



February 26, 2009

Office of the Commissioner
Bureau of the Public Debt
9th Floor
799 9th Street NW
Washington, DC 20239-0001

Attention: Van Zeck
Commissioner of the Public Debt

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

Ladies and Gentlemen:

We are writing on behalf of IntercontinentalExchange, Inc. ("ICE"), a corporation organized under the laws of the State of Delaware, and The Clearing Corporation ("TCC"), a corporation organized under the laws of the State of Delaware, to request that the U.S. Department of Treasury (the "Department") grant, pursuant to Section 15C(a)(5) of the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act"), for the avoidance of legal uncertainty, an exemption for ICE US Trust LLC ("ICE Trust"), a wholly-owned subsidiary of ICE US Holding Company GP LLC (formerly named ICE US Trust Holding Company LLC), a Delaware limited liability company ("Holdco GP LLC"), participants in ICE Trust ("ICE Trust Participants"), certain entities affiliated with ICE Trust Participants¹ ("Affiliates" which, together with ICE Trust Participants, are referred to as "Participants") and inter-dealer brokers ("IDBs") from the provisions of Sections 15C(a), (b) and (d) of the Exchange Act (other than subsection (d)(3)) and the rules and regulations of the Department thereunder, applicable to government securities brokers and government securities dealers, to the extent such requirements, rules and regulations would otherwise be applicable to the activities of any of the foregoing in connection

¹ For purposes of this request, an affiliate means an entity that directly, or indirectly through one or more intermediaries controls or is controlled by, or under common control with an ICE Trust Participant.

with the offer, execution, termination, clearance, settlement, performance and related activities involving credit default swaps ("CDS") entered into by such ICE Trust Participants (or their Affiliates) with other ICE Trust Participants and submitted to ICE Trust for clearance and settlement as described herein.²

Except as provided in the conditions for exemptive relief described in Section IV, this request is without prejudice to, and is not intended to limit, ICE Trust's, its Participants' and the other specified applicants' eligibility for or reliance on any other statutory or regulatory basis for relief from the provisions of the Exchange Act in connection with the activities contemplated by this request.

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

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

I. Credit Default Swaps

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

Very generally, the party seeking credit protection (the "protection buyer") under a CDS makes periodic fixed payments to the party providing credit protection (the "protection seller"). The protection seller agrees, in exchange for such periodic fixed payments, to purchase from the protection buyer, at par value (or for some other designated value), an agreed principal amount

² The applicants expect shortly to receive exemptive relief from the U.S. Securities and Exchange Commission ("SEC") granting ICE Trust, Participants and IDBs (or classes of entities similarly situated) certain exemptions (the "SEC CDS Exemptions") under the Exchange Act but excluding, among other provisions, Exchange Act Section 15C, with respect to activities described in this request. The applicants also expect to rely on the interim temporary final rules set forth in Release Nos. 33-8999; 34-59246; 39-2549.

(the “notional amount”) of deliverable obligations in the event that the reference entity experiences one or more specified credit events or to effect a cash settlement by payment of the difference between the par (or other designated) value of a reference obligation and the reference obligation’s market value following the credit event.

The reference entity can be a company, a governmental entity or any other borrower. The deliverable or reference obligations can consist of a specific obligation of the reference entity, a category of obligations, or all repayment obligations of the reference entity. There is no requirement that either party to a CDS hold any obligations of the reference entity. Some CDS include reference obligations or deliverable obligations that may be government securities as defined in Section 3(a)(42) of the Exchange Act, such as securities issued by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation and debt of corporate issuers benefiting, for example, from guarantees by the Federal Deposit Insurance Corporation.

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

CDS can be written on a single reference entity (“single name CDS”) or CDS can be written with respect to groups or indices of reference entities (“index CDS”). Index CDS allow market participants to more efficiently manage or assume exposure to the creditworthiness of specific sectors of the economy.

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

Even though CDS are a relatively recent financial innovation, they have quickly become an extremely important and widely used tool for the mitigation and transfer of credit risk. Prior to the advent of the over-the-counter (“OTC”) CDS market, no tradable financial instrument existed that would enable a company exposed to a third party’s default risk to manage that credit risk efficiently and in a liquid market. Created in response to the need for such an instrument, CDS have provided enormous benefits both to financial institutions and to borrowers. They enable financial institutions to hedge the credit risks inherent in the corporate financings that are necessary for economic growth. This enhances the stability of financial institutions and reduces the cost of funds for borrowers. It also makes additional credit capacity available, enabling financial institutions to expand the credit facilities they are able to offer to their commercial and investment banking clients. It is therefore not surprising that CDS have seen significant growth in recent years.

The Bank for International Settlements (“BIS”) has estimated that, as of December 2007, the outstanding notional amount of CDS was just under \$58 trillion.³ The outstanding notional amount of CDS has recently been substantially reduced through a series of voluntary netting initiatives and is currently estimated to be less than \$29 trillion.⁴ A majority of the market is comprised of bilateral OTC transactions between dealers, which includes approximately 15 to 20 global commercial and investment banks, and the largest share of the notional amount within that sector is comprised of index CDS.⁵

³ Report entitled “Credit Default Swap Market Notional amounts outstanding at end of December 2007” published by the Bank for International Settlement, available at <http://www.bis.org/statistics/otcder/dt21.pdf>.

It is important to note that the outstanding notional amount of CDS published by the BIS does not accurately reflect the actual levels of market and credit risk exposures in the CDS market. To calculate such exposures one would need to consider the following: (1) net exposure of the participants in the market, after taking into account offsetting positions; (2) the probability that the underlying reference entities will default; (3) the probability that any party to a CDS will default in its obligations under the applicable CDS; (4) the amount of collateral held by participants in the market; and (5) the probable recovery amounts that the participants will collect upon the occurrence of probable defaults. Due to the bilateral nature of CDS transactions and the lack of any central counterparty or systematic information aggregator, it is very difficult to determine actual risk exposures in this market.

⁴ See http://www.dtcc.com/products/derivserv/data_table_i.php, http://www.markit.com/information/news/press_releases/2008/october/16.html, http://www.markit.com/information/news/press_releases/2008/october/31.html, and http://www.markit.com/information/news/press_releases/2008/november/24.html describing the most recent compressions.

⁵ Testimony of Patrick M. Parkinson, Deputy Director, Division of Research and Statistics of the Federal Reserve Board, before the Subcommittee on Securities, Insurance and Investment of the U.S. Senate Committee on Banking, Housing and Urban Affairs, July 8, 2008 (the “Parkinson Testimony”), p. 1. This testimony is available at <http://www.federalreserve.gov/newsevents/testimony/parkinson20080709a.htm>.

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

1. Counterparty Risk. Counterparty risk is a primary concern for CDS market participants. As bilateral transactions, CDS expose each party to the risk of the other party's non-performance. This is of particular concern to the protection buyer under a CDS, because its ability to successfully protect itself against the failure or default of a reference entity depends on the protection seller's ability to perform its obligations under the CDS.
2. Redundant Gross Notional Exposures. As professional intermediaries supply liquidity to the CDS market, they simultaneously accumulate large notional exposures. Many of these exposures are offsetting but are executed opposite different counterparties. Professional intermediaries may also have large offsetting exposures with each other. These offsetting gross notional CDS exposures give rise to potentially redundant counterparty credit exposures that remain on market participants' books so long as the offsetting CDS exposures remain outstanding. The large population of redundant, offsetting transactions also gives rise to additional operational inefficiencies for the market as noted below.
3. CDS Transaction Processing Backlog. The CDS market's rapid growth has seen widespread use of these products by large numbers and categories of market participants. ISDA has estimated that from 2004 to 2006 the notional size of the CDS market grew fivefold.⁶ Because CDS are individually negotiated and are generally not executed through exchanges or other electronic matching engines, the processing of confirmations evidencing CDS transactions is generally handled individually by market participants, each of which has different levels of operational infrastructure and capacity to process CDS transactions. Not surprisingly, this has resulted in processing backlogs in the confirmation of CDS transactions.⁷
4. Monitoring and Managing CDS Transactions. As noted above, the volume and bilateral character of CDS transactions requires that firms have significant operational resources. Large outstanding CDS trade populations increase the operational resources necessary to monitor and administer these positions. This operational burden can become particularly acute in times of market stress, such as in circumstances where a major counterparty defaults, or in the case of a credit event affecting a borrower that is a reference entity under large numbers of CDS.

⁶ "Fed Says Banks Meet Target on Derivatives Backlog." Bloomberg, February 16, 2006, available at <http://www.bloomberg.com/apps/news?pid=10000006&sid=aO.Ek0E2iqpI&refer=home>.

⁷ In order to address this issue, major market participants have increasingly used the trade comparison and confirmation services offered by DTCC's Deriv/SERV service described in Section II below. The use of this service and other measures has significantly reduced confirmation backlogs for many of the largest market participants.

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

II. Description of ICE Trust's Proposed Clearing Activities

A. Overview

1. Background

ICE, in conjunction with TCC, is planning to launch a new global central clearing platform for CDS. With the approval by the NYSBD of the ICE application on December 4, 2008, ICE Trust has been established as a limited purpose limited liability trust company, which will provide the clearance and settlement platform and services. Based on the anticipated closing of the acquisition described below, current scheduling and consultation with regulators, ICE intends to launch ICE Trust's clearing services as promptly as possible following receipt of all necessary regulatory approvals and the relief requested herein.

2. Information about the Acquisition of TCC by ICE

On October 29, 2008, ICE announced its plan to acquire TCC. ICE and TCC have entered into a term sheet dated October 29, 2008 with respect to such acquisition. The parties have negotiated and agreed upon definitive transaction documentation.

The acquisition of TCC remains subject to the satisfaction of certain conditions, including receipt of all necessary approvals from governmental authorities for clearing CDS and for the consummation of the transaction. ICE anticipates closing the transaction upon the termination or expiration of the Hart-Scott-Rodino ("HSR") waiting period. The parties filed under HSR on December 23, 2008 and requested early termination.

The acquisition is being structured such that Holdco GP LLC will contribute its sole membership interest in ICE Trust to ICE US Holding Company L.P., a Cayman Islands exempted limited partnership ("ICE Holding LP") so that ICE Holding LP will be the sole member of ICE Trust and Holdco GP LLC will be the general partner of, and manage, ICE Holding LP. ICE Holding LP will also be the sole shareholder of TCC. ICE is the sole member of Holdco GP LLC and has sole authority to appoint its board of managers.

There will be two classes of LP interests in members in ICE Holding LP: (a) the Class A LP interests, which will be held by ICE and Holdco GP LLC, and (b) the Class B LP interests, which will be the current shareholders of TCC. Any profits received by ICE Holding LP from

ICE Trust will be distributed 50 percent to the Class A LP interest holders and 50 percent to the Class B LP interest holders. The voting rights of the membership interests will be vested solely in the Class A LP interest holders.

3. Information about ICE

ICE, organized in May 2000 under the laws of the State of Delaware, is a publicly traded company listed on the New York Stock Exchange (“NYSE”) that trades under the ticker symbol “ICE”. ICE, directly and through its wholly-owned subsidiaries, operates global regulated futures exchanges and OTC-markets for commodities and derivative products and currently operates two central party clearing houses in North America and, in November 2008, commenced operating a central party clearing house in Europe. ICE operates its OTC energy markets through its globally distributed electronic platform and ICE owns 100 percent of:

- ICE Futures Europe, which operates as a United Kingdom Recognized Investment Exchange for the purposes of price discovery, trading and risk management within the energy commodity futures and options markets;
- ICE Futures U.S., Inc., which operates as a United States Designated Contract Market for the purpose of price discovery, trading and risk management within the soft commodity, index and currency futures and options markets;
- ICE Futures Canada, Inc., which operates as a Canadian Commodity Futures Exchange for the purpose of price discovery, trading and risk management within the agricultural futures and options markets;
- Creditex Group Inc., which operates in the OTC CDS markets;
- ICE Clear U.S. which performs the clearing and settlement of every futures and options contract traded through ICE Futures U.S., Inc.;
- ICE Clear Canada which performs the clearing and settlement of every futures and options contract traded through ICE Futures Canada, Inc.; and
- ICE Clear Europe which, since November 8, 2008, performs the clearing and settlement of every futures and options contract trading through ICE Futures Europe and for all of ICE’s cleared OTC energy products.

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

4. Information about TCC

TCC, a closely held corporation organized under the laws of the State of Delaware, is owned by eleven major financial institutions, three leading OTC derivatives IDBs, an international exchange and a leading OTC services provider.⁸ TCC is a registered derivatives clearing organization, regulated by the Commodity Futures Trading Commission. TCC has cleared futures contracts as an independent clearinghouse since 1925. Currently, TCC has approximately 50 participants and provides derivatives clearing services for multiple exchanges and marketplaces, including the Chicago Climate Futures Exchange, the United States Futures Exchange,⁹ the Eurex Global Clearing Link, OTC Benchmark Treasury Futures, and the Financial and Energy Exchange (FEX Australia).¹⁰ As a registered derivatives clearing organization, TCC is currently regulated by the Commodity Futures Trading Commission. Throughout its history, TCC has continuously evolved to meet the evolving needs of the derivatives market. It has been an industry innovator while continuing its role as central counterparty. At least initially, it is envisaged that ICE Trust will receive processing and operational support from TCC, ICE and other wholly-owned subsidiaries of ICE.

5. Information about ICE Trust

ICE Trust, effective December 4, 2008, is organized as a New York State chartered limited liability trust company and will become a member of the Federal Reserve System. ICE Trust is subject to direct supervision and examination by the NYSBD and, due to its expected membership in the Federal Reserve System, will be subject to direct supervision and examination by the Board of Governors of the Federal Reserve System ("Federal Reserve"), specifically the Federal Reserve Bank of New York ("FRBNY").

Initially, ICE Trust's business will be limited to the provision of clearing services for the OTC CDS market. During this initial phase, ICE Trust will act as a central counterparty for ICE Trust Participants (in each case, acting as principal for its own account or the account of an Affiliate¹¹) by assuming, through novation, the obligations of all eligible CDS transactions

⁸ The current shareholders of TCC include: Bank of America Strategic Investments Corporation, Barclays Bank PLC, Citigroup Global Markets Inc., Credit Suisse First Boston Next Fund, Inc., Creditex Group Inc., Deutsche Bank Securities Inc., GFI Inc., Goldman, Sachs & Co., ICAP Securities no. 2 B.V., LabMorgan Corporation, the Markit Group Limited, Merrill Lynch, Pierce, Fenner & Smith Incorporated, MF Global Inc., Morgan Stanley & Co. Incorporated, UBS Americas Inc., and U.S. Exchange Holdings, Inc..

⁹ The agreement with the United States Futures Exchange is in the process of being terminated.

¹⁰ FEX Australia expects to launch as a live exchange in early 2009.

¹¹ In cases in which an ICE Trust Participant acts for the account of an Affiliate, it will be for the proprietary account of such Affiliate as principal and not as agent for any other person.

accepted by it for clearing and collecting margin and other credit support from its Participants to collateralize their obligations to ICE Trust.

We anticipate that when ICE Trust's CDS clearing service launches, it will first address the reduction of the existing population of inter-Participant index CDS. On a regular basis, ICE Trust will process and clear outstanding inventories of qualifying CDS. This is expected to significantly reduce the outstanding notional amount of inter-dealer index CDS. ICE Trust will subsequently begin its "live" clearing service, and ICE Trust Participants (in each case, acting as principal for its own account or the account of an Affiliate) will be able to indicate at execution of a transaction that the transaction is to be submitted to ICE Trust for clearing. In the initial phase, ICE Trust's CDS clearing services will be limited to transactions for the proprietary accounts of ICE Trust Participants (in each case, acting as principal for its own account or the account of an Affiliate).

The first products ICE Trust expects to clear include certain untranch CDX North American Investment Grade, High Yield and Crossover indices. Thereafter ICE Trust anticipates that it will expand the range of CDS contracts eligible for clearing, including iTraxx indices, single name CDS (which may include issuers of government securities), and additional CDX indices (including tranches).

B. Participants in ICE Trust

Participation in ICE Trust will be open to all qualified applicants, each of whom will clear transactions solely as principal for its own (or an Affiliate's) account and not on behalf of other persons. In order to qualify as an ICE Trust Participant, an applicant will be required to satisfy ICE Trust's participant criteria at the time that the applicant applies to ICE Trust and on an ongoing basis thereafter. These criteria are specified in ICE Trust Rule 201. As of the date of this letter, these requirements include the following:

- regulation for capital adequacy by a federal or foreign financial regulator or status as an affiliate of an entity that is subject to regulation (as a result of which such Participant would be subject to consolidated holding company group supervision) by such financial regulator;
- the ICE Trust Participant or, at ICE Trust's discretion, the parent entity of the ICE Trust Participant, if the parent entity is providing an unconditional guaranty of the ICE Trust Participant's obligations to ICE Trust, must have \$5 billion in tangible net worth (computed in accordance with the Federal Reserve's definition of "Tier 1 capital" as set forth in Federal Reserve Regulation Y Part 225 Appendix A);
- the ICE Trust Participant or, at ICE Trust's discretion, the parent entity of the ICE Trust Participant, if the parent entity is providing an unlimited guaranty of the ICE Trust

Participant's obligations to ICE Trust, must (x) at the time of admission, have a minimum long-term debt rating of "A" from Standard & Poor's (and its equivalent from other nationally recognized rating agencies) and (y) at any time after admission, maintain a minimum long-term debt rating of at least "BBB" from Standard & Poor's (and its equivalent from other nationally recognized rating agencies); provided that, if the ICE Trust Participant, or its parent entity, as the case may be, does not satisfy the foregoing ratings requirement, it demonstrates to ICE Trust that it otherwise satisfies, in the sole discretion of ICE Trust, other stringent credit criteria established by ICE Trust;

- demonstrated operational competence in CDS;
- demonstrated risk management competence; and
- ongoing membership in CDS industry organizations, such as the International Swaps and Derivatives Association and the Deriv/SERV service of The Depository Trust & Clearing Corporation ("DTCC").

These requirements are consistent with international standards for central counterparties as articulated in the Recommendations for Central Counterparties, Bank for International Settlements, Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions, November 2004 (the "BIS IOSCO CCP Recommendations").¹² The BIS IOSCO CCP Recommendations require "participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation" in a clearing organization.¹³ It is anticipated that initially the ICE Trust Participants will be the following ten major CDS dealers: Bank of America, Barclays,¹⁴ Citibank, Credit Suisse, Deutsche Bank, Goldman Sachs, JPMorgan Chase, Merrill Lynch, Morgan Stanley, and UBS.

¹² BIS IOSCO CCP Recommendations, p. 16-17. The BIS IOSCO CCP Recommendations reflect the views of central banks, securities regulators and other financial regulators from the Group of Ten and other countries.

¹³ BIS IOSCO CCP Recommendations, p. 4.

ICE expects that all of TCC's current shareholder banks and dealers (each of whom currently meets these requirements) will participate as clearing Participants of ICE Trust. The inter-dealer market represents the most significant portion of the outstanding notional amount of the CDS market, and TCC's shareholder banks and dealers account for the majority of this volume. Accordingly, ICE Trust should be in a position from its inception to clear a significant portion of the CDS market and to reduce significantly associated counterparty credit and operational risks.

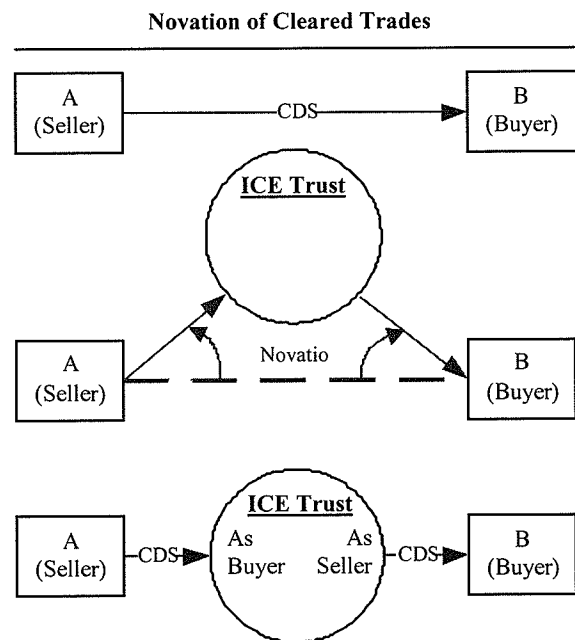
¹⁴ It is currently anticipated that Barclays will be ready operationally in February to clear CDS with ICE Trust and, depending on the launch date of the ICE Trust clearing services, will become an ICE Trust Participant shortly after launch.

C. Clearing of CDS

ICE Trust's structure and operations have been subject to comprehensive federal and New York State supervision and review as well as industry consultation, and further development of its structure and operations will be subject to approval by its bank regulators. We respectfully request that the exemptive relief sought herein apply on an ongoing basis to ICE Trust and its Participants as the ICE Trust Rules and operations evolve subject to NYSBD and Federal Reserve regulatory oversight, and subject to compliance with such conditions as the Department may impose in connection with any exemptive relief granted by it in response to this request.

1. ICE Trust as Central Counterparty

In order for ICE Trust to act as central counterparty and clear CDS, it must first receive accurate and reliable information regarding the transactions that are submitted for clearing. Additionally, as a clearinghouse, ICE Trust's primary role will be to reduce the credit risk associated with cleared CDS. Accordingly, ICE Trust's trade submission process is designed to ensure that it maintains a matched book of offsetting CDS contracts, a prerequisite for any central counterparty.



Although CDS are currently bilaterally negotiated and executed, major market participants frequently use DTCC's Deriv/SERV comparison and confirmation service when documenting their CDS.¹⁵ This service creates accurate electronic records of transaction terms and counterparties. As part of this service, market participants separately submit the terms of a CDS to Deriv/SERV in electronic form. Paired submissions are compared to verify that their terms match in all required respects. If a match is confirmed, the parties receive an electronic confirmation of the submitted transaction. All submitted transactions are recorded in the

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For ease of reference herein, DTCC is referred to as the service provider of Deriv/SERV confirmation and matching services. However, on July 21, 2008, DTCC and Markit entered into a joint venture to provide OTC confirmation and matching services. Accordingly, Deriv/SERV may be administered by an entity other than DTCC. In that event, ICE Trust will enter into an appropriate agreement or assignment with the successor entity administering the Deriv/SERV confirmation and matching services.

Deriv/SERV Trade Information Warehouse, which serves as the primary registry for submitted transactions.¹⁶

ICE Trust will leverage the Deriv/SERV infrastructure in operating its CDS clearing service. Initially, all trades submitted by Participants for clearing through ICE Trust will be recorded in the Deriv/SERV Trade Information Warehouse. ICE Trust will, initially on a weekly basis, obtain from DTCC matched trades that have been recorded in the Deriv/SERV Trade Information Warehouse as having been submitted for clearing through ICE Trust. Within two months of launch, ICE Trust intends to obtain matched trades from DTCC on a daily basis. ICE Trust expects that, in time, the matching service provided by Deriv/SERV or other parties will automatically forward, on a real time basis, to ICE Trust qualifying matched CDS contracts that both parties have elected to submit for clearing.

Participants may use the facilities of an IDB to execute CDS, for example, to access liquidity more rapidly or to maintain pre-execution anonymity, and submit such transactions for clearance and settlement to ICE Trust.¹⁷ These IDBs may variously be unregistered with the SEC, may be registered as broker-dealers or government securities broker-dealers, or may be registered as broker-dealers and operating subject to Regulation ATS. To our knowledge, none of these IDBs discipline their subscribers other than by exclusion from trading. Additionally, to our knowledge, these IDBs, although they are compensated for the matching and effecting CDS transactions, do not handle the funds or property of their CDS participants. IDBs similarly do not assume market positions in connection with their intermediation of CDS transactions.

As described below, once a matched CDS contract has been forwarded to, or obtained by, ICE Trust, and has been accepted for clearing by it, ICE Trust will clear the CDS contract by becoming the central counterparty to each party to the trade through novation. Deriv/SERV's current infrastructure will help to ensure that ICE Trust maintains a matched book of offsetting CDS contracts. Maintaining a matched offsetting book is essential to managing the credit risk associated with CDS submitted to ICE Trust for clearing.

Under the ICE Trust Rules, each bilateral CDS contract between two ICE Trust Participants that is submitted, and accepted by ICE Trust, for clearing will be "novated." As part of this process, each bilateral CDS contract submitted to ICE Trust will be replaced by two superseding CDS contracts between each of the original parties to the submitted transaction and ICE Trust. Under these new contracts, ICE Trust will act as protection buyer to the original protection seller and as protection seller to the original protection buyer. As central counterparty

¹⁶ Deriv/SERV has recently begun to manage payment flows, settlements, and adjustments to contract terms through the CDS lifecycle.

¹⁷ Inter-dealer brokers currently active in the CDS market include Garban, Creditex, GFI, Tullet Prebon, Markit and ICAP.

to each novated CDS contract, ICE Trust will be able to net offsetting positions on a multilateral basis, even though ICE Trust will have different counterparties with respect to the novated CDS contracts that are being netted.

As part of the novation process, the terms and conditions governing the CDS bilaterally negotiated by the submitting counterparties will be superseded by the relevant provisions of the ICE Trust Rules applicable to the relevant CDS transaction. This step is necessary in order to eliminate any documentation basis risk, and consequent financial risk, to ICE Trust (and, indirectly, to Participants) that could arise if, as a result of multilateral netting, the documentation terms governing opposite sides of offsetting CDS positions to which ICE Trust is central counterparty are not consistent.

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

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

2. Deriv/SERV Trade Information Warehouse

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

D. Credit Support Framework

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

As the central counterparty to each of the ICE Trust Participants, ICE Trust will have exposure to the risk of defaults by ICE Trust Participants. To address this counterparty credit risk, ICE Trust (1) will require the ICE Trust Participants to provide credit support for their obligations under cleared CDS transactions and (2) has established rules that “mutualize” (as described below) the risk of an ICE Trust Participant default across all ICE Trust Participants. ICE Trust’s risk management infrastructure and related risk metrics have been structured specifically for the CDS products that ICE Trust clears. Each ICE Trust Participant’s credit support obligations will be governed by a uniform credit support framework and applicable ICE Trust Rules.

1. Credit Support Requirements

ICE Trust will maintain strict, objectively determined, risk-based margin and guaranty fund requirements. These requirements will be subject to extensive and ongoing regulation and oversight by the Federal Reserve and the NYSBD. These requirements will also be consistent with clearing industry practice, Basel II capital adequacy standards and international standards established for central counterparties as articulated in the BIS IOSCO CCP Recommendations. The amount of margin and guaranty fund contribution required of each ICE Trust Participant will be continuously adjusted to reflect the size and profile of, and risk associated with, the ICE Trust Participant’s cleared CDS transactions (and related market factors).

Each ICE Trust Participant’s margin requirement will consist of two components: (1) initial margin, reflecting a risk-based calculation of potential loss on outstanding CDS positions in the event of a significant adverse market movement, and (2) mark-to-market margin, based upon an end-of-day mark-to-market of outstanding positions. Acceptable margin will initially include only cash in specified currencies and G-7 government debt for initial margin and only cash for mark-to-market margin. ICE Trust Participants will be required to cover any end-of-day margin deficit with U.S. dollars by the following morning, and ICE Trust will have the discretion to require and collect additional margin, both at the end of the day and intraday, as it deems necessary.¹⁸

¹⁸

An ICE Trust Participant will be permitted to withdraw mark-to-market margin amounts credited to its account to the extent not required to satisfy its initial margin requirement.

ICE Trust will also maintain a guaranty fund (the “Guaranty Fund”) to cover losses arising from an ICE Trust Participant’s default on cleared CDS transactions that exceed the amount of margin held by ICE Trust from the defaulting ICE Trust Participant. Each ICE Trust Participant will be required to contribute a minimum of \$20 million to the Guaranty Fund initially when it becomes an ICE Trust Participant and on an ongoing basis, additional amounts based on its actual and anticipated CDS position exposures. The adequacy of the Guaranty Fund will be monitored daily and the need for additional contributions will initially be determined on at least a monthly basis, based on the size of ICE Trust Participant exposures within the ICE Trust clearing system. As a result, the Guaranty Fund will grow in proportion to the position risk associated with the aggregate volume of CDS cleared by ICE Trust.

In order to calculate the initial margin and mark-to-market margin requirements, as well as the appropriate Guaranty Fund contribution for an ICE Trust Participant, ICE Trust has developed a sophisticated and robust set of risk metrics to measure and determine these amounts. In each case, the amount of margin to be posted or contribution to be made will be calculated separately for each type of CDS cleared by an ICE Trust Participant, subject to applicable risk offsets recognized under ICE Trust’s policies and procedures. Initial margin will be calculated in accordance with ICE Trust’s policies and procedures and will be based on (a) the largest probable loss likely to be sustained by the ICE Trust Participant over a specified time period due to adverse movements in credit spreads, (b) the degree to which the ICE Trust Participant’s long and short positions exhibit offsetting risk characteristics and (c) the ICE Trust Participant’s position concentration relative to the size of the market for the relevant CDS. Mark-to-market margin will be calculated daily as the replacement (or mark-to-market) value of an ICE Trust Participant’s outstanding positions based on end-of-day mark-to-market prices. Mark-to-market margin will be calculated separately for each currency in which an ICE Trust Participant has open positions.

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

2. Mutualization

Mutualization is designed to provide additional protection to ICE Trust from losses arising from an ICE Trust Participant’s default by making other Participants’ contributions to the Guaranty Fund available to cover the defaulting ICE Trust Participant’s losses.

In the event of an ICE Trust Participant's default, ICE Trust may look to the margin posted by such Participant, such Participant's Guaranty Fund contributions and, if applicable, any recovery from a parent guarantor. ICE Trust will also provide a one-time priority Guaranty Fund contribution of \$50 million funded over time as set forth in Chapter 8 of the ICE Trust Rules. In addition to this priority Guaranty Fund contribution, ICE Trust will contribute an additional \$50 million over time to the Guaranty Fund,¹⁹ and at its discretion, ICE Trust will be authorized to use, to the extent needed, other ICE Trust Participants' Guaranty Fund contributions to satisfy any obligations of the defaulting ICE Trust Participant; provided that, any recovery from the defaulting ICE Trust Participant, its parent guarantor, if any, or the sale of the defaulting ICE Trust Participant's positions in ICE Trust will first be used to refund any amounts utilized by ICE Trust from contributions of non-defaulting ICE Trust Participants to the Guaranty Fund.

In the event that the non-defaulting ICE Trust Participants' contributions to the Guaranty Fund are less than the remaining obligations of the defaulting ICE Trust Participant, ICE Trust will require the non-defaulting ICE Trust Participants to contribute additional capital, equal to such excess. However, an ICE Trust Participant can limit the amount of this additional assessment to an amount equal to such Participant's Guaranty Fund contribution immediately prior to the relevant default by contributing such amount and withdrawing from ICE Trust, with the withdrawal effective as described in the ICE Trust Rules.

These margin and credit support requirements will help to mitigate the counterparty credit risk that ICE Trust faces as a central counterparty, and will also help to mitigate counterparty credit risk more broadly within those portions of the CDS market that are cleared through ICE Trust. The use of dynamic margin requirements will help to ensure that each ICE Trust Participant is sufficiently collateralized at any point in time based on prevailing market conditions and ICE Trust Participant position risk. Moreover, the Guaranty Fund and the mutualization protocol will help to ensure that, in the case of an occurrence of an extreme multiple-counterparty default scenario, ICE Trust will have adequate credit support and resources to contain the resulting risk and to maintain the integrity of the cleared CDS market. The ongoing supervision of the Federal Reserve and NYSBD will help to ensure that ICE Trust maintains a robust, adequate and dynamic credit support regime.

E. Liquidation of a Defaulting ICE Trust Participant

Following a default by an ICE Trust Participant, ICE Trust has a number of tools available to it under the ICE Trust Rules to ensure an orderly liquidation and unwinding of the open positions of such defaulting Participant. In the first instance, upon determining that a

¹⁹ This second \$50 million will be contributed over time and will be applied to satisfy obligations on a pro rata basis with other ICE Trust Participants' Guaranty Fund Contributions as set forth in the ICE Trust Rules.

default has occurred, ICE Trust will have the ability to immediately enter into replacement CDS transactions with other ICE Trust Participants that are designed to mitigate, to the greatest extent possible, the market risk of the defaulting ICE Trust Participant's open positions. For open positions in which there is no liquid trading market, ICE Trust may enter into covering CDS transactions for which there is a liquid market and that are most closely correlated with such illiquid open positions. Such cover transactions will help to minimize increases in the losses with respect to a defaulting ICE Trust Participant's illiquid open positions while ICE Trust is seeking to close out these open positions.

After entering into covering transactions in the open market, if any, ICE Trust will seek to close out any remaining open positions of the defaulting ICE Trust Participant (including any initial covering transactions) by using one or more auctions or other commercially reasonable unwind processes. The ICE Trust Rules will prohibit ICE Trust from entering into any replacement transaction if the price of such transaction would be below the least favorable price that would be reasonable to accept for such replacement transaction. This provision is designed to prevent ICE Trust from entering into replacement transactions at unnecessarily depressed prices in times of market stress. To the extent ICE Trust is not able to enter into the necessary replacement transactions through auctions or open market processes, ICE Trust will be entitled to allocate such replacement transactions to the remaining Participants at the floor price established by ICE Trust.

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

F. Daily Mark-to-Market Prices

ICE Trust will calculate a daily mark-to-market price for each type of CDS cleared by it based on end-of-day prices submitted to it by ICE Trust Participants. On a daily basis, each ICE Trust Participant will be required to provide to ICE Trust (either directly or through a designated third-party)²⁰ an accurate end-of-day price (in either credit spread or price format according to

²⁰

ICE Trust intends to enter into arrangements with third parties to perform daily mark-to-market price calculations, matched interest allocation and related services. Currently, with respect to Index CDS based on the untranch CDX North American Investment Grade, High Yield and Crossover indices, ICE Trust intends to enter into an agreement with the Markit Group, the publisher of these indices, to provide the

product convention, and either in mid-point or bid/offer terms) for each type of cleared CDS in which such ICE Trust Participant has a cleared position. ICE Trust will determine from time to time, with input from the relevant ICE Trust Participants, an agreed upon default bid/offer range to be applied to mid-point submissions and a notional amount for each type of cleared CDS based on then-current market conditions.

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

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

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

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

* * *

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

services described in this sub-section. ICE Trust anticipates that, as it begins to clear other types of CDS, it will enter into similar agreements with appropriate third parties.

III. Regulatory Status of Credit Default Swaps

A. Current Regulatory Status of CDS

It is uniformly accepted that CDS transactions, as currently conducted, qualify as “security-based swap agreements” under Section 206B of the GLBA, and therefore are not securities for purposes of the Acts.²¹ As a result, CDS transactions are generally not subject to regulation under either of the Acts, with the exception of certain specifically enumerated anti-fraud, insider trading, short swing profit and anti-manipulation provisions.²² As described below, the consequences of clearing CDS through ICE Trust raise a potential question regarding the status of CDS as security-based swap agreements.

As a threshold matter, under Section 206B of the GLBA, in order for a CDS to qualify as a security-based swap agreement, it must be a “swap agreement” as defined in GLBA Section 206A.²³ Under Section 206A(a) of the GLBA, a “swap agreement” includes:

“any agreement, contract, or transaction . . . the material terms of which (other than price and quantity) are subject to individual negotiation, and that —

* * *

(2) provides for any purchase, sale, payment or delivery (other than a dividend on an equity security) that is dependent on the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence; [or]

(3) provides on an executory basis for the exchange, on a fixed or contingent basis, of one or more payments based on the value or level of one or more... securities, instruments of indebtedness, indices... or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates

²¹ See Exchange Act Section 3A(b) and Securities Act Section 2A(b) (security-based swap agreements are not securities under the Acts).

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

²³ GLBA Section 206C.

the financial risk so transferred, including any such agreement, contract, or transaction commonly known as a . . . , credit default swap[.]”²⁴ (Emphasis added.)

Because CDS – whether physically settled or cash-settled – involve a payment or delivery that is dependent on the occurrence of a credit event, it is clear that CDS are covered under Section 206A(a)(2). It is equally clear from the highlighted language at the end of Section 206A(a)(3) that Congress specifically intended credit default swaps to qualify as swap agreements.²⁵

We note that GLBA Section 206A(b) excludes a number of transactions that would otherwise meet the requirements of Section 206A(a) from the definition of swap agreement.²⁶ Based on the plain meaning of these provisions, Congress’s clear intent and applicable principles of statutory construction, we believe that none of the exclusions in Section 206A(b) operates to carve out CDS from the definition of swap agreement.²⁷

A security-based swap agreement is defined, in turn, under GLBA Section 206B as a “swap agreement” of which a material term is based “on the price . . . of any security or any group or index of securities, or any interest therein.”²⁸ In the case of CDS that provide for the potential delivery of a debt security against a specified payment amount, or a cash payment

²⁴ GLBA Section 206A(a).

²⁵ We note that in 2000, credit default swaps included both physically-settled and cash-settled CDS.

²⁶ GLBA Section 206A(b)(1) (carving out securities options) and Section 206A(b)(4) (carving out any agreement, contract, or transaction providing on a contingent basis for the delivery of securities but *specifically* preserving transactions providing for purchases or sales of securities predicated on contingencies that might reasonably be expected to affect or be affected by the creditworthiness of a party other than a party to the transaction).

²⁷ As noted in footnote 27, Section 206A(b)(1) excludes from the definition of swap agreement various securities options, including puts, calls and options on securities. While CDS can resemble certain types of securities options, we believe, based on long-settled and well-established principles of statutory construction, that this provision does not exclude CDS from the definition of swap agreement. Courts, confronted with the need to reconcile a general provision that is in conflict with a more specific provision in the same statute, have consistently held that the more specific provision governs, to the extent of the conflict. *See, e.g., Ginsberg & Sons v. Popkin*, 285 U.S. 204 (1932); *Kepner v. U.S.*, 195 U.S. 100 (1904); *Maiatico v. United States*, 302 Fed. 2d 880 (DC Cir. 1962). It seems clear that the exception for agreements involving credit-based contingencies contained in Section 206A(b)(4) is significantly more specific and narrowly focused than the more general exception for securities options contained in Section 206A(b)(1). Similarly, in *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561 (1995), the Supreme Court held that, “the Court will avoid a reading [of a statute] which renders some words absolutely redundant.” *Id.* at 574. *Accord, Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998); *U.S. v. Alaska*, 521 U.S. 1 (1997); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988); *U.S. v. Menasche*, 348 U.S. 528, 536-537 (1955). If the securities option exclusion in Section 206A(b)(1) were read to exclude CDS, this would render certain provisions from Sections 206A(a)(3) and 206A(b)(4), effectively meaningless and redundant.

²⁸ GLBA Section 206C.

based on the value of a debt security, many market participants have assumed that such CDS may be regarded as security-based swap agreements. To the extent CDS are not security-based swap agreements under Section 206B, they would constitute non-security-based swap agreements under GLBA Section 206C (“non-security-based swap agreement means any swap agreement . . . that is not a security-based swap agreement . . .”).²⁹

Notwithstanding the foregoing, for purposes of Section 206A(a) of the GLBA, in order for a CDS to be considered a swap agreement, it is not sufficient that the CDS falls within one of the enumerated clauses of that section. It is also necessary that the “material terms” of the CDS (other than price and quantity) be “subject to individual negotiation”.³⁰ As noted above, currently, market participants individually negotiate the terms of the ISDA Schedule, Confirmation and (if applicable) CSA that will govern individual CDS based on each party’s own assessment of its needs and requirements and the counterparty risk presented by the other party.

B. Legal Uncertainty Raised by Central Counterparty Clearing Structure

In order to reduce its counterparty risk, it is essential that ICE Trust, as a central counterparty, maintain an exactly matched book of CDS positions at all times. In addition, in order to reduce documentation risk (and therefore market and credit risk), all of the CDS that are cleared and settled through ICE Trust must be subject to similar credit risk mitigation and collateral terms and must be governed by uniform terms. The practical effect of this is that the bilaterally negotiated terms of all CDS transactions submitted to ICE Trust for clearing must be superseded by the ICE Trust Rules. Because these rules will contain uniform credit support and contractual terms applicable to each similar CDS and to all Participants, irrespective of any single Participant’s unique position or requirements, there arises some uncertainty as to whether the terms of the CDS cleared and settled through ICE Trust are “subject to individual negotiation” within the meaning of GLBA Section 206A(a).

A CDS that does not qualify as a security-based swap agreement may potentially be subject to characterization as a security. Similarly, a CDS that has one or more reference or deliverable obligations that are government securities and that does not qualify as a security-based swap agreement may potentially be subject to characterization as a government security.

As a threshold matter, we note that we are aware of no legislative history or judicial precedent construing the individual negotiation requirement of GLBA Section 206A(a). It is clear from the text of the provision, however, that this prong of the swap agreement definition looks to the circumstances prevailing at the time a transaction’s terms are negotiated by the

²⁹ GLBA Section 206C.

³⁰ GLBA Section 206A(a).

parties. Even though the material terms of CDS submitted to ICE Trust for clearing are superseded by a uniform set of rules, Participants, at the time they enter into a CDS transaction, are free to specify any terms they may wish to negotiate, including whether or not to submit the relevant transaction to ICE Trust for clearing.

Although the framework for the regulation of securities broker-dealers has been effective for traditional securities activities, we believe that it has not provided a commercially practical framework for the conduct of broad categories of over-the-counter derivatives activities. Given that ICE Trust Participants will be the most sophisticated derivatives market participants, will be acting solely for their own accounts (or the account of their Affiliates) and will be limited to firms who are subject to regulation or consolidated supervision by a financial regulator, we believe little would be gained by subjecting these Participants to regulation as government securities brokers or dealers with respect to cleared CDS that reference government securities.

On the other hand, requiring government securities broker/dealer regulation and imposing the Exchange Act Section 15C's government securities regime to cleared CDS that reference government securities would create a significant and burdensome dislocation of this part of the CDS market and, of greatest concern, would almost certainly present an extremely significant obstacle to the adoption of clearing for this and related segments of the CDS market. We believe the imposition of such additional regulation and regulatory constraints would be unwarranted, would not constitute an efficient allocation of regulatory resources, and would not serve the public interest. Equally important, however, given the size and significance of the CDS market, proceeding in the face of any material legal uncertainty as to the regulatory status of a significant portion of CDS cleared through ICE Trust would be unacceptable both to market participants and the official sector. Either outcome would produce undesirable consequences and jeopardize the important benefits that the introduction of clearing for CDS can provide.

We believe that an optimal result can be achieved, without any need to resolve the status of cleared CDS, by the Department granting exemptive relief to ICE Trust, its Participants and IDBs, for the avoidance of legal uncertainty, on terms and conditions that would, in effect, permit ICE Trust, its Participants and IDBs to continue to conduct business in cleared CDS that reference government securities on the basis that such transactions would be treated as security-based swap agreements under the Exchange Act. We believe such relief would be consistent with the public interest and the standards for the issuance of exemptive relief by the Department under the Exchange Act as described in Section IV below.

IV. Proposed Exemptive Relief for Applicants from the Provisions of the Exchange Act Governing Government Securities Transactions

Under Exchange Act Section 15C(a)(5), the Secretary of the Department may "exempt any government securities broker or government securities dealer, or class of government securities brokers or government securities dealers, from any provision of" Sections 15C(a), (b),

or (d) of the Exchange Act (other than subsection (d)(3)) and the rules and regulations of the Department thereunder “if the Secretary finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of this title.”³¹

From the perspective of the public interest, ICE Trust’s proposed clearing activities have the potential to provide many important benefits. Most importantly, by significantly reducing the credit and operational risks associated with the CDS activities of its Participants, ICE Trust will not merely benefit its Participants, it will reduce potential sources of contagion risk, which, in turn, will benefit all market participants, including third parties for whom Participants act as professional intermediaries, and investors who, as we have recently witnessed, are both directly and indirectly impacted by a lack of confidence in, or by other adverse developments affecting, the credit markets. Indeed, senior officials within the public sector have expressed the view that it is critical that a prudent clearing framework for the OTC CDS market be developed as a matter of urgency, and ICE Trust is endeavoring to address this pressing need. ICE Trust’s activities will also enhance regulatory transparency and facilitate the ability of regulators to promote market stability and avert market crises.

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

In addition, IDBs potentially will have an important role in the efficient and effective implementation, and continued operation, of the CDS clearing services being offered by ICE Trust. It is anticipated that ICE Trust, as part of its regular day-to-day clearing procedures, will accept for clearing CDS transactions of its Participants submitted by a number of IDBs. Invariably, a significant number of these CDS transactions will reference government securities. As is the case in other fixed income markets, Participants that want to enter into a CDS transaction that references government securities that will subsequently be submitted to ICE Trust, instead of themselves locating another Participant to transact with, may choose to submit one side of a CDS transaction to an IDB, who will then locate another Participant willing to take the opposite side of such CDS transaction. The ability of Participants to access IDBs for these and other types of cleared CDS will ensure that a broader range of CDS transactions are submitted to and cleared by ICE Trust in an orderly manner and will provide Participants additional means through which to execute and submit CDS transactions for clearing.

³¹ Exchange Act Section 15C(a)(5).

As noted above, the IDBs for whom relief is sought herein would act in relation to ICE Trust-cleared CDS transactions only for Participants who will be extremely sophisticated and well-capitalized and in circumstances where such IDBs (a) do not handle funds or property of the Participants, (b) intermediate transactions on an agency basis, and as result do not become parties to, and are therefore not subject to the credit and market risks associated with, the CDS transacted through them, and (c) do not discipline subscribers other than by exclusion from trading.

On the other hand, imposition of government securities broker/dealer requirements with respect to cleared CDS that reference government securities would be unwarranted and burdensome on ICE Trust, ICE Trust Participants and IDBs. The requirement to transfer these activities to a registered government securities broker or dealer alone carries with it the need to re-document a significant number of trading relationships ICE Trust Participants have and, possibly worse, to bifurcate applicable cleared CDS activities from other CDS and related OTC derivatives activities. Not only do we see little or no benefit accruing to investors or the general public from such a requirement, we believe the resulting commitment of regulatory resources would be inefficient and would not be justified by a cost-benefit analysis. Of greatest concern, however, is that the burdens such a requirement would entail would likely erect a significant obstacle to achieving the benefits sought to be achieved by ICE Trust's proposed CDS clearing initiative.

As the Department is aware, many Congressional leaders, the SEC and the Federal Reserve have emphasized the need for prompt implementation of a clearing solution for CDS. Clearly, capital adequacy and operational risk management competencies are an extremely important component of the Exchange Act's regulatory framework and are particularly relevant to the efficacy of ICE Trust's clearing initiative. The ICE Trust Rules will, however, directly address these issues by limiting ICE Trust Participants to those institutions that are the most highly capitalized and sophisticated financial institutions and that have highly developed competencies in risk and operations management. Moreover, ICE Trust will be subject to examination by extremely sophisticated bank regulators, specifically with respect to the qualification of its Participants and the risks presented by Participants' activities to ICE Trust and to other Participants. Initially, the ICE Trust Rules will also limit Participants to institutions who are either directly regulated by a U.S. federal or foreign financial regulator or who are affiliates of such institutions and who, as a result, are subject to the consolidated supervision of the institution's holding company group by a U.S. federal or foreign financial regulator.

Equally, protections against market abuses, such as market manipulation and insider trading, are important components of the investor and public interest protections afforded under the Acts and could be as relevant to cleared CDS as to other CDS. In order to address this important regulatory objective, ICE Trust requests that the exemptive relief sought herein be limited in scope so that all provisions of the Exchange Act that are applicable to security-based

swaps remain applicable to the activities of ICE Trust and its Participants in relation to CDS to be cleared by ICE Trust.³²

Based on these considerations, we believe the general exemptive relief sought herein pursuant to Section 15C(a)(5) of the Exchange Act fully satisfies the relevant conditions for exemption under Sections 15C(a), (b) and (d) (other than subsection (d)(3)).

Moreover, we do not believe that the relief sought herein under Section 15C(a)(5) of the Exchange Act requires or depends upon any resolution of the question presented by the status of cleared CDS under the swap agreement definition in GLBA Section 206A(a) or the status of cleared CDS referencing government securities as government securities. On the contrary, we believe that the relief sought herein is warranted whether or not one regards cleared CDS as swap agreements under GLBA Section 206A(a) or as securities or as government securities. We therefore respectfully request that the Department issue the requested relief on the substantive merits of the relevant exemptive relief, for the purpose of eliminating legal uncertainty and promoting the public benefits to be derived from ICE Trust's proposed clearing initiative, and without addressing or resolving any questions presented by the application of GLBA Section 206A(a) to cleared CDS.

We respectfully suggest that to the extent that the SEC CDS Exemptions exclude exemptions from the application of certain Exchange Act provisions (and rules and regulations thereunder) to the cleared CDS activities described herein and/or specify certain conditions to the provided exemptive relief, that the Department exemptive relief sought herein be issued subject to the same conditions and to compliance with such retained Exchange Act provisions (and specified rules and regulations thereunder), to the extent applicable.

V. Conclusion

Based on the foregoing, we respectfully request that the Department grant, pursuant to Section 15C(a)(5) of the Exchange Act, for the avoidance of legal uncertainty, an exemption for ICE Trust, Participants and IDBs from the provisions of Sections 15C(a), (b) and (d) of the Exchange Act (other than subsection (d)(3)) and the rules and regulations of the Department thereunder, applicable to government securities brokers and government securities dealers, to the extent such requirements, rules and regulations would otherwise be applicable to their activities in connection with the offer, execution, termination, clearance, settlement, performance and related activities involving CDS entered into by such Participants with other Participants and submitted to ICE Trust for clearance and settlement as described herein.

³²

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

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

* * *

If you should have any questions or comments or require further information regarding this request for exemptive relief, please do not hesitate to contact any of the undersigned at 770-738-2120, in the case of ICE, and 312-786-5763, in the case of TCC, or their respective counsel, Abigail Arms of Shearman & Sterling LLP at 202-508-8025 and Edward J. Rosen of Cleary Gottlieb Steen & Hamilton LLP at 212-225-2820.

Very truly yours,

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Enclosures