

ICE Clear Credit began clearing single-name CDS transactions in December 2009.

An ICE Clear Credit single-name CDS that is based on a single reference obligation would be a Security-Based Swap based upon the second prong of the Security-Based Swap definition that includes a swap that is based on "a single security or loan, including any interest therein or on the value thereof."[79] In addition, the third prong of the Security-Based Swap definition includes a swap that is based upon the occurrence of an event relating to a "single issuer of a security," provided that such event "directly affects the financial statements, financial condition, or financial obligations of the issuer."[80] This provision applies generally to event-triggered swap contracts, such as single-name CDS contracts triggered by the bankruptcy of an issuer, a default on one of an issuer's debt securities, or the default on a non-security loan of an issuer.

Narrow-Based Index CDS

A narrow-based Index CDS is a credit derivative used to hedge credit risk or to take a position on a basket of credit entities.

A narrow-based index is an index:

(a) that has nine or fewer component securities;

(b) in which a component security comprises more than 30 percent of the index's weighting;

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[78] The Trade Information Warehouse ("**TIW**") is a centralized global repository for trade reporting and post-trade processing of OTC credit derivative contracts.

[79] Exchange Act § 3(a)(68)(A)(ii)(II).

[80] Exchange Act § 3(a)(68)(A)(ii)(III).

(c) in which the five highest weighted component securities in the aggregate comprise more than 60 percent of the index's weighting; or

(d) in which the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting have an aggregate dollar value of average daily trading volume of less than $50,000,000 (or in the case of an index with 15 or more component securities, $30,000,000), except that if there are two or more securities with equal weighting that could be included in the calculation of the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting, such securities shall be ranked from lowest to highest dollar value of average daily trading volume and shall be included in the calculation based on their ranking starting with the lowest ranked security.[81]

An ICE Clear Credit narrow-based CDS contract in which the underlying reference is a narrow-based index or the issuers of securities in a narrow-based index would be a Security-Based Swap. ICE Clear Credit narrow-based Index CDS contract specifications do not provide for mandatory physical settlement.

3. Index CDS

Broad-Based Index CDS

A broad-based Index CDS is a credit derivative used to hedge credit risk or to take a position on an underlying reference that is not a narrow-based security index or the issuers of securities that are not in a narrow-based security index. A broad-based Index CDS is a Swap, not a Security-Based Swap.

New series of broad-based Index CDS are issued every six months by Markit Group Limited.[82] Prior to the announcement of each series, a group of investment banks is polled to determine the credit entities that will form the constituents of the new broad-based index. On the day of issue, a fixed coupon is decided for the whole index based on the credit spread of the entities in the index. Once this has been decided, the broad-based index constituents and the fixed coupon are published and the broad-based indices can be actively traded. ICE Clear Credit's Index CDS contract specifications do not provide for mandatory physical settlement.

ICE Clear Credit began clearing North American broad-based Index CDS contracts on March 9, 2009.

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[81] CEA §§ 1a(35)(A) and (B) and Exchange Act §§ 3(a)(55)(B) and (C).

[82] Markit Group Limited ("**Markit**") is a financial information services company that specializes in CDS data.

4. Scope Of Eligible Products

ICE Clear Credit intends to apply the commingling and portfolio margining relief requested herein to the following Eligible Products: (a) the currently cleared Index CDS products identified in Exhibit A; and (b) the currently cleared Security-Based CDS identified in Exhibit B. Product specifications for all of the foregoing Eligible Products are set forth in Chapter 26 of the Clearing Rules.

In addition, ICE Clear Credit also intends to apply the commingling and portfolio margining relief to additional CDS instruments such as: (a) sovereign CDS from three regions: (i) Latin America; (ii) Eastern Europe, the Middle East and Africa; and (iii) Asia; (b) high-yield corporate CDS, specifically, US dollar-denominated CDS contracts referencing non-investment grade corporate entities domiciled in North America; and (c) other CDS instruments within the above-described Eligible Product types, categories and classes, that satisfy the following criteria:

(a) significant non-cleared outstanding notional exposure relative to other instruments in the same product class;

(b) significant trading liquidity to support an orderly liquidation of positions if required; and

(c) adequate pricing data from at least four Participants who are available to provide daily prices for such instrument to assure the effectiveness of ICE Clear Credit's End of Day Settlement Pricing Process.

B. An Analysis of the Risk Characteristics of the Eligible Products

The primary categories of risk that apply to the Eligible Products include:

(a) spread risk,

(b) liquidity risk,

(c) concentration risk,

(d) jump-to-default risk,

(e) interest rate sensitivity, and

(f) basis risk.

These risk categories apply in varying degrees to the Eligible Products, depending on the type of CDS instrument, the tenor of a given position, and the underlying name(s) and indices and the management of these risks are addressed in the ICE Clear Credit Portfolio Approach to CDS Margining/Index Decomposition Methodology, attached as Exhibit H.

Spread risk is the most important risk characteristic of the Eligible Products. Spread risk relates to the movement of credit spreads with respect to a particular instrument. The credit spread reflects the default probability of the underlying name(s) of the CDS instrument.

Liquidity risk relates to the trading conditions for an instrument. Liquidity can be measured by considering the relative size of bid/offer spreads for an instrument, with narrow values representing more active (i.e., liquid) trading conditions and wider values representing more volatile (i.e., illiquid) trading conditions. Generally, Index CDS are more actively traded than single-name CDS and have narrower bid/offer widths, and thus they offer greater liquidity.

Concentration risk relates to the risk of potential loss attributable to concentrated positions whose liquidation may lead to additional instrument or portfolio loss upon liquidation.

Jump-to-default risk relates to the exposure due to the underlying reference entity to entering a state of default.

Interest rate sensitivity relates to changes in the discount default-free term structure used to price CDS instruments.

Basis risk relates to the difference between quoted spread and fair (intrinsic) spread (i.e., the relative richness or cheapness of an index relative to its components).

The design of the ICE Clear Credit risk management methodology also addresses the following broader risk categories: (a) idiosyncratic risk (the risk that effects a small number of underlying names without ubiquitous market effects); (b) systematic risk (the risk that affects the entire market); and (c) contagion risk, which is considered for Clearing Participants and cleared underlying reference entities that exhibit high levels of correlations. Please see Section IV.G, below.

C. A Description of Whether the Eligible Products Would be Executed Bilaterally and/or Executed on a Designated Contract Market and/or a Swap Execution Facility

CDS transactions cleared by ICE Clear Credit are currently conducted on a bilateral basis between counterparties, rather than on a centralized exchange. Upon the commencement of mandatory clearing and the trading of CDS transactions on swap execution facilities ("**SEFs**") and security-based swap execution facilities ("**SSEFs**"), ICE Clear Credit will accept for clearing CDS transactions executed on qualified SEFs for Index CDS and qualified SSEFs for Security-Based CDS transactions.

D. An Analysis of the Liquidity of the Respective Markets for the Swaps and Security-Based Swaps That Would be Commingled, the Ability of Participants and ICE Clear Credit to Offset or Mitigate the Risk of Such Swaps and Security-Based Swaps in a Timely Manner Without Compromising the Financial Integrity of the Account, and, as Appropriate, Proposed Means for Addressing Insufficient Liquidity

1. Eligible Product Listing Criteria, Contract Volumes and Open Interest

ICE Clear Credit currently offers 42 unique Index CDS contracts and 128 single-name CDS.

As noted above, ICE Clear Credit applies the following listing criteria to Eligible Products, which are designed to assure sufficient liquidity:

(a) material non-cleared open interest as measured by a minimum of $750 million gross notional in the Trade Information Warehouse;

(b) sufficient market liquidity to support an orderly liquidation of positions if required (as measured by minimum of $10 million daily gross notional traded); and

(c) at least four Participants are available to provide daily prices for each instrument.

Attached as Exhibit D is historical volume and open interest for cleared CDS transactions on ICE Clear Credit.[83]

Attached as Exhibit E is open interest and transaction activity reported to the TIW for Index CDS and single-name CDS cleared by ICE Clear Credit based on DTCC publicly available data. This data includes ICE Clear Credit cleared volumes, as well as transactions in the reference names for Index CDS and single-name CDS that were not cleared by the parties on ICE Clear Credit, so as to provide a picture of the liquidity of the OTC market for instruments that are cleared on ICE Clear Credit. The DTCC data includes only transactions in which market participants were engaging in market risk transfer activity. Risk transfer activity is defined as transactions that change the risk position between two parties. This includes new trades between two parties, termination of an existing transaction, or the assignment of an existing transaction to a third party. The DTCC data indicates the number of clearing dealers that executed transactions on a particular reference entity on a monthly basis, the average daily notional of transactions executed on each reference entity name (this notional amount represents the amount executed

[83] The Index CDS data starts on March 13, 2009. The single name data starts on December 29, 2009. The data is organized by clearing date, product, volume (notional), open interest (notional) and volume (trades). For single-names the data is at the reference entity level (e.g., Alcoa), rather than the instrument level (e.g., Alcoa, 100 coupon, 6/20/2016 scheduled termination date).

across the entire maturity spectrum for each reference entity), and the average number of transactions (a buy and a sell) on each reference entity executed on a given day.

2. Ability of Participants and ICE Clear Credit to Offset or Mitigate the Risks of Eligible Products Without Compromising the Integrity of the Account

Any Participant that clears Index CDS transactions for customers is required to be registered with the CFTC as an FCM. Any Participant that clears Security-Based CDS transactions is required to be registered as a BD with the SEC. All Participants must maintain the CFTC-prescribed minimum amount of Adjusted Net Capital as reported (or as would be reported) to the CFTC on a Form 1-FR or FOCUS Report.

ICE Clear Credit's portfolio margining methodology describes the risk management policies and procedures of ICE Clear Credit, which seek to assure that Participants possess the capacity to fulfill their responsibilities to ICE Clear Credit, and that ICE Clear Credit possesses the ability to manage the risks associated with discharging its responsibilities as a CA. See Sections F and G below for further information.

3. Proposed Methods for Addressing Insufficient Liquidity

In the event of a default by a Participant, ICE Clear Credit strives to minimize the impact of the default on non-Defaulting Participants[84] by instituting Default Management Procedures. The goal of such procedures is to limit the risk associated with the Defaulting Participant's default and to conduct an orderly close-out or mitigate the risk relating to the Defaulting Participant's positions. See Section K below for further information.

E. An Analysis of the Availability of Reliable Prices for Each of the Eligible Products

ICE Clear Credit has developed a comprehensive approach to the end-of-day settlement price process and the daily mark-to-market (valuation) process using reliable, market-driven pricing. The pricing methodology simulates trading based on the end-of-day prices submitted by Participants. ICE Clear Credit periodically requires Participants whose bids and offers "cross" to enter into positions at the crossed price. This requirement to periodically execute on matched interests serves as a means of ensuring Participants submit bona fide end-of-day prices to ICE Clear Credit. The end-of-day pricing process begins each day at 4:30 p.m., Eastern time, when each Participant has five minutes to submit a firm end-of-day price to ICE Clear Credit. ICE Clear Credit converts these end-of-day prices into a single, standardized bid-offer spread format. ICE Clear Credit then applies its fixing algorithm to determine the end-of-day settlement prices and matched bid/offers (if any), by product. ICE Clear Credit then publishes the end-of-day settlement prices to the market at approximately 5:30 p.m.

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[84] *See* Clearing Rule 605.

F. A Description of the Financial, Operational, and Managerial Standards or Requirements for Participants that Would be Permitted to Commingle Swaps and Security-Based Swaps

1. Participant Financial Requirements

Participants that are BD/FCMs: must: (A) maintain a minimum of $100 million of Adjusted Net Capital;[85] and (B) have Excess Net Capital[86] that is greater than 5 percent of the Participant's Required Segregated Customer Funds.[87] Participants that are not BD/FCMs must have a minimum of $5 billion of Tangible Net Equity.[88]

ICE Clear Credit will adjust these required minimums to comply with the SEC- and CFTC-prescribed minimum capital requirements that will be applicable to clearing members of a CA and DCO when the SEC and CFTC finalize their rules relating to such minimum capital requirements.[89] Participants will be required to report their Adjusted Net Capital as reported (or as would be reported) to the CFTC on a Form 1-FR or FOCUS Report.

If at any time a Participant that is a BD/FCM has a required Guaranty Fund deposit[90] that exceeds 20 percent of its Excess Net Capital, ICE Clear Credit may impose additional Initial Margin requirements for such Participant for risk management purposes. Any material change in

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[85] "Adjusted Net Capital" for a Participant that is an FCM, is as defined in CFTC Rule 1.17 and as reported on its Form 1-FR-FCM or FOCUS Report or as otherwise reported to the Commission under CFTC Rule 1.12, and for a Participant that is not an FCM but is a Broker-Dealer, shall be its "net capital" as defined in SEC Rule 15c3-1 and as reported on its FOCUS Report.

[86] "Excess Net Capital" for a Participant that is an FCM or a Broker-Dealer shall equal its "excess net capital" as reported on its Form 1-FR-FCM or FOCUS Report or as otherwise reported to the Commission under CFTC Rule 1.12.

[87] A "Participant's Required Segregated Customer Funds" equals (i) the total amount required to be maintained by such Participant on deposit in segregated accounts for the benefit of customers pursuant to Sections 4d(a) and 4d(f) of the Act and the regulations thereunder and (without duplication) pursuant to the rules of relevant clearing organizations for positions carried on behalf of customers in the cleared OTC derivative account class plus (ii) the total amount required to be set aside for customers trading on non-United States markets pursuant to CFTC Rule 30.7.

[88] "Tangible Net Equity" must be computed in accordance with the Federal Reserve Board's definition of "Tier 1 capital" as contained in Federal Reserve Regulation Y Part 225 Appendix A (or any successor regulation thereto), in the case of a bank or other Participant subject to such regulation, or otherwise shall be the Participant's equity less goodwill and other intangible assets, as computed under generally accepted accounting principles.

[89] Risk Management Requirements for Derivatives Clearing Organizations, 76 Fed. Reg. 3,698, 3,719 (proposed Dec. 16, 2010) (to be codified at 17 C.F.R. pt. 39.12(a)(2)). Clearing Agency Standards for Operation and Governance, 76 Fed. Reg. 14,472, 14,538 (proposed Mar. 3, 2011) (to be codified at 17 C.F.R. § 240.17Ad–22(b)(7)).

[90] The Guaranty Fund is discussed in Section IV.J.5. below.

a Participant's Adjusted Net Capital or Excess Capital level that is required to be reported to the CFTC under CFTC Regulation 1.12 also must concurrently be reported to ICE Clear Credit.

ICE Clear Credit, at its discretion, may deem the ongoing capital requirements of a Participant set out above to be met by the provision to ICE Clear Credit of an unconditional guarantee (in a form, substance, and amount acceptable to ICE Clear Credit) of the obligations of the Participant to ICE Clear Credit from a direct or indirect parent company of the Participant (not including a subsidiary of the Participant), provided, among other things, that: (i) the guarantor itself meets ICE Clear Credit's minimum capital criteria; (ii) ICE Clear Credit is satisfied that the guarantee is enforceable against the guarantor; and (iii) ICE Clear Credit is satisfied that the guarantor will be able to meet its financial obligations under the guarantee based upon such audited financial information or other financial information as is reasonably requested by ICE Clear Credit.

ICE Clear Credit relies on an internal ratings system to evaluate and monitor Participants. This internal rating provides guidance in determining the expected financial stability and credit/counterparty risk of each Participant. There are seven components to the internal rating, representing a combination of financial reporting data, more dynamic market data, and an overall qualitative assessment of the Participant's financial condition and market standing. Each component receives a separate score. The scores range from 1 to 5+, with 1 being the best score possible and 5+ the worst. The internal rating is the weighted average of the individual scores. Each Participant must maintain an ICE Clear Credit internal rating that does not exceed 3.0 (generally equivalent to an A rating by Moody's or Standard & Poor's).

2. Participant Operational and Managerial Requirements

Additionally, ICE Clear Credit evaluates each applicant's operational capabilities. To become a Participant, an applicant must demonstrate: (i) operational competence in CDS, including the ability to process the expected volumes and values of contracts within the required time frames; (ii) systems and management expertise in CDS, including maintaining appropriate back-office facilities; (iii) an ability to submit pricing data within the required time frames; (iv) risk management expertise in CDS; and (v) that it has established relationships with one or more swap data repositories and/or security-based swap data repositories as necessary for reporting its cleared Contracts in accordance with applicable law. Risk management expertise is evaluated, in part, with a survey addressing risk management sophistication in the CDS product area.

Alternatively, an applicant may demonstrate these operational capabilities by entering into an outsourcing arrangement with another Participant (through an arrangement that is acceptable to ICE Clear Credit), provided, however, that the Participant remains responsible to ICE Clear Credit for the performance of the functions outsourced to its service provider.

To become a Participant, an applicant must complete the Participant Application; enter into the Participant Agreement; and provide the supplemental information requested in the Participant Application, including financial statements, an organization chart, organizational documents, and risk management policies and procedures.

3. Registration of Participants with the CFTC as an FCM and Registration with the SEC as a BD

Any Participant that clears Index CDS transactions for customers must be registered with the CFTC as an FCM, and any Participant that clears Security-Based CDS transactions for customers also will be required to be registered with the SEC as a BD. All Participants must also be "eligible contract participants" as defined in Section 1a(18) of the CEA.

4. Monitoring of Participants

ICE Clear Credit has established financial surveillance policies and procedures designed to enable ICE Clear Credit to meet applicable self-regulatory organization financial surveillance obligations standards established by the Commission or the CFTC, and to allow ICE Clear Credit to satisfy itself that each Participant meets ICE Clear Credit's financial requirements as well as the Commission and CFTC financial reporting, net capital, and segregation rules and requirements.

All Participants are required to provide to ICE Clear Credit in a timely manner all reports and information relating to the Participant, persons controlling the Participant, and related or affiliated organizations as required by the ICE Credit Rules or otherwise required by ICE Clear Credit, and upon becoming aware that any such report or information was at the time provided false or misleading in any material respect, promptly provide to ICE Clear Credit a correcting amendment of or supplement to such report or information. Further, the Rules require Participants to provide notice to ICE Clear Credit of significant financial, regulatory and organizational events that could impact the financial or operation capacity of a Participant. ICE Clear Credit personnel will review and analyze such reports, information and notices to monitor the financial and operational condition of its Participants.

ICE Clear Credit's financial surveillance program includes a combination of ongoing monthly financial surveillance, daily clearing member monitoring in conjunction with the Risk Department, and ad hoc on-site examinations of Participant's records and procedures, when deemed necessary, to verify their compliance with the Rules, Commission and CFTC capital requirements, CFTC customer segregation rules, Commission customer protection rules, "early warning" and regulatory notice requirements, and to identify material inadequacies in internal controls by the review of an independent auditor's material inadequacies letter. In addition, ICE Clear Credit has applied to become a member of the Joint Audit Committee.[91] If membership to the Joint Audit Committee is granted, ICE Clear Credit may leverage the existing examination and annual on-site examination efforts of an FCM Participant's designated self-regulatory organization in lieu of performing its own on-site examination.

[91] The Joint Audit Committee is a representative committee of U.S. futures exchanges and regulatory organization.

G. A Description of the Systems and Procedures that Would be Used by ICE Clear Credit to Oversee Participants' Risk Management of any Commingled Eligible Products

1. The ICE Clear Credit Risk Management Approach

ICE Clear Credit's risk management approach is comprehensive, recognizing five types of risk: Systemic Risk, Collateral Risk, Market and Interest Rate Risk, Operational Risk, and Settlement Risk.

Systemic Risk. Systemic risk addresses the risks facing the broader financial market or system, and not just specific Participants. ICE Clear Credit's systemic risk management goal is to ensure that no additional counterparty risk is introduced and that each Participant is insulated from the Default[92] of another Participant.

ICE Clear Credit's approach to managing systemic risk is based on a six-tiered waterfall. The strength of the approach is that each tier builds on the other tiers, and all tiers apply to all Participants without exception. The tiers are (in order):

(a) Membership Criteria: Ensure that Participants have sufficient credit strength, financial resources, and operational capabilities. Membership criteria are discussed above in Section IV.F.

(b) Initial Margin Requirement: Collateralize potential Participant portfolio loss under distressed market conditions on a daily basis. Initial Margin[93] is discussed below in Section IV.J.

(c) Mark-to-Market/Variation Margin: Adjust Participant net asset value of cleared instruments daily based on end-of-day mark-to-market valuations. Mark-to-Market Margin[94] is discussed below in Section IV.J.

(d) Intra-day Risk Monitoring and Special Margin Call Execution: Identify additional margin requirements based on a comparison of unrealized profit/loss to initial margin, understanding unusual market fluctuations.

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[92] *See* Clearing Rule 102 for the definition of "**Default.**"

[93] *See* Clearing Rule 403.

[94] *See* Clearing Rule 404.

(e) Guaranty Fund: Mutualize losses under extreme, but plausible, market scenarios. The Guaranty Fund is discussed below in Section IV.J.

(f) Limited One-time Assessment: Oblige Participants to contribute a limited amount of additional default funding.

Collateral Risk. Collateral risk management is the measurement and management of movement in the value of collateral relative to the Margin[95] deposits and Guaranty Fund requirements under current or future circumstances. Collateral risk management related to margin deposits and the Guaranty Fund is managed through a combination of conservative definitions of acceptable collateral, haircuts, and limitations on the investment of cash collateral/Guaranty Fund deposits (described below in Section J). Exchange rate risk related to non-U.S. dollar denominated collateral is mitigated by the application of foreign exchange-based haircuts.

Market Risk and Interest Rate Risk. Because ICE Clear Credit's investment portfolio is in interest-bearing assets, ICE Clear Credit's market risk is in the form of interest rate risk. Presently, the Margin and Guaranty Fund deposits are held primarly in U.S. dollar cash, although approximately 6.4 percent of Margin and 5 percent of the Guaranty Fund deposits are held in U.S. Treasury securities. ICE Clear Credit's Investment Policy Statement establishes the parameters for the management of the investment portfolio.[96] Interest rate risk related to Margin or Guaranty Fund deposits is mitigated by haircuts on such collateral.

Operational Risk. Operational risk is the risk of loss resulting from inadequate or failed internal processes, people and systems, or from external events. Operational risk also includes legal risk, which is the risk of loss resulting from failure to comply with laws as well as prudent ethical standards and contractual obligations. It also includes the exposure to litigation from ICE Clear Credit's activities. Operational risk is mitigated through the implementation of detailed policies and procedures, adequate management oversight, and risk management controls.

Settlement Risk. ICE Clear Credit bears settlement risk if Participants do not meet their daily settlement obligations. This settlement risk is managed and mitigated with clear direct payment deadlines supported by explicit Default policies and procedures.

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[95] *See* Clearing Rule 102 for the definition of "**Margin**."

[96] ICE Clear Credit's Investment Policy states that investment portfolio's primary objective is the protection of principal. Under ICE Clear Credit's Investment Policy, investments are restricted to: U.S. Government and those governmental agency securities with an explicit full faith and credit guarantee of the U.S. Government or repurchase agreements backed by said securities. U.S. Government and governmental agency securities must have a maximum maturity of no greater than two years from the date of purchase and the maximum average duration of the overall portfolio must not exceed 24 months.

2. Governance and Organization

ICE Clear Credit Risk Management Staff

ICE Clear Credit's risk management approach is reinforced by a governance and oversight framework designed to identify the day-to-day accountability for risk management as well as the responsible oversight and controls.

ICE Clear Credit's Chief Risk Officer is directly responsible for risk management and, in this capacity, is directly accountable to ICE Clear Credit's President.[97] The direct management of risk is balanced by a committee structure that provides (i) oversight and accountability, (ii) advisory input and, when necessary, (iii) specialized execution. These responsibilities are addressed across the committees that support and advise the Board of Directors with regard to its responsibilities for overseeing ICE Clear Credit's risk and risk management.

The Risk Management Department, which is overseen by the Chief Risk Officer, is responsible for practices and procedures implementing ICE Clear Credit's portfolio margining methodology. The Risk Management Department consists of seven individuals, who are dedicated to risk management and do not have responsibilities in other functions.[98]

The Risk Management Department is responsible for managing the risk inherent in all products cleared by ICE Clear Credit and all forms of collateral accepted by ICE Clear Credit. This includes the following tasks:

Analytics

(a) Quantifying and analyzing Margin and Guaranty Fund requirements;

(b) Back testing Initial Margin requirements;

(c) Stress testing and completing scenario analysis to supplement ICE Clear Credit's quantitative methodologies;

(d) Reviewing CDS risk models and parameters (e.g., degrees of freedom, sample Mean Absolute Deviations, recovery rates, assumptions, portfolio benefit parameters) on a monthly basis;

(e) Reviewing and validating the use of pricing or valuation models, including pricing for collateral;

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[97] The Chief Risk Officer is a dual employee of ICE Clear Credit and The Clearing Corporation ("**TCC**"), a CFTC-registered DCO and an affiliate of ICE Clear Credit.

[98] TCC provides risk management services to ICE Clear Credit pursuant to the Master Services Agreement.

Exposure

(a) Monitoring Participants' Margin and Guaranty Fund requirements on an ongoing basis;

(b) Verifying Mark-to-Market values on all transactions and position reports;

(c) Modeling and analyzing collateral values;

(d) Analyzing and/or monitoring interest rate sensitivities;

(e) Recommending position or concentration limits to the Risk Working Group, the Risk Committee and the Board of Managers (see below), as well as the monitoring of those limits;

Monitoring

(a) Analyzing and/or monitoring prospective and current Participants;

(b) Maintaining a "Watch List" of Participants who pose a material risk to ICE Clear Credit and other Participants;

(c) Analyzing and/or monitoring settlement banks; and

Default Participation

(a) Executing default procedures according to the Clearing Rules and procedures, with guidance from the CDS Default Committee (described in Section IV.L below).

On at least a monthly basis, the Risk Management Department conducts a statistical analysis of the Margin levels and market performance. Using the minimum standards established by ICE Clear Credit management in consultation with the Risk Working Group and the Risk Committee, the Risk Management Department recommends margin methodology changes to the President and the Board of Managers for their approval.

ICE Clear Credit also has appointed a Chief Compliance Officer who reports directly to the President of ICE Clear Credit.[99] The Chief Compliance Officer is responsible for, *inter alia*, reviewing compliance by ICE Clear Credit with the Core Principles, resolving any conflicts of interest, ensuring compliance with the CEA and CFTC Regulations, establishing policies and procedures for addressing non-compliance, and addressing non-compliance.

[99] ICE Clear Credit's Chief Compliance Officer will fulfill the responsibilities of the "Chief Compliance Officer" set forth in Section 3C(j)(1) of the Exchange Act.

ICE Clear Credit Committees

The relevant committees for the purposes of risk management are the: (i) Risk Committee; (ii) Risk Management Subcommittee; (iii) Audit Committee; (iv) Compliance Committee; (v) Risk Working Group; (vi) Participant Review Committee; (vii) Advisory Committee; (viii) CDS Default Committee; and (ix) Business Conduct Committee, each of which is described below. The ICE Clear Credit governance structure also includes the following special purpose committees: (i) CDS Regional Committee; (ii) Trading Advisory Committee; and (iii) Business Continuity Planning Oversight Committee.

Risk Committee. The Risk Committee consists of twelve members and is responsible for making recommendations to the Board of Managers on margin rate setting, stress testing, product acceptance, product definition, margin asset acceptance, margin asset discount rates, and investment policy.[100] Three of the Risk Committee members are (i) an independent member of the Board of Managers, who serves as chairman; and (ii) two officers of ICE Clear Credit from among the CEO, President, CFO, and Chief Risk Officer, each appointed by ICE Clear Credit. The remaining nine members are appointed by Participants.

Each member of the Risk Committee is subject to the approval of the Board of Managers. Each member must have risk management experience and expertise and no member of the Risk Committee may be subject to statutory disqualification under Section 8a(2) of the CEA or other applicable CFTC Regulations. The Risk Committee makes recommendations at a meeting by a majority vote of members or by unanimous written consent, absent a meeting. The Risk Committee is required to meet no less frequently than quarterly; however, since its constitution, the Risk Committee has met at least monthly. The Board of Managers or any two members of the Risk Committee may call for a meeting. Emergency meetings of the Risk Committee may be called by any one or more members of the Risk Committee.

The Risk Committee must be consulted in relation to any of the following actions:

(a) accepting for clearing any types of transactions other than pre-approved products, making modifications to ICE Clear Credit provisions relating to the specific characteristics of a contract, or making the determination that a proposed modification to ICE Clear Credit provisions does not constitute a contract modification;

(b) modifying ICE Clear Credit provisions that relate to Margin;

(c) modifying ICE Clear Credit provisions that relate to: (i) the structure, size, or application of the Guaranty Fund; (ii) the methodology for calculating a Participant's required Guaranty Fund contribution or the components thereof; (iii) the types of

[100] Chapter 5 of the Clearing Rules describes the Risk Committee.

currency or assets eligible for, or valuation methodology or discounts applied to, a Participant's Guaranty Fund contribution; (iv) the limit on Participant assessments; (v) the time period for, or means by which, Collateral is returned to a Participant; (vi) the methodology for determining the interest rate credited for Collateral on deposit in the Guaranty Fund; (vii) the methodology and procedures for applying amounts on deposit in Guaranty Fund and recoveries related thereto; (viii) provisions relating to the use, rehypothecation or investment of Collateral on deposit in the Guaranty Fund; or (ix) the size, form, timing, investment guidelines, valuation, or priority scheme with respect to the ICE Clear Credit contributions to the Guaranty Fund;

(d) modifying ICE Clear Credit provisions that relate to (i) the closing-out process, the CDS Default Committee or the other rights and obligations of ICE Clear Credit upon the Default of a Participant or the occurrence of an ICE Clear Credit Default; (ii) the definition of ICE Clear Credit Default or Default or the process required to determine that a Default has occurred; (iii) the definition of Termination Event, the process required to determine that a Termination Event has occurred, or the rights and obligations of ICE Clear Credit upon the occurrence of a Termination Event with respect to a Participant; (iv) the process for dispute resolution; or (v) the process for effecting physical settlement of Contracts or the allocation methodology relating thereto;

(e) modifying ICE Clear Credit provisions that relate to open access to the clearing system for all execution venues and all trade processing platforms;

(f) modifying ICE Clear Credit provisions that relate to (i) ICE Clear Credit or any other person seeking the consent of, or engaging in consultation with, the Risk Committee or any other specified body or other person; (ii) the delegation of responsibility for an action or determination to a person other than ICE Clear Credit; (iii) ICE Clear Credit or any other person applying a particular standard for an action or determination, including, without limitation, Clearing Rule 615 (Determinations by ICE Clear Credit); or (iv) Chapter 7 (Disciplinary Rules) of the Clearing Rules;

(g) modifying the Clearing Rules or other provisions relating to the Risk Committee; and

(h) any action that must be submitted to the Risk Management Subcommittee (described below).

On at least an annual basis, to ensure an adequate risk control, the Risk Committee reviews ICE Clear Credit's risk management compliance with ICE Clear Credit's overall risk management procedures, which includes ICE Clear Credit's portfolio margining methodology, and associated policies and/or procedures, the margin framework and methodologies, the Guaranty Fund framework and methodologies, the Acceptable Collateral Policy and associated haircuts, the Investment Policy Statement, and all other relevant risk management policies, limits, and guidelines, to ensure their ongoing effectiveness.

The Risk Committee also has the authority to designate four members for election to the Board of Managers, two of whom must satisfy the independence requirements set forth under the Clearing Rules. Further, the Risk Committee is entitled to consult with ICE Clear Credit's parent company, IntercontinentalExchange, Inc. ("**ICE Inc.**"), prior to ICE Inc. appointing any member of the Board of Managers (other than a Risk Committee Board Appointee) with respect to the skills and experience of such proposed member.

Risk Management Subcommittee. The Risk Management Subcommittee is a subcommittee of the Risk Committee composed of five members who have risk management experience. Two of the members of the Risk Management Subcommittee are public directors as defined in CFTC Rule 1.3(ccc), appointed by ICE Clear Credit. One member of the Risk Management Subcommittee is a Non-Participant Party nominated by the Advisory Committee and two members are representatives of Participants who are members of the Risk Committee.

The Risk Management Subcommittee must be consulted in relation to any of the following actions:

(a) Determining products eligible for clearing;

(b) Determining the standards and requirements for initial and continuing Participant eligibility;

(c) Approving or denying (or reviewing approvals or denials of) Participant applications; and

(d) Modifying any of the responsibilities, rights or operations of the Risk Management Subcommittee or the manner in which the Risk Management Subcommittee is constituted as set forth in the Rules.

Audit Committee. The Audit Committee of ICE Clear Credit provides the Board of Managers with an independent opinion and recommendations on matters of importance to ICE Clear Credit's financial matters, systems and controls, legal and regulatory compliance, and business ethics.

The Audit Committee consists of three independent members of the Board of Managers. No manager may serve as a member of the Audit Committee if such manager serves on the audit committees of more than two other public companies unless the Board of Managers determines

that such simultaneous service would not impair the ability of such manager to effectively serve on the Audit Committee. The Audit Committee meets at least quarterly, and more frequently as circumstances dictate.

The Audit Committee has the following major responsibilities:

(a) overseeing the performance of the internal controls, internal audit function, external auditors, and annual financial reporting of ICE Clear Credit;

(b) overseeing the integrity of ICE Clear Credit's financial statements;

(c) overseeing ICE Clear Credit's compliance with legal and regulatory requirements;

(d) overseeing the qualifications and independence of ICE Clear Credit's external auditors; and

(e) attending to such other matters related to ICE Clear Credit's financial statements or accounting policies and any legal matter that could have a significant impact on ICE Clear Credit's financial statements and compliance programs and procedures that are delegated by the Board of Managers to the Audit Committee from time to time.

The Audit Committee is responsible for reviewing ICE Clear Credit's Annual Compliance Plan on an annual basis, including the results of the Annual Compliance Risk Assessment, planned program activities, and Compliance Department staffing and budgeting. On a quarterly basis, the Audit Committee reviews top compliance risks, progress against the Annual Compliance Plan, remediation efforts, key risk indicators, including the results of testing, and the status of regulatory examinations. The Audit Committee also has responsibility for reviewing material correspondence or other action by regulators or governmental agencies as well as ICE Clear Credit's response to such correspondence or action. The Audit Committee must monitor compliance with ICE Clear Credit's Code of Business Conduct and Ethics, review and approve all requests by managers or officers for waivers of the code, and annually review the Code of Business Conduct and Ethics for Managers.

In discharging its oversight role, the Audit Committee is empowered to investigate any matter brought to its attention, with full access to all books, records, facilities, and ICE Clear Credit personnel, and the authority to engage independent counsel and other advisors as it determines necessary to carry out its duties and responsibilities. The Audit Committee has the resources and authority appropriate to discharge its duties and responsibilities, including the authority to select, retain, terminate, and approve the fees and other retention terms of special or independent counsel, accountants or other experts and advisors, as it deems necessary or appropriate, without seeking approval of the Board of Managers or management.

Compliance Committee. The Compliance Committee consists of senior management of ICE Clear Credit, presently including the Chief Compliance Officer (who serves as the Chair), the Compliance Manager, the General Counsel, the Chief Financial Officer, the Chief Risk Officer, the Chief Operating Officer, the Director of Technology, the Director of Operations, the Operational Risk Manager, and the Director of Internal Audit. The Compliance Committee meets at least 10 times each year, and may meet more frequently at the request of the Chair.

The Compliance Committee oversees and manages compliance risk management processes for ICE Clear Credit's compliance-related policies and its firm-wide compliance risk management program. The Compliance Committee is responsible for the establishment and ongoing administration of firm-wide compliance risk reporting. The Compliance Committee must ensure that significant compliance issues across ICE Clear Credit are addressed in a timely manner. The Compliance Committee reviews major compliance-related policies and significant compliance-related procedures and approves such policies and procedures that do not require approval of the Board of Managers or Audit Committee. Finally, the Compliance Committee reviews and approves the Annual Compliance Plan, including actual and planned staffing levels, and forwards it to the Audit Committee for review.

Risk Working Group. The Risk Working Group is responsible for providing advice to the ICE Clear Credit Risk Management Department, ICE Clear Credit management, and the Risk Committee, to help ensure that ICE Clear Credit's risk management procedures, including ICE Clear Credit's portfolio margining methodology, are robust in scope, measurement, management, and controls, and that it correctly and equitably charges each Participant for the amount and quality of risk it introduces. The Risk Working Group helps to provide guidance and input into ICE Clear Credit's systemic risk approach (including collateral eligibility and applicable haircuts). Each Participant may appoint a representative to the Risk Working Group. The Risk Working Group is chaired by the Chief Risk Officer.

The Risk Working Group has the following primary responsibilities:

(a) Reviewing and validating ICE Clear Credit's risk philosophy and risk tolerances, including periodic review of models, key assumptions, data requirements, etc.;

(b) Reviewing ICE Clear Credit's periodic back testing;

(c) Consulting with Risk Management Department personnel and the Risk Committee regarding changes to the risk management procedures, policies, limits, and other guidelines for acceptable risk taking activities; and

(d) Reviewing and recommending treatment of new products and their associated margin and Guaranty Fund requirements.

Participant Review Committee. The Participant Review Committee is a committee consisting of ICE Clear management and employees that evaluates applicants for Participant status, ensures that Participants maintain good standing, and adjudicates the suspension process.

Advisory Committee. The Advisory Committee is composed of representatives of up to twelve major market participants, two members of ICE Clear Credit management, and an Independent Director of ICE Clear Credit. The market participants, selected by ICE Clear Credit following consultation with the Risk Committee, are representatives of the customers of Participants who are not themselves Participants. The Advisory Committee proposes actions to both the Board of Managers and the Risk Committee for consideration, as applicable, by those bodies. However, neither the Board of Managers nor the Risk Committee is under any obligation to accept any proposal made by, or take any action proposed by, the Advisory Committee. The Advisory Committee also nominates the non-participant member of the Risk Management Subcommittee.

CDS Default Committee. The CDS Default Committee provides market perspective and feedback on ICE Clear Credit's Participant Default Management Procedures, which are described in Section IV.L, below. Members of the CDS Default Committee are chosen from a list of Committee Eligible Participants.[101] Three Committee Eligible Participants are chosen on a rotating basis and are responsible for managing ICE Clear Credit's exposure due to a Participant's Default. The CDS Default Committee will convene upon the declaration of Default and, in conjunction with the Chief Risk Officer, assists with the liquidation of the Defaulting Participant's portfolio. Members of the CDS Default Committee are seconded to ICE Clear Credit to liquidate and/or hedge the positions held by the Defaulting Participant. The CDS Default Committee also assists ICE Clear Credit in determining and managing "Minimum Target Prices" for hedged portfolios related to a Default. In this capacity, the CDS Default Committee provides advice on necessary auction(s) as well as the process to allocate remaining positions to Non-Defaulting Participants.

Business Conduct Committee. The Business Conduct Committee is responsible for adjudicating suspected violations of the Clearing Rules.

Master Services Agreement with The Clearing Corporation

ICE Clear Credit is a party to a Master Services Agreement with its 100 percent commonly owned affiliate, TCC, a DCO registered with the CFTC, and its ultimate parent, ICE Inc. (the "**Master Services Agreement**"), pursuant to which TCC provides ICE Clear Credit services related to clearing and risk management systems. These services include, but are not limited to, implementation of the Clearing Rules, administration of the Participant application process, receipt and validation of transaction data, reconciliation of transaction data with the TIW, communication of transaction data to and from Markit, validation of proposed settlement

[101] A Committee Eligible Participant is any Participant approved by the Board of Managers, after consultation with the Risk Committee, for participation on one or more Regional CDS committees.

prices, administration of daily settlements with Participants and settlement banks, administration of the daily clearing and netting processing, daily reconciliation with and support of Participants, provision of risk management services, receipt and processing of notices of physical settlements, support for anti-money laundering and bank secrecy act policies and procedures, support for ICE Clear Credit's financial and regulatory reporting responsibilities, and provision of all technology infrastructure, application development and support, and product development to carry out these services. At its inception, ICE Clear Credit relied almost exclusively on TCC for the performance of these services. As ICE Clear Credit has grown, however, more of these functions are being performed directly by ICE Clear Credit personnel. Pursuant to the Master Services Agreement, ICE Inc. provides ICE Clear Credit with human resources, property management, office, financial and regulatory reporting and internal audit services.

TCC and ICE Inc. are required to perform their obligations under the Master Services Agreement using the reasonable skill and care expected of a provider of services of a similar nature, size, and scope as the services provided to ICE Clear Credit in accordance with the industry practices and standards that reasonably could be expected of a professional provider of the services, and in accordance with any standards set out in any ICE Inc. or TCC policy from time to time. TCC and ICE Inc. are required to allocate sufficient resources to the provision of services to allow ICE Clear Credit to operate its business efficiently.

Approximately 74 individuals support the Legal, Compliance, Client Services and Support, Risk, Technology, Treasury, Internal Audit, and Product Development departments of ICE Clear Credit. This will enable ICE Clear Credit to fulfill its responsibilities as a CA and a DCO. ICE Clear Credit presently has approximately 41 employees. Under the Master Services Agreement, approximately 33 employees of TCC and three employees of ICE Inc. provide core services to ICE Clear Credit.

H. A Description of the Financial Resources of ICE Clear Credit, Including the Composition and Availability of a Guaranty Fund with Respect to Swaps and Security-Based Swaps that Would be Commingled

1. Overview

ICE Clear Credit maintains adequate financial resources to discharge its financial obligations as a CA. In addition to its own financial resources, ICE Clear Credit is able to cover its financial obligations to Participants in the event of a Participant's Default with Margin deposits, contributions to the Guaranty Fund, and assessment power, each of which is described in detail in Section J, below. The Guaranty Fund required deposit as of September 12, 2011, was $4.072 billion, which is approximately 45 percent of the amount of Initial Margin of $9.1 billion. As described in detail below, Participants' Margin and Guaranty Fund deposits are immediately available and highly liquid. At least 45 percent of Participant's Margin and Guaranty Fund deposits must be in cash. After the application of a Defaulting Participant's Margin and Guaranty Fund deposit, and the respective Guaranty Fund contributions of non-Defaulting Participants, ICE Clear Credit may make a one-time assessment against all non-Defaulting

Participants of up to the Guaranty Fund obligation, to be paid within one business day, whereby the remaining losses are shared among those Participants.

As described below, the size of the Guaranty Fund, not including assessment powers, set at the maximum stress loss of the uncollateralized losses of the two largest defaulting Participants with a long protection profile and the uncollateralized losses of the two largest defaulting Participants with a short protection profile. The funded amount of the Guaranty Fund covers the stress test of the two largest Participants. The Guaranty Fund is described in detail in Section J.5 below.

2. ICE Inc.

ICE Inc. is the ultimate parent company of ICE Clear Credit. ICE Inc. is a leading operator of global futures exchanges, OTC markets, and derivatives clearing houses. ICE Inc. operates leading futures and OTC marketplaces for trading and clearing a broad array of energy, environmental and agricultural commodities, CDSs, equity indices and foreign exchange contracts. ICE Inc.'s consolidated revenues increased 16 percent to a record $1.1 billion for the year ended December 31, 2010, compared to the same period in 2009. During the year ended December 31, 2010, 329.0 million contracts were traded in ICE Inc.'s affiliated futures markets, up 25 percent from 262.3 million contracts traded during the year ended December 31, 2009. During the year ended December 31, 2010, 333.1 million contract equivalents were traded in ICE Inc.'s OTC energy markets, up 28 percent from 260.8 million contract equivalents traded during the year ended December 31, 2009.

To meet immediate liquidity needs in the event of a Participant's Default, ICE Clear Credit may borrow (through ICE Inc.) up to an aggregate principal amount of $100,000,000 against ICE Inc.'s senior unsecured revolving credit facility of $300,000,000, to be used to provide liquidity for the clearing operations of ICE Clear Credit. Borrowing requests against the senior revolving credit facility must be made prior to 10:00 a.m. Eastern Time and generally will be funded within one hour of the administrative agent receiving the borrowing request. ICE Clear Credit (and ICE Trust) has never drawn on this credit line.

3. Participant Margin

As described in further detail in Section J, below, ICE Clear Credit collects adequate margins to collateralize risk. The margin required from each Participant is sufficient to cover potential exposures in normal market conditions. Participants' Margin deposits are immediately available and highly liquid.[102] At least 45 percent of Participants' Margin deposits must be in cash.

[102] Participants' Margin deposits satisfy the CFTC's proposed regulation 39.15(c)(1) regarding the types of assets acceptable as initial margin. Risk Management Requirements for Derivatives Clearing Organizations, 76 Fed. Reg. 3,698, 3,724 (Jan. 20, 2011) (to be codified at 17 C.F.R. pt. 39) ("A derivatives clearing organization shall limit the assets it accepts as initial margin to those that are have minimal credit, market, and liquidity risks. A derivatives clearing organization may not accept letters of credit as initial margin.").

4. Guaranty Fund

As described in further detail in Section J, below, ICE Clear Credit requires all Participants to participate in funding the Guaranty Fund. Guaranty Fund deposits are immediately available and highly liquid.[103] At least 45 percent of Guaranty Fund deposits must be in cash. The Guaranty Fund required deposit as of September 12, 2011, was $4.072 billion, which is approximately 45 percent of the amount of Initial Margin of $9.1 billion.

I. A Description and Analysis of the Margin Methodology That Would be Applied to the Commingled Swaps and Security-Based Swaps, Including any Margin Reduction Applied to Correlated Positions, and any Applicable Margin Rules with Respect to Both Participants and Customers

ICE Clear Credit's margin methodology is described in detail in Section J, below. ICE Clear Credit's portfolio margining methodology, which will apply to commingled Eligible Products, are discussed in Section V, below, and in Exhibit H attached hereto.

J. An Analysis of the Ability of ICE Clear Credit to Manage a Potential Default with Respect to Any of the Swaps or Security-Based Swaps that would be Commingled

1. Overview

ICE Clear Credit mitigates its financial exposure with a hierarchy of protections: (i) Initial Margin, (ii) Mark-to-Market Margin, (iii) the Guaranty Fund, and (iv) the right of one-time limited assessment. The combination of these protections mitigates the exposure of ICE Clear Credit to potential losses from Participant Defaults to ensure that ICE Clear Credit's operations are not disrupted and Non-Defaulting Participants are not exposed to losses that they are not able to anticipate or control.

2. Initial Margin

ICE Clear Credit collects adequate but not excessive margins to collateralize risk. The margin required from each Participant is sufficient to cover potential exposures in normal market conditions. The Initial Margin requirements account for instrument risk, hedging benefits, bid-offer spreads (liquidity), Jump-to-Default[104] exposure, and concentration risk. Features of the Initial Margin calculation methodology include accurately defined log-return credit spread distribution assumptions, specific stress scenarios for credit spread moves, and recovery rates.

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[103] Guaranty Fund deposits satisfy the CFTC's proposed regulation 39.15(c)(1) regarding the types of assets acceptable as initial margin. *See id.*

[104] Jump-to-default exposure arises from the simultaneous default of a Participant and credit events associated with the underlying single names on which the defaulting Participant has sold protection.

Collectively, ICE Clear Credit believes this methodology and the selected risk parameters provide a robust and conservative Initial Margin approach.

The instrument risk (margin) requirement is obtained by estimating scenario Profits/Losses ("**P/L**") for a set of hypothetical contracting (tightening) and widening credit spread scenarios and by considering the largest loss. The scenario P/L is defined as the difference between the hypothetical scenario spread level and the current market (settlement) spread level.

The bid/offer requirement incorporates the transaction costs associated with liquidating the portfolio of a Defaulting Participant. Transaction costs can lead to significant losses for large portfolios. The developed approach provides a general solution that can capture the proper liquidation cost for directional portfolios as well as for well-hedged portfolios. The bid/offer requirement is estimated by considering the liquidity and the expected bid/offer widths for different instruments. The approach assumes, in general, that short-protection and long-protection positions would be liquidated at different bid/offer widths.

Jump-to-Default requirements are incorporated to account for the simultaneous Default of a Participant and a credit event associated with the underlying single-name on which the Defaulting Participant has sold protection. Index instruments are decomposed into their constituents and a Net Notional Amount ("**NNA**") is calculated for every instrument in a portfolio at the single-name level. A probability of Default is estimated for every single-name from the front end of its credit spread term structure. The probability of Default is estimated from the simulated widening spread scenario at the market implied return rate that produces the greatest value. The "**Expected Loss Given Default**" is estimated by means of a single-name-specific minimum return rate. If the NNA is negative (sold more protection than bought), then Jump-to-Default requirements apply.

Large positions are subject to additional risk assessments derived from the market depth and liquidity associated with the instruments under consideration. Concentration charges apply to both long and short index and single-name positions for which the overall position size is above a specific threshold that is predetermined by the Risk Management Department. Thresholds and overall position sizes are defined in terms of a 5 Year On-the-Run equivalent notional ("**5Y OTR equivalent**"). Portfolio positions are converted into 5Y OTR equivalent notional amounts in order to apply the concentration charges. The concentration charges are progressive and can yield total requirements that asymptotically approach the full liability (i.e., NNA) for a directional short position portfolio, or the value of the premiums to be paid for a directional long position portfolio. The current price of the considered instrument is taken into account to determine the maximum potential risk factor loss.

Diversification benefits are provided across risk factors that exhibit low levels of dependence (based on Kendall Tau correlation). Risk factors that exhibit rank correlations whose absolute value is below a pre-determined threshold are eligible for diversification benefits. This benefit ensures that risk requirements accurately reflect the level of risk of a diversified portfolio.

On no less than a monthly basis, ICE Clear Credit conducts a statistical analysis of margin levels and market performance. Using the minimum standards established by ICE Clear Credit management in consultation with the Risk Working Group and the Risk Committee, the Risk Management Department recommends margin methodology changes to the President and the Board of Managers for their approval.

Margin requirements for each Participant are calculated and communicated at least once each day (by 4:00 a.m. in the daily flow) and margin is due no later than 9:00 a.m. Eastern Time.

3. Mark-to-Market Margin

Mark-to-Market Margin is calculated daily based on the changing market value of held positions. Participants are required to post additional Mark-to-Market Margin when the prior day's margin balance is insufficient to meet the current day's margin obligation.

On a daily basis, concurrent with the calculation of Initial Margin for new positions, ICE Clear Credit calculates the Mark-to-Market Margin for all Participants. ICE Clear Credit determines the replacement value of each of its Participants' cleared positions based upon end-of-day settlement prices determined through ICE Clear Credit's price discovery process.

The required Mark-to-Market Margin is calculated as Net Mark-to-Market Margin per CDS position. Net Mark-to-Market Margin is calculated as (1.0 – Settlement Price) * Net Notional Amount. This total required Net Mark-to-Market Margin is compared to the previous balance of Mark-to-Market Margin posted. Any Mark-to-Market Margin deficits are payable in cash and are included in the daily settlement process. Excess margin is not returned unless requested by a Participant.

To determine the cash owed, ICE Clear Credit deducts both the cash deposits and unrealized P/L related to previously cleared positions from the margin required. Unrealized gains for each Participant are recognized in Participants' cash accounts as a "**Cash Mark-to-Market Credit**."

Additionally, the President, Chief Risk Officer, or the Chief Risk Officer's designee, has the authority to change margins as necessary to protect the interests of ICE Clear Credit.

Margin requirements for each Participant are calculated and communicated at least once each day (by 4:00 a.m. Eastern Time in the daily flow) and are due no later than 9:00 a.m. Eastern Time. All deficits related to change in net Mark-to-Market Margin must be met in cash.

4. Intraday Risk Monitoring/Special Margin Call

Intraday, the adequacy of the collected Initial Margin (i.e., risk-based margin) is actively monitored and is supported by automated feeds of the available intraday price data. This data is used to measure each Participant's intraday unrealized profit and loss to determine if ICE Clear Credit's intraday exposure to each Participant is covered by the margin on deposit. The data is also used to measure and further explain intraday variability, which contributes to the Risk

Management Department's required determination of the type of daily market environment (as an input to the daily end-of-day settlement pricing process). Intraday prices are based on Bloomberg runs received throughout the day from Participants' existing pricing processes. The bid-ask quotes are used as the intraday bid-ask and are automatically fed into the ICE Clear Credit risk management application. The ICE Clear Credit risk management application captures the intraday price and immediately revalues the P/L moves for each Participant's portfolios and the related Initial Margin requirement.

ICE Clear Credit may issue margin calls to Participants that maintain insufficient levels of risk collateralization to protect the Clearing House and its Clearing Participants. If an additional margin call is made, the Clearing Participant has one hour to fully collateralize any deficits associated with the additional margin call. The Risk Management Department will notify the ICE Clear Credit Treasury Department of the "special" margin call. As a backup, the risk management application confirms the "special" margin call with an email to the ICE Clear Credit Treasury Department to initiate the margin call.

Along with CDS intraday market information, the Risk Management Department monitors equity, foreign exchange and fixed income markets, and market volatility indices as an indicator of market movements and variability.

5. Guaranty Fund

ICE Clear Credit requires all Participants to participate in funding the Guaranty Fund. Each Participant is required to maintain a minimum of $20 million in the Guaranty Fund. The Guaranty Fund mutualizes losses under extreme but plausible market scenarios.[105] Typically these extreme scenarios are low-probability events whose quantification is designed to absorb the maximum stress loss of the uncollateralized losses of the two largest defaulting Participants with a long protection profile and the uncollateralized losses of the two largest defaulting Participants with a short protection. The methodology computes the magnitude of potential losses based on a comprehensive set of stress test scenarios, relying on a combination of quantitative and qualitative inputs. The stress test scenarios are designed to account for both: (i) occurrence of credit events for three reference entities on which the defaulted Clearing Participants sold protection (uncollateralized loss-given-default), and (ii) adverse contracting or widening credit spread scenarios (uncollateralized spread response losses).

Funds to meet Guaranty Fund requirements are requested on the first business day of every month. However, on a daily basis, the Risk Management Department monitors Guaranty Fund size and allocations. If a Participant's daily estimated Guaranty Fund requirements exceed 5 percent of its prior day's Guaranty Fund collateral on deposit, additional Guaranty Fund contributions are called. All deficits related to a change in Guaranty Fund requirements must be met in cash by the end of the business day. The deficit may need to be met earlier at the Chief

[105] The parameters for these scenarios include the most volatile periods—the bankruptcy of Bear Stearns and collapse of Lehman Brothers in 2008—reflecting periods of great market disruption.

Risk Officer's discretion. Eligible collateral can be substituted for cash posted to the Guaranty Fund.

Additionally, in accordance with the Clearing Rules, the President, or his/her designee, has the authority to request additional Guaranty Fund commitments as necessary to protect the interests of ICE Clear Credit. In the event that ICE Clear Credit is accepting sizable positions through the weekly backloading process, ICE Clear Credit may pre-collect Guaranty Fund contributions

ICE Clear Credit (through ICE Inc.) maintains a deposit in the Guaranty Fund of approximately $30 million (as of September 30, 2011), and will increase such deposit to $50 million by December 14, 2011.

6. Right of One-Time Limited Assessment

After the application of a Defaulting Participant's Margin and Guaranty Fund deposit, and the respective Guaranty Fund contributions of non-Defaulting Participants, ICE Clear Credit may make a one-time assessment against all non-Defaulting Participants of up to their Guaranty Fund obligation, to be paid within one business day, whereby the remaining losses are shared among those Participants.

K. A Discussion of the Procedures that ICE Clear Credit Would Follow if a Participant Defaulted, and the Procedures that a Participant Would Follow if a Customer Defaulted, with Respect to any of the Commingled Swaps or Security-Based Swaps in the Account

1. Declaring a Participant in Default

As set forth in Clearing Rule 20-605(a), a Default occurs when a Participant: (i) fails to meet, or appears, in the judgment of ICE Clear Credit, likely to fail to meet any of its obligations (other than an obligation to deposit Margin) with respect to, or is otherwise in default or subject to early termination under, the CDS Participant's Contracts with ICE Clear Credit; (ii) fails to Transfer Margin (whether Initial Margin or Mark-to-Market Margin) by the deadline established under the Rules; (iii) is suspended or expelled or whose privileges are revoked by a market or by ICE Clear Credit; or (iv) has a guarantor providing a guarantee who fails to meet, or appears, in the judgment of ICE Clear Credit, likely to fail to meet, any obligations with respect to, or who is otherwise in default under, the guarantee. ICE Clear Credit must use its best efforts to consult with the Risk Committee before making any determination that a Participant is in Default where (i) the Participant has failed to comply with a trading activity limitation or a limitation imposed upon the occurrence of a termination event; or (ii) where approval of the Board of Managers by a two-thirds majority of those voting is required to declare the Participant in Default.

If a Participant is in Default as described above, ICE Clear Credit will declare the Participant in Default and take necessary action to mitigate risk for the remaining Participants.

The level of authority required to declare a Default is based on the type of event upon which the Default is being contemplated:

- In the event of a bankruptcy filing, an officer designated by the Board of Managers for this purpose (an "**Eligible ICE Clear Credit Officer**") has the authority to declare a Participant in Default.

- If a Participant fails to satisfy a margin call or Mark-to-Market Margin payment, an Eligible ICE Clear Credit Officer and either the Chairman of the Board of Managers or two members of the Board of Managers collectively have the authority to declare the Participant in Default. Before a Participant can be declared in Default for failing to satisfy a margin call or mark-to-market payment, an ICE Clear Credit Officer will contact the appropriate bank to verify that the payment is not held up due to a technical error. The ICE Clear Credit Officer will take reasonable steps to verify with the bank that the payment funds are not available and will not be processed. Further, the ICE Clear Credit Officer will work with the Participant's point of contact as is appropriate to resolve the issue before a Default is declared.

For all other events, a declaration of Default must be approved by a Board of Managers vote with at least two-thirds majority and a quorum of 50 percent of members.

2. Communicating the Default

Prior to taking any action to close, transfer, or otherwise resolve a Defaulting Participant's open CDS Positions, ICE Clear Credit's General Counsel or another member of ICE Clear Credit's Legal or Compliance Departments will notify the Defaulting Participant, the Non-Defaulting Participants, ICE Clear Credit's regulators, and the public. ICE Clear Credit will officially notify the Defaulting Participant that it is considered in "Default" pursuant to the Clearing Rules and its Participant Agreement. ICE Clear Credit will send the Defaulting Participant a Default Notice by e-mail and fax. ICE Clear Credit will notify Non-Defaulting Participants of a Default declaration as soon as reasonably practical by issuing an "**Information Circular**" and sending it via e-mail to each Non-Defaulting Participant's point of contact. The Information Circular will inform the Non-Defaulting Participants of the Default and that the information will be posted on ICE Clear Credit's website. ICE Clear Credit will notify the public of the Participant's Default by posting the Information Circular on ICE Clear Credit's website. ICE Clear Credit also will notify its regulators as appropriate.

3. Activating the CDS Default Committee and Seconding Traders

Immediately following the declaration of a Default, ICE Clear Credit will cease all clearing activities for the Defaulting Participant. ICE Clear Credit also will activate the CDS Default Committee. The CDS Default Committee will work with ICE Clear Credit management and will ultimately be responsible to the Board of Managers for their actions.

The CDS Default Committee consists of no more than three Committee Eligible Participants. Each CDS Default Committee participant is responsible for designating one employee and at least two alternate employees with credit default swap experience to be a CDS Default Committee Member and serve as its representative on the CDS Default Committee. CDS Default Committee Members are "randomly chosen" pursuant to Clearing Rule 20-617 to serve the relevant term, and are responsible for consulting with the Chief Risk Officer, as appropriate, to achieve the following:

- determining and executing any closeout or initial cover transactions;
- determining and adjusting minimum target prices for auctions;
- providing ICE Clear Credit a recommendation as to how to unwind or hedge the open CDS positions of the Defaulting Participant; and
- conducting an auction of a portion of the Defaulting Participant's portfolio.

An ICE Clear Credit officer will notify the designated CDS Default Committee Members of the Default and the activation of the CDS Default Committee by phone. If a CDS Default Committee Member is unable to meet his or her obligations to the committee (e.g., out of the country, in the hospital, cannot be reached in a reasonable amount of time), an ICE Clear Credit officer will notify the designated Alternate Committee Member. If neither the CDS Default Committee Member nor one of the Alternate Committee Members is available or if they cannot be reached in a reasonable amount of time, the ICE Clear Credit Officer will notify the relevant Participant to designate an appropriate CDS Default Committee Member. Once the CDS Default Committee has been activated, the Chief Risk Officer will review and discuss by telephone the strategy to mitigate the risk of the Defaulting Participant. This review will consist of an overview of the strategy to be used in hedging and unwinding the Defaulting Participant's portfolio.

When this review is complete, the Chief Risk Officer will determine when to implement the strategy that will be used in hedging and/or unwinding the Defaulting Participant's portfolio and where the CDS Default Committee Members will be located that are implementing this strategy. Specific next steps taken on the first day of the Default will be determined by the Chief Risk Officer and will be dependent on the facts and circumstances related to the Default, including the day of the week and time of day of the declaration of the Default and the size and complexity of the portfolio of the Defaulting Participant.

ICE Clear Credit will isolate the Defaulting Participant's portfolio within its internal risk management system. The Risk Management Department will actively monitor the risk associated with the Defaulting Participant's portfolio and coordinate with the CDS Default Committee Members for appropriate actions. The CDS Default Committee and the Risk Management Department will use this system to manage the Defaulting Participant's risk separately from the ~~Non-~~Defaulting Participants. The Risk Management Department will

produce risk analyses and reports associated with the hedging activities taking place to minimize the Defaulting Participant's risk.

The Risk Management Department will be assembled by the Chief Risk Officer as soon as a Participant is declared to be in Default. The Risk Management Department will participate in the strategy call with the CDS Default Committee. The Chief Risk Officer will divide the Defaulting Participant's portfolio into appropriate sub-portfolios following ICE Clear Credit's risk hedging strategy. In the event that the Chief Risk Officer is not available, the Head of Quantitative Analytics or Senior Risk Manager of the Risk Management Department may be appointed by an Eligible ICE Clear Credit Officer to act on behalf of the Chief Risk Officer.

ICE Clear Credit will notify each CDS Default Committee Member that he/she is being seconded to manage the Defaulting Participant's portfolio. The CDS Default Committee Members will execute the hedging and liquidating transactions that the Chief Risk Officer and Risk Management Department deem necessary to minimize the overall risk of the Defaulting Participant's portfolio. The CDS Default Committee Members are responsible for treating the Defaulting Participant's portfolio as confidential and ensuring their portfolio management is unbiased and fair to all Non-Defaulting Participants to the best of his/her ability. The Chief Risk Officer only will share information with the CDS Default Committee Members to the extent that such information is necessary for them to execute the hedging strategy. At no time may the CDS Default Committee Members discuss the Defaulting Participant's portfolio with anyone other than ICE Clear Credit's management and staff, the other members of the CDS Default Committee, and regulators, as requested.

4. Conducting Hedging and Portfolio Partitioning

The Clearing Rules and Participant Default Management Procedures provide ICE Clear Credit with the authority to close, transfer, or otherwise resolve the Defaulting Participant's positions and apply the collateral of the Defaulting Participant towards the losses. To manage the risk associated with the Participant's Default, ICE Clear Credit will isolate the Defaulting Participant's positions and will convert any non-cash portion of the Defaulting Participant's Margin and collateral securing its portion of the Guaranty Fund into cash. The Chief Risk Officer, in consultation with the CDS Default Committee members, will hedge and/or liquidate positions as necessary and appropriate.

The hedging process will be used to reduce the immediate risk associated with the Defaulting Participant's positions. As positions are unwound and/or hedged, they will be entered into the ICE Clear Credit default management systems; positions will be updated intra-day. Positions entered through the system will be copied into the risk database, allowing for updated risk to be calculated by the Chief Risk Officer. The cost of entering into these positions also will be tracked to monitor the erosion of the Margin held against the Defaulting Participant's portfolio. The Risk Management Department will periodically re-evaluate its risk exposure to the Defaulting Participant as hedges are put on, positions are unwound, and auctions take place.

5. Conducting Auctions

The Chief Risk Officer, in consultation with the CDS Default Committee, will use his/her discretion to split, if necessary, the hedged portfolio into marketable pieces which will be auctioned. At the discretion of ICE Clear Credit, the CDS Default Committee Members will be responsible for directing the auction process. For single-name CDS, the CDS Default Committee will attempt to organize sub-portfolios for auction within each sector. Once the positions are hedged, the auction process may begin. The objective of the auction is to effectively terminate and replace the Defaulting Participant's positions in order for ICE Clear Credit to regain an exactly matched book. Hedged positions will be auctioned off to the Non-Defaulting Participants.

The auction of each portion of the hedged portfolio will undertake the following steps:

- Position disclosure to Non-Defaulting Participants;
- Minimum target price setting;
- Bidding mechanics;
- Auction result and legal novation/settlement; and
- Trade submission to the TIW by winning bidder and ICE Clear Credit.

6. Allocating Remaining Positions to Non-Defaulting Participants

Those positions for which ICE Clear Credit does not receive a formal bid above the minimum target price (or any bids at all) from any of the Non-Defaulting Participants will go through the allocation process, which will not begin until the auction process described above has been completed and associated trades have cleared. The allocation process schedule will be similar to the auction process and encompass six stages:

- Notification to the Non-Defaulting Participants that an auction was not successful and the allocation process has been triggered;
- Re-aggregation and re-partitioning (as necessary) of the remaining positions;
- Determination of position allocation among Non-Defaulting Participants based on risk exposure and overall portfolio size;
- Communication of position allocation to each relevant Participant impacted;
- Communication of price; and
- Trade novation.

After the allocated positions have been novated, the Participant's positions will be netted in accordance with the normal clearing and settlement process.

7. Use of Margin and Guaranty Fund

ICE Clear Credit procedures call for the use of the Defaulting Participant's Margin and Guaranty Fund towards the losses. A Defaulting Participant's Margin for its proprietary account may be applied to satisfy a Default in a customer account, but a Defaulting Participant's Margin in its customer account may not be applied to satisfy a Default in its proprietary account. ICE Clear Credit's policies also allow it to take any other action as ICE Clear Credit may deem necessary or appropriate for its protection, including but not limited to drawing promptly on other financial resources (including but not limited to the Guaranty Fund balances of ICE Clear Credit and the non-Defaulting Participants).

Upon a Participant Default, withdrawals from the Guaranty Fund will be made in the following order (each tranche must be fully exhausted before moving to the next tranche):

(a) Defaulting Participant's Guaranty Fund Contribution.

(b) "First loss" funded by ICE Clear Credit's first priority contribution (one-time loss not to exceed $25 million in total despite number of losses).

(c) "Second loss" tranche funded equally by ICE Clear Credit and the Non-Defaulting Participants' Guaranty Fund balances (see below for the specifics of how this tranche is calculated).

(d) Remainder of the Guaranty Fund.

The total amount of the second loss tranche is the equivalent of up to $25 million from ICE Clear Credit and a total of $25 million times the number of Non-Defaulting Participants (e.g., if there are nine Non-Defaulting Participants, the Participants would commit 9 * $25 million, or a total of $225 million and ICE Clear Credit would contribute $25 million for a total of $250 million) unless the total Guaranty Fund divided by the number of Participants plus one is less than $20 million. The total amount committed by each Non-Defaulting Participants will be pro-rated based on each Participant's percentage of the total Guaranty Fund balance to reflect their proportionate share of the risk pool. Thus, while the total Participant commitment is the number of Participants times $25 million (or an equal amount less than $25 million as described above—the pro-rata reduction of $25 million works in reverse in the same way), the actual commitment per Participant will be pro-rated.

In the event that the Guaranty Fund is exhausted, the remaining Participants will be obligated to contribute additional amounts to the Guaranty Fund based on a one-time limited assessment. The amount of the assessment will be up to (but will not exceed) each Participant's Guaranty Fund obligation prior to the Default.

L. A Description of the Arrangements for Obtaining Daily Position Data from Each Beneficial Owner of Swaps and Security-Based Swaps in the Account.

ICE Clear Credit's Risk Management Department actively monitors Participants' position concentration as part of its daily risk management processes. This monitoring is supported by the Participant margin reports, which specify the concentration charges by Participants. The report shows the simulated P/L and related concentration charges at the Participant level. Long positions show a loss in the simulated downward moves of the credit spread while short positions show a loss in the simulated upward moves of credit spreads. The report provides the Risk Management Department with the tools to identify and monitor the riskiest directional (long & short) portfolios based on the size of the portfolios' concentration charges. ICE Clear Credit will obtain beneficial owner level position data through data submitted to the ICE Link trade processing platform by Participants.

V. Portfolio Margining Methodology

A. ICE Clear Credit's Portfolio Approach to CDS Margining/Index Decomposition Methodology

ICE Clear Credit based its portfolio risk management modeling approach to CDS instruments on a combination of time series analysis, used to obtain distributions for the realizations of the identified risk factors, and a stress scenario approach that augments statistical considerations. The methodology provides portfolio benefits, such as reduced risk requirements for portfolios containing Index CDS and Security-Based CDS instruments. The riskiness of a specific instrument position is assessed by estimating the profit-and-loss for a given notional amount in response to hypothetical credit spread and recovery rate scenarios combined with losses arising from a jump-to-default state. Through the index decomposition methodology, the actual portfolio is "reduced" to corresponding positions in index and single-name products. The reduced portfolio is then subjected to additional requirements and charges to account for credit spread risk, liquidity risk, portfolio basis risk, large position requirements, jump-to-default requirements, and portfolio interest rate sensitivity. See Exhibit H hereto for further detail regarding ICE Clear Credit's portfolio approach to CDS margining and index decomposition methodology.

B. Results of Independent Analysis of ICE Clear Credit Margin Methodology

ICE Clear Credit engaged Finance Concepts,[106] an independent risk management consultant, to provide a third-party review of the proposed Risk Methodology enhancements. Finance Concepts performed its study in March 2011 and concluded that, "(i) ICE variation margin levels were sufficient to cover liquidation costs under the most extreme credit conditions and (ii) the margin relief for long-short positions based on Index Decomposition constitutes a prudent and well-founded methodology for warehousing risk associated with multi-index, multi-

[106] See Finance Concepts Home Page, www.finance-concepts.com.

obligor CDS portfolios." A copy of Finance Concept's analysis is attached as Confidential Exhibit G: Finance Concepts, "A Stress Test of the ICE Margin Requirements for Large Multi-Asset Portfolios."

VI. Proposed Exemptive Relief

A. Exempt ICE Clear Credit and its Participants from Certain Parts of the SEC's Customer Protection Regime

1. Exempt ICE Clear Credit and its Participants from Rule 15c3-3

ICE Clear Credit has been successfully clearing CDSs for more than two years. As described above, on July 16, 2011, ICE Clear Credit became registered as a DCO and as a CA by operation of law, subjecting it to both the Exchange Act and the CEA, and the relevant regulations thereunder.[107] Thus, absent relief, BD/FCMs that deal in Swaps and Security-Based Swaps will be subject to both SEC Rule 15c3-3 and CEA Section 4d(f) and related CFTC and/or ICE Clear Credit rules. This will subject ICE Clear Credit to incongruent and conflicting regulatory requirements, as well as the need to use a so-called "two pot" model for portfolio margining. This model "is based—at the clearing firm level—on maintenance of a fully-margined futures account that guarantees the customer's security account and—for purposes of the portfolio margin rules in the securities account—is allowed in the margin calculation. At the clearinghouse level, the two pot model is based on unsecured cross-guarantees between the two clearinghouses with no common pool of collateral."[108]

The two pot model is more expensive, more time-consuming, riskier, and less economically efficient for swap-market participants. Indeed, perpetuating the two pot model could well encourage the movement of a significant portion of the U.S. CDS market offshore, which would be contrary to the intent of Congress in adopting the Dodd-Frank Act to better manage risk in the sizeable U.S. CDS market.[109] Offshore clearing firms such as those in London and other commercial centers currently enjoy the benefits of an open portfolio margining program and generally are not subject to the complexity and additional costs associated with a dual regulatory system such as the one in the U.S.[110] Facilitating portfolio margining in the U.S.

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[107] *See* Dodd-Frank Act § 763(b) (adding Exchange Act § 17A(1)) and Dodd-Frank Act § 725(g) (amending CEA § 5b), respectively.

[108] Joint Meeting of the Commodities Futures Trading Commission and the Securities & Exchange Commission (Sept. 2, 2009) (prepared remarks of Anthony J. Leitner), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/jointmeeting090209_leitner.pdf.

[109] The ISDA has estimated the total outstanding notional amount of all CDSs to be $26.3 trillion as of mid-year 2010. *See* ISDA, Summaries of Market Survey Results *available at* http://www.isda.org/statistics/recent.html#2010mid.

[110] Jeremy Grant, U.S. looks to regain edge by relaxing margin rules, Financial Times (Oct. 20, 2006, 3:00 AM), http://www.ft.com/cms/s/0/c683788e-5fd6-11db-a011-0000779e2340.html#axzz1JB5FHhC7.

CDS market will therefore be a crucial factor in leveling the playing field for domestic and foreign swap market participants.

Since its inception, ICE Clear Credit's clearing operations have been structured around the single account ("one pot") model because of the greater economic, risk and operational efficiency afforded by that model. ICE Clear Credit is currently operating as a central counterparty for CDSs and both it and its Participants have expended considerable resources to become fully operational. If ICE Clear Credit is not allowed to continue holding these CDSs in a single account, its current clearing methodology and infrastructure will have to be completely restructured to a two pot model in order for it to clear CDSs for BD/FCMs that are clearing Swaps on behalf of customers. In addition to the significant cost and time that ICE Clear Credit and its Participants would be required to expend in order to alter ICE Clear Credit's existing successful clearing program, such a requirement would result in ICE Clear Credit, Participants, and customers having to constantly move money back and forth between the separate margin accounts for single-name and broad-based index CDSs in order to reflect the daily movements of such products. Participants and customers would incur significant transaction costs every time this happens. In comparison, the OTC market currently offers clearing members a great degree of flexibility regarding financing options and the form of collateral used, if they choose to clear at all.[111] Imposing a "two pot" model, with its associated costs and inefficiencies, could therefore have a chilling effect on the central clearing of Swaps and Security-Based Swaps.

In enacting the Dodd-Frank Act, Congress clearly understood the benefits that portfolio margining provides for the market and market participants. ICE Clear Credit's one pot model is clearly the most effective, safest and efficient means of providing those benefits. All of the Swap contracts cleared and settled through ICE Clear Credit would be subject to similar credit risk mitigation and collateral requirements, and governed by uniform terms.[112] Allowing ICE Clear Credit to implement its portfolio margining program in a single account would therefore further the risk mitigation intent of the Dodd-Frank Act and allow the marketplace to function more efficiently, while at the same time affording market participants the full protections contemplated by the Dodd-Frank Act reforms. As SIFMA has noted, portfolio margining "enables effective cash management by corporate end-users, institutional investors, and financial institutions."[113] Market participants will not only be able to expend fewer resources on margin, they also will be able to improve their allocation of funds based on their actual risk profile, as more of their assets will be held in a single location with built-in systems to determine their current portfolio. Consequently, portfolio margining will incentivize large customers trading in

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[111] Mark Jickling & Kathleen Ann Ruane, Congressional Research Service, The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title VII, Derivatives 4 (2010) (the "**CRS Report**").

[112] *See* ICE Trust, 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 at 22–23 (Feb. 26, 2009) (the "**ICE Trust February 2009 Request Letter**").

[113] SIFMA Letter, *supra* note 74.

highly correlated products to take positions that reduce their overall risk and, in turn, the overall risk of the market. All of this will further the goals of the Dodd-Frank Act.

At the clearing level, not allowing one pot portfolio margining would increase the costs and burdens associated with clearing trades. As has been discussed by numerous respected voices in the industry, including both the Commission and the CFTC, it is not feasible to determine within an account which derivatives are Swaps and which are Security-Based Swaps in order to comply within the respective segregation regimes.[114] Even if a method could be formulated to efficiently identify Securities-Based Swaps from other Swaps within an account, the varying collateral terms of the instruments would make netting increasingly difficult and operationally impracticable. Furthermore, requiring ICE Clear Credit to calculate its actual counterparty risk while simultaneously complying with SEC and CFTC segregation regimes by operating separate accounts at each level and constantly netting them against each other would be impractical. The commingling of products in a single account greatly improves netting efficiency, which leads to lower expected counterparty risk exposure.[115] The Dodd-Frank Act was designed to impose the benefits of a CCP-type regime on the unregulated swap market, and simplifying clearing agencies' netting procedures by allowing them to proceed with one commingled account will more fully and efficiently achieve the benefits of CCP clearing.

ICE Clear Credit obtained FRB and NYSBD "no objections" for its one pot portfolio margining program. While ICE Clear Credit has been commingling assets since it began offering single-name CDS clearing, the addition of portfolio margining is an important step toward furthering the goals of the Dodd-Frank Act.

In the past, the customer segregation rules discussed above have presented an obstacle to implementing portfolio margining programs based on the one pot methodology. The language in Section 713(a) of the Dodd-Frank Act, however, contemplates elimination of this obstacle and encourages the Commission to grant the relief requested by ICE Clear Credit in this submission.[116]

ICE Clear Credit proposes to convert all current customer swap accounts, which will hold both Security-Based Swaps and ordinary Swaps, to 4d(f) portfolio margining accounts, once ICE Clear Credit obtains the necessary relief from the CFTC. The 4d(f) portfolio margining accounts

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[114] *See* Joint Report of the SEC and the CFTC on Harmonization of Regulation (Oct. 16, 2009) at 22–24 (the "**2009 White Paper**"), *available at* http://www.sec.gov/news/press/2009/cftcjointreport101609.pdf; Leitner & McDaniel, *supra* note 63, at p. 5.

[115] *Cf.* Darrell Duffie & Haoxiang Zhu, Does a Central Clearing Counterparty Reduce Counterparty Risk?, Stanford Graduate School of Business, Mar. 6, 2010 at 25, *available at* http://www.stanford.edu/~duffie/DuffieZhu.pdf. The authors argue that reduced netting efficiency can lead to higher expected counterparty risk exposure. *Id.*

[116] The relief we are requesting is also consistent with the Commission and CFTC's own recommendations in the 2009 White Paper, which make clear that the Commission and the CFTC recognize the benefits inherent in such portfolio margining programs.

will allow ICE Clear Credit to offer the greatest benefit to the market by allowing its Participants and their customers greater operational efficiencies, lower margining costs, and a more comprehensive risk profile assessment.

As noted in the ICE Trust November 2010 Order, the Commission has been mandated to, and has taken multiple actions to, encourage the prompt development of CDS CCPs. ICE Clear Credit has already done so successfully. The relief we are now requesting is the necessary next step in transitioning ICE Clear Credit's swap clearing services into compliance with the regulatory framework contemplated by the Dodd-Frank Act in a way that makes it operationally feasible to continue its successful swap clearing operations, and that provides Participants with the necessary margin treatment to most efficiently operate under the new regulations of the Dodd-Frank Act.

2. Exempt ICE Clear Credit and its Participants from the Application of Parts of Certain Rules that Relate to Rule 15c3-3: Rule 15c3-1; Rule 17a-4; Rule 17a-5 and Rule 17a-11(c)(2)

Granting ICE Clear Credit and its Participants the proposed exemptive relief from Rule 15c3-3 will affect several other related rules, specifically Rule 15c3-1, Rule 17a-3, Rule 17a-4, Rule 17a-5, and Rule 17a-11(c)(2) (the "**Related Rules**"). Complying with the Related Rules will prove problematic for ICE Clear Credit and its Participants absent further exemptive relief because the Related Rules were designed with Rule 15c3-3 as a reference point.

Most importantly, both Rule 15c3-1(a)(1) and Rule 15c(3)-1(a)(2) reference Rule 15c3-3 as an integral piece of their net capital ratio requirements. Contributions to the Reserve Bank Account pursuant to Rule 15c3-3 are specifically exempted from the definition of the aggregate indebtedness used in Rule 15c3-1(a)(1).[117] The alternative standard of Rule 15c3-1(a)(2), to which the BD/FCMs that clear CDSs through ICE Clear Credit and the BD/FCMs that clear CDSs on behalf of their customers will be subject, requires net capital of a BD to be the greater of $250,000 or 2 percent of the debit items calculated under the "Formula for Determination of Reserve Requirements for Brokers and Dealers" of Exhibit A to Rule 15c3-3.[118] They must also make certain adjustments to their reserve calculations for the purposes of Rule 15c3-3(e). Should customer assets be held in a 4d(f) account rather than a 15c3-3 account, there would be an issue as to how to account for those assets under a formula that is based on there being a 15c3-3 account. To address this problem, ICE Clear Credit suggests that the Commission either: (i) provide relief that would allow Participants and the BD/FCMs that clear through the Participants to treat customer assets in the Account as if they were held in an account subject to Rule 15c3-3 for purposes of the reserve calculation in Rule 15c3-1; or (ii) allow such parties to rely on the CFTC net capital rule for such assets.[119] In addition to fostering compliance with the

[117] 17 C.F.R. § 240.15c3-1(c)(1)(vii).

[118] 17 C.F.R. § 240.15c3-3(e).

[119] *See supra* note 47, which analogizes the comingling of customer assets to the treatment of "mixed swaps."

spirit of the Net Capital Requirements of Rule 15c3-1, this relief will also allow BD/FCMs to take into account the collective assets of customers when calculating capital requirements.

Similarly, Rule 17a-11(c)(2) requires a BD/FCM to send notice to the SEC, CFTC and its designated examining authority, "(i)f a computation made by a broker or dealer, which has elected the alternative standard of Rule 15c3-1, shows that its net capital is less than 5 percent of aggregate debit items computed in accordance with Rule 15c3-3a Exhibit A: Formula for Determination Reserve Requirement of Brokers and Dealers under Rule 15c3-3."[120] As in the above case, allowing the Account to be treated for these purposes as if it were subject to regulation under 15c3-3 (or in compliance with CFTC capital requirements) will further the goals of the regulatory scheme to ensure appropriate, accurate notification by BD/FCMs.

Furthermore, Rules 17a-3 and 17a-4 require the creation and preservation of certain books and records by "Certain Exchange Members, Brokers and Dealers."[121] Rule 17a-3 mandates the creations of a record of the current computation for aggregate indebtedness and net capital pursuant to Rule 15c3-1, which, as discussed above, cannot be computed without using certain numbers calculated pursuant to Rule 15c3-3.[122] Rule 17a-4 requires certain records to be preserved for a period of not less than 3 years, the first two in an accessible place. This includes several records made pursuant to Rule 15c3-3 as well as in relation to any assets used in computations related to Rule 15c3-3.[123] Without the customer assets that are proposed to be held in the Account, these records will be incomplete. Therefore, in order for these recordkeeping requirements to serve their intended purpose, ICE Clear Credit proposes that the Commission allow Participants and BD/FCMs holding customer assets in the Account, for the purposes of those recordkeeping requirements of Rules 17a-3 and 17a-4 affected by 15c3-3, to maintain books and records with respect to the Account as if the Account were subject to Rule 15c3-3.

In the alternative, ICE Clear Credit proposes that the Commission exempt customer assets held in the Account from the recordkeeping requirements of Rules 17a-3 and 17a-4, provided that they are governed by similar CFTC rules. This would be consistent with the Commission's treatment of security futures products, which are exempt from the recordkeeping requirements of Rules 17a-3 and 17a-4 when held in CFTC-governed accounts and subject to

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[120] 17 C.F.R. § 240.17a-11(c)(2).

[121] 17 C.F.R. § 240.17a-3 and 17 C.F.R. § 240.17a-4.

[122] 17 C.F.R. § 240.17a-3(a)(11).

[123] *See* 17 C.F.R. § 240.17a-4(b)(8-10).

similar CFTC rules,[124] as well as the Commission's proposed treatment for certain mixed swaps.[125]

Finally, the reporting requirements found in Rule 17a-5 make multiple references to Rule 15c3-3.[126] Rule 17a-5 delineates several reports required to be filed by BDs, including annual audited financials including information regarding the "Computation for Determination of the Reserve Requirements under Exhibit A of Rule 15c3-3 and Information Relating to the Possession or Control Requirements Under Rule 15c3-3," and specific audit procedures and objectives in relation Rule 15c3-3.[127] For these reporting requirements to serve their intended purpose, ICE Clear Credit proposes that the Commission allow BD/FCMs holding customer assets in the Account, for the purposes of the reporting requirements of Rule 17a-5 affected by Rule 15c3-3, to treat the Account as if it were subject to Rule 15c3-3.

In the alternative, ICE Clear Credit proposes that the Commission exempt customer assets held in the Account from the reporting requirements of Rule 17a-5, provided that the positions are subject to similar CFTC requirements. The Commission has allowed for similar treatment with respect to security futures products, amending Rules 17a-3 and 17a-4 to exempt security futures products held in CFTC-governed accounts from the recordkeeping requirements of those rules provided that they are governed by similar CFTC rules.[128] Furthermore, the Commission has recently proposed rules that allow for similar treatment of certain mixed swaps.[129]

B. Exempt Certain ICE Clear Credit Affiliates from the Definition of "Customer" as Contemplated by the Hypothecation Rules

The incongruence of the securities and futures regulatory schemes is also evident in the treatment of Affiliate positions. ICE Clear Credit anticipates that some Participants may move all or part of their CDS business to an Affiliate as part of their adjustment to the new Dodd-Frank Act regulatory regime. ICE Clear Credit also anticipates that in the event that a Participant does

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[124] *See* Final Rule: Applicability of CFTC and SEC Customer Protection, Recordkeeping, Reporting, and Bankruptcy Rules and the Securities Investor Protection Act of 1970 to Accounts Holding Security Futures Products, Exchange Act Release No. 34-46473, 67 Fed. Reg. 58,283, 58,290–91 (Sept. 13, 2002) (the "**Security Futures Release**").

[125] *See* Product Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 29818, at 29893-94 (May 23, 2011) (to be codified at 17 C.F.R. pt. 240) (the "**Product Definitions Release**").

[126] 17 C.F.R. § 240.17a-5.

[127] *See* 17 C.F.R. §§ 240.17a-5(d) and (g).

[128] *See* Security Futures Release, *supra* note 124, 67 Fed. Reg. at 58,290–91.

[129] *See* Product Definitions Release, *supra* note 125, 76 Fed. Reg. at 29893-94.

move its CDS business to an Affiliate, the Affiliate may still wish to clear CDS positions through the Participant.

The definition of "customer" for purposes of the Hypothecation Rules makes it impossible to commingle Affiliates' Swap and Security-Based Swap positions (and attendant collateral) in a single account. For purposes of the CEA, Affiliates are considered non-customers and their positions must be held in the BD/FCM's proprietary account. However, an Affiliate falls within the definition of a "customer" for purposes of both Rules 8c-1 and 15c2-1 (the "**Hypothecation Rules**").[130] Without relief from the definition of "customer" as contemplated by the Hypothecation Rules, ICE Clear Credit would be required to create yet another account just to accommodate affiliate positions.

ICE Clear Credit therefore proposes that the Commission exempt Affiliates of ICE Clear Credit Participants and the BD/FCMs that clear through such Participants from the application of Rule 15c3-3, so that positions held by such persons may be comingled in a proprietary account. ICE Clear Credit further requests that the Commission exempt Affiliates from the definition of "customer" for purposes of the Hypothecation Rules, provided that the following conditions are met: (i) they have given their consent to be treated as non-customers and agreed to have their claims subordinated to bona fide "customers" in the event of a Participant insolvency; and (ii) they have entered into written non-conforming subordination agreements with Participants.

We note that the Commission has taken a "no action" position with regard to a similar plan proposed by the Options Clearing Corporation in 2000.[131]

C. Terms and Conditions of Requested Relief

A. Proposed Conditions to Exemption from Rule 15c3-3

As a condition to the Commission exempting ICE Clear Credit and its Participants from Rule 15c3-3, ICE Clear Credit represents that it will: (i) maintain strict, objective, risk based portfolio margin requirements that will comply, at all times, with the standards of ICE Clear Credit's proposed portfolio margin program, as approved by the FRB and the NYSBD; (ii) maintain segregation of customer's funds and securities from its own assets and from proprietary assets held for Participants and the BD/FCMs that clear through the Participants, in accordance with requirements under CFTC and ICE Clear Credit's Rules; (iii) maintain and make available to the Commission upon request for inspection and review, any and all books and records relating to its business; and (iv) provide for separate treatment of customer and proprietary positions in the case of a default in accordance with applicable law. In addition, the Participants

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[130] For purposes of Rules 8c-1 and 15c2-1, the definition of "customer" excludes any general or special partner or any director or officer of a broker or dealer, or any participant, as such, in any joint, group or syndicate account with such broker or dealer or with any partner, officer or director. 17 C.F.R. §§ 240.8c-1(b)(1) and 240.15c2-1(b)(1). However, none of the exclusions would specifically apply to an Affiliate of a Participant.

[131] *See* Options Clearing Corp., SEC No-Action Letter, *supra* note 29.

and the BD/FCMs that clear through them will be required to: (i) establish written policies stating how customer CDS positions will be held, and the portfolio margin program applied to such assets; (ii) provide a written disclosure to each CDS customer stating that the account will not be protected under Rule 15c3-3 or SIPA; (iii) comply with applicable capital requirements; (iv) comply with applicable notification requirements; (v) comply with applicable reporting requirements; and (vi) comply with applicable recordkeeping requirements.

ICE Clear Credit understands that any exemptive relief requested herein would be subject to compliance with conditions specified in the exemptive relief. Such conditions may include that those Participants that are BD/FCMs maintaining clearing accounts at ICE Clear Credit must be in material compliance with the rules, and applicable laws and regulations, relating to risk management, capital, liquidity and segregation of customers' funds and securities (and related books and records and reporting requirements).

B. Proposed Conditions to Exemption From the Definition of "Customer" as Contemplated by the Hypothecation Rules

As a condition to the Commission exempting certain Affiliates of ICE Clear Credit Participants from the definition of "customer" as contemplated by the Hypothecation Rules, ICE Clear Credit represents that each Affiliate exempted from the definition of "customer" would enter into a non-conforming subordination agreement with its Participant which would be filed with both the Commission and the CFTC (the "**Subordination Agreement**"). Included in the terms of the Subordination Agreement would be a specific acknowledgement by the Affiliate that its funds would not receive customer protection treatment under any applicable insolvency regime, foreign or domestic, and confirmation that the funds to be subordinated do not belong to any U.S. customers. Further, to the extent that funds to be pledged are not proprietary, an appropriate disclosure of these points would be made by the Affiliate. Finally, the Affiliate would be required to provide an opinion of counsel to the Participant that the Affiliate is legally authorized to subordinate all of its claims against the Participant to those of bona fide customers.

We note that these conditions conform to the conditions set forth in the Commission's "no action" position taken with respect to the Options Clearing Corporations in its request for comparable relief.[132]

C. Conclusion

Based on the foregoing, we respectfully request that the Commission provide, in accordance with Section 713(a) of the Dodd-Frank Act, by rule, regulation or order pursuant to Section 36 of the Exchange Act, relief exempting ICE Clear Credit and its Participants from Section 15(c)(3) of the Exchange Act and Rule 15c3-3 thereunder, in order to allow BD/FCMs to: (i) hold Customer Positions in CDSs that include both broad-based index CDSs that are regulated by the CFTC, and narrow-based index CDSs and single-name CDSs that are regulated

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[132] *See* Options Clearing Corp., SEC No-Action Letter, *supra* note 29.

by the Commission, in a customer commingled omnibus account at ICE Clear Credit LLC that is subject to Section 4d(f) of the CEA and subject to Subchapter IV of Chapter 7 of Title 11 of the United States Code and the rules and regulations thereunder; (ii) calculate margin for the Account utilizing portfolio margin pursuant to a portfolio margining program approved by the CFTC; and (iii) provide similar relief for BD/FCMs that maintain clearing accounts for their customers at ICE Clear Credit. Further, to the extent that other SEC rules would be affected by the exemptive relief, we ask that the Commission provide the relief described in this letter, that would allow affected BD/FCMs to comply with the rules by treating the account subject to Section 4d(f) as if it were subject to Rule 15c3-3, or to allow affected BD/FCMs to be in compliance as long as they have complied with parallel CFTC rules. We also request that the Commission grant relief from parts of Rules 8c-1; 15c2-1; Rule 15c3-1; Rule 17a-3; Rule 17a-4; Rule 17a-5; and Rule 17a-11(c)(2), as described in this letter.

We believe that the Commission's grant of the requested exemptive relief will provide participants in the CDS market with the necessary incentive, and capital and operational efficiency, to make the central clearing of CDSs through ICE Clear Credit, as contemplated in the Dodd-Frank Act, economically feasible and will prevent regulatory arbitrage. Moreover, if the requested exemptive relief is granted, it will foster the development of a CDS market that is characterized by a significant reduction of systemic risk by encouraging participants to maintain hedged portfolios of CDS positions through ICE Clear Credit's proposed portfolio margining program.

If you should have any questions or comments or require any further information regarding this request for exemptive relief, please do not hesitate to contact the undersigned at (312) 558-5905, or Edward J. Johnsen, Winston & Strawn, (212) 294-4741, or Christopher Edmonds, President of ICE Clear Credit, at (312) 836-6810, or Kevin R. McClear, General Counsel of ICE Clear Credit, at (312) 836-6833.

Sincerely,

Michael M. Philipp

Attachments

cc: Mary L. Schapiro, Chairman
Elisse B. Walker, Commissioner
Luis A. Aguilar, Commissioner
Troy A. Paredes, Commissioner
John Ramsay, Deputy Director, Division of Trading and Markets
Mr. Christopher Edmonds, Chief Executive Officer, ICE Clear Credit LLC
Mr. Kevin R. McClear, General Counsel, ICE Clear Credit LLC

Supplemental Materials

Exhibit A: Currently Cleared Index CDS Products

Exhibit B: Currently Cleared Security-Based CDS Products

Exhibit C: Clearing Rules

Exhibit D: Historical Volume and Open Interest for Cleared CDS Transactions on ICE Clear Credit

Exhibit E: Open Interest and Transaction Activity for Index CDS and Single-Name CDS Cleared by ICE Clear Credit Based on DTCC Publicly Available Data

Confidential Exhibit F: ICE Clear Credit Portfolio Margining Methodology

Confidential Exhibit G: Finance Concepts, "A Stress Test of the ICE Margin Requirements for Large Multi-Asset Portfolios"

Exhibit H: ICE Clear Credit Portfolio Approach to CDS Margining/Index Decomposition Methodology