

DEPARTMENT OF THE TREASURY

Order Granting Temporary Exemptions from Certain Government Securities Act Provisions and Regulations in Connection with a Request from ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments

AGENCY: Department of the Treasury, Office of the Assistant Secretary for Financial Markets.

ACTION: Notice of temporary exemptions.

SUMMARY: The Department of the Treasury (Treasury) is granting temporary exemptions from certain Government Securities Act provisions and regulations regarding the central clearing of credit default swaps that reference government securities. The temporary exemptions were requested by ICE Trust U.S. LLC. Treasury is also soliciting public comment on this order.

EFFECTIVE DATE: Effective March 7, 2010.

FOR FURTHER INFORMATION CONTACT: Lori Santamorena, Lee Grandy, or Kevin Hawkins, Bureau of the Public Debt, Department of the Treasury, at 202-504-3632.

SUPPLEMENTARY INFORMATION: The following is Treasury's order granting temporary exemptions:

I. Introduction

Treasury regulations govern transactions in government securities¹ by government securities brokers² and government securities dealers³ under Section 15C of

¹ The term government securities is defined at 15 U.S.C. 78c(a)(42).

² A government securities broker generally is "any person regularly engaged in the business of effecting transactions in government securities for the account of others," with certain exclusions. 15 U.S.C. 78c(a)(43).

the Securities Exchange Act of 1934 (Exchange Act), as amended by the Government Securities Act of 1986 (GSA). These regulations impose obligations concerning financial responsibility, protection of customer securities and balances, and recordkeeping and reporting.

Treasury has issued multiple orders providing temporary conditional exemptions to permit ICE Trust U.S. LLC (ICE Trust) to clear and settle transactions in credit default swaps (CDS)⁴ that reference government securities (collectively, "the ICE Trust orders"). Specifically, on March 6, 2009, Treasury granted a temporary exemption from certain GSA provisions and regulations to ICE Trust, certain ICE Trust participants, and certain eligible contract participants (ECPs)⁵ (the March 6, 2009 order).⁶ In the same order Treasury also granted a limited temporary exemption from certain GSA regulatory requirements to government securities brokers and government securities dealers that are not financial institutions. On December 7, 2009, Treasury extended the expiration date of these temporary exemptions until March 7, 2010 (the December 7, 2009 order).⁷ Also,

³ A government securities dealer generally is "any person engaged in the business of buying and selling government securities for his own account, through a broker or otherwise," with certain exclusions. 15 U.S.C. 78c(a)(44).

⁴ A CDS is a bilateral contract between two parties, known as counterparties. The value of this financial contract is based on underlying obligations of a single entity (reference entity) or on a particular security or other debt obligation, or an index of several such entities, securities, or obligations. The obligation of a seller to make payments under a CDS contract is triggered by a default or other credit event as to such entity or entities or such security or securities.

⁵ ECPs are defined in Section 1a(12) of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.* The use of the term ECPs in this order refers to the definition of ECPs in effect on the date of this order, and excludes persons that are ECPs under Section 1a(12)(C). The temporary exemption provided to ECPs in this order also applies to interdealer brokers that are ECPs.

⁶ 74 FR 10647, March 11, 2009 Order Granting Temporary Exemptions from Certain Provisions of the Government Securities Act and Treasury's Government Securities Act Regulations in Connection with a Request on Behalf of ICE US Trust LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments, available at:

http://www.treasurydirect.gov/instit/statreg/gsareg/gsareg_treasexemptiveorder309.pdf.

⁷ 74 FR 64127, December 7, 2009 Order Extending Temporary Exemptions from Certain Government Securities Act Provisions and Regulations in Connection with a Request from ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, available at:

[http://www.treasurydirect.gov/instit/statreg/gsareg/FR_Treasury_Order_ICE_Extension_\(12-7-09\).pdf](http://www.treasurydirect.gov/instit/statreg/gsareg/FR_Treasury_Order_ICE_Extension_(12-7-09).pdf).

on January 28, 2010, Treasury granted a temporary, conditional exemption⁸ until March 7, 2010, to certain ICE Trust clearing members and certain ECPs to accommodate using ICE Trust to clear customer CDS transactions (the January 28, 2010 order).

On February 23, 2010, Treasury received a letter (the request)⁹ from ICE Trust asking that Treasury extend the temporary exemptions in the March 6, 2009 and January 28, 2010 orders. The request relates to the exemption for ICE Trust clearing members, including certain entities affiliated with ICE Trust clearing members,¹⁰ and certain ECPs from provisions of the Exchange Act governing government securities transactions, to the extent such provisions would otherwise apply to such ICE Trust clearing members and ECPs in regard to cleared CDS.¹¹ The request also relates to the temporary exemption previously granted to registered or noticed government securities brokers and government securities dealers that are not financial institutions.

ICE Trust has stated that the existing orders have allowed the financial industry to advance the goal of central clearing of CDS. It also states that the orders should be extended because allowing them to expire will jeopardize the ability of ICE Trust to continue operations; that any regulatory risk to the use of ICE Trust as a central counterparty (CCP) could create a significant barrier to the goal of encouraging the use of

⁸ 75 FR 4626, January 28, 2010 Order Granting a Temporary Exemption from Certain Government Securities Act Provisions and Regulations in Connection with a Request from ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments, available at: <http://www.treasurydirect.gov/instit/statreg/gsareg/TreasuryICEOrderFedRegisterJan282010.pdf>

⁹ Letter from Kevin McClear, General Counsel, ICE Trust to the Commissioner of the Public Debt, Van Zeck, February 23, 2010, available at: <http://www.treasurydirect.gov/instit/statreg/gsareg/gsareg.htm>.

¹⁰ ICE Trust stated that, for purposes of its request, an affiliate means an entity that, directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, a clearing member.

¹¹ For purposes of this order, cleared CDS means a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to ICE Trust, that is offered only to, purchased only by, and sold only to ECPs (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this order (other than a person that is an ECP under paragraph (C) of that section)), and that references a government security.

CCPs in the clearing of CDS; and that it would be premature to allow the orders to expire in the absence of a clear framework for continuing ICE Trust's service. ICE Trust also notes that the orders provide regulatory agencies with adequate authority to monitor ICE Trust's activities, and that ICE Trust is also comprehensively monitored and regulated by state and federal banking supervisors.

Based on the facts presented and the representations made in the request,¹² Treasury is granting a temporary exemption to certain ICE Trust clearing members and certain ECPs from the GSA provisions in connection with using ICE Trust to clear both ICE Trust clearing members' proprietary and customer CDS transactions that reference government securities. Treasury is also granting a limited exemption from certain Treasury regulatory requirements for registered or noticed government securities brokers and government securities dealers that are not financial institutions with respect to both proprietary and customer CDS transactions that reference government securities. The exemptions are subject to certain conditions and will expire on November 30, 2010, unless Treasury renews, revokes, or modifies them. These temporary exemptions are consistent with an extension of temporary exemptions the Securities and Exchange Commission (SEC) recently granted to ICE Trust related to the central clearing of CDS.¹³

¹² See note 9, *supra*. The temporary exemptions Treasury is granting in this order are based on representations made in the current request and previous requests from ICE Trust. Treasury recognizes, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if these temporary exemptions become unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in cleared CDS associated with persons subject to the unavailable exemptions will remain unchanged, but no new positions can be established pursuant to the temporary exemptions until all of the underlying representations are again accurate.

¹³ See the SEC's website at www.sec.gov for the recent Securities Exchange Act Release. Order Extending Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection with Request of ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments.

In providing these temporary exemptions from certain provisions of Section 15C of the Exchange Act, Treasury is not determining whether particular CDS are “government securities” under 15 U.S.C. §78c(a)(42).

II. Discussion

A. ICE Trust's Clearing Activity

In its request for an extension, ICE Trust represents that, other than as discussed in its request, there have been no material changes to the operations of ICE Trust and the representations made in their previous letters requesting the relief Treasury provided in the ICE Trust orders.

The request states that, to date, the products eligible for clearing at ICE Trust include CDS transactions involving certain indices and CDS contracts based on individual reference entities or securities (single-name CDS contracts) that meet ICE Trust’s risk management and other criteria. The request also states that since the date of the March 2009 order, ICE Trust has cleared approximately \$3.5 trillion in notional amount of index-based CDS contracts and approximately \$10.3 billion in notional amount of single-name CDS contracts. We understand that to date, ICE Trust has not cleared any CDS contracts that reference U.S. government securities.

B. Conditional Temporary Exemption for Certain ICE Trust Clearing Members and Certain ECPs

In the March 6, 2009 order, Treasury concluded that the CCP clearing facility for CDS proposed by ICE Trust may increase transparency, enhance counterparty risk management, and contribute generally to the goal of mitigating systemic risk. Treasury further recognized the possibility that applying the GSA requirements to certain CDS

market participants that are not registered or noticed government securities brokers or government securities dealers could deter some of them from using ICE Trust to clear CDS transactions where the CDS references a government security, and thereby reduce the potential systemic risk mitigation and other benefits of central clearing. Consistent with these findings, as well as with the public interest and the protection of investors, Treasury temporarily exempted ICE Trust, certain ICE Trust clearing members, and certain ECPs from the GSA provisions. For similar reasons, in the December 7, 2009 order Treasury extended these temporary exemptions until March 7, 2010.

Also, on January 28, 2010, Treasury granted until March 7, 2010, a temporary, conditional exemption to accommodate customer clearing. The exemption was granted to certain ICE Trust clearing members and certain ECPs from the GSA provisions in connection with using ICE Trust to clear CDS transactions of their customers. Treasury recognized that facilitating the central clearing of CDS transactions, including those of ICE Trust clearing members' customers, will increase transparency, enhance counterparty risk management, and contribute generally to the goal of mitigating systemic risk.

Treasury finds that the circumstances upon which it issued the previous exemptions still exist and, therefore, Treasury believes that granting this temporary exemption is warranted and appropriate.

For these reasons, the Secretary finds that, it is consistent with the public interest, the protection of investors, and the purposes of the Exchange Act to grant the conditional, temporary exemption set forth below. This exemption will expire on November 30, 2010, unless Treasury renews, revokes, or modifies it and is consistent with a recent

extension of temporary exemptions the SEC granted related to a request from ICE Trust concerning central clearing of CDS.¹⁴

C. Temporary Exemption for Registered or Noticed Government Securities Brokers and Government Securities Dealers That Are Not Financial Institutions

In its March 6, 2009 order, Treasury provided a temporary exemption for government securities brokers and government securities dealers that are not financial institutions from certain GSA regulations with respect to CDS transactions that are submitted to ICE Trust for clearance and settlement.

In crafting this temporary exemption, Treasury balanced the need to avoid creating disincentives to the prompt use of CCPs against the critical role that certain government securities brokers and government securities dealers play in promoting market integrity and protecting customers. Treasury recognized that the full range of GSA requirements should not be applied immediately to government securities brokers and government securities dealers that engage in transactions involving CDS that reference a government security.

Accordingly, in light of the risk management and systemic benefits in continuing to facilitate CDS clearing by ICE Trust, the Secretary finds, pursuant to Section 15C(a)(5) of the Exchange Act, that it is consistent with the public interest, the protection of investors, and the purposes of the Exchange Act to grant a temporary exemption to registered or noticed government securities brokers and government securities dealers that are not financial institutions from the regulations in 17 CFR parts 402, 403, 404, and

¹⁴ See note 13, *supra*.

405 except as circumscribed below.¹⁵ Treasury is providing this temporary exemption to maintain consistency with the SEC's requirements applicable to registered broker-dealers with respect to CDS transactions that are submitted to ICE Trust for clearance and settlement. This exemption will expire on November 30, 2010, unless Treasury renews, revokes, or modifies it.

However, consistent with the March 6, 2009 order, this order does not exempt registered or noticed government securities brokers or government securities dealers from the following: (1) the capital requirements for registered government securities brokers and government securities dealers in part 402 of the GSA regulations (which are comparable to SEC Rule 15c3-1 on net capital);¹⁶ (2) the provisions of part 403 of the GSA regulations that incorporate and modify SEC Rule 15c3-3 on reserves and custody of securities; (3) the provisions of parts 404 and 405 of the GSA regulations that incorporate and modify SEC Rules 17a-3 through 17a-5, 17h-1T and 17h-2T, on records and reports; and (4) the provisions of part 404 of the GSA regulations that incorporate and modify SEC Rule 17a-13 on quarterly security counts. This temporary exemption applies to these entities' transactions in cleared CDS.¹⁷

With respect to noticed government securities brokers and government securities dealers that are financial institutions, the GSA regulations generally adopt the appropriate regulatory agency rules for financial institutions that are comparable to the SEC rules to which the Treasury exemption does not apply. The GSA regulations also incorporate other rules of the appropriate regulatory agencies that are applicable to financial

¹⁵ The rules in part 400 are excluded because they are rules of general application. The rules in part 401 are excluded because they cover existing exemptions. The rules in part 449 are excluded because they describe forms that are required by other rules.

¹⁶ Part 402 does not apply to registered broker-dealers that are subject to Rule 15c3-1.

¹⁷ See note 11, supra.

institutions. Consistent with Treasury's March 6, 2009 order, this temporary exemption does not apply to financial institution government securities brokers and government securities dealers, who should continue to comply with existing rules.

D. Consultations and Considerations

In ordering these temporary exemptions, Treasury has consulted with and considered the views of the staffs of the SEC, the Commodity Futures Trading Commission (CFTC), and the appropriate regulatory agencies for financial institutions.¹⁸

Treasury continues to believe that applying the GSA requirements to certain CDS market participants that are not registered or noticed government securities brokers or government securities dealers could deter some of them from using ICE Trust to clear CDS transactions where the CDS references a government security, thereby reducing the potential systemic risk mitigation and other benefits of central clearing. Treasury also continues to believe that, in order to avoid creating obstacles to the use of CCPs for CDS, the full range of GSA requirements generally should not be applied to government securities brokers and government securities dealers for transactions involving CDS that reference government securities. Moreover, Treasury continues to believe that it would be premature to allow the exemptions to expire.

Treasury bases this order on the facts and circumstances presented and representations made by ICE Trust in the request. ICE Trust has indicated that there have been no material changes to any of the facts or circumstances in its request for extension

¹⁸ The definition of appropriate regulatory agency with respect to a government securities broker or a government securities dealer is set out at 15 U.S.C. 78c(a)(34)(G). The definition includes the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Director of Thrift Supervision, and in limited circumstances the SEC.

and expansion of the March 6, 2009 order that would cause such representations to no longer be materially accurate.

III. SOLICITATION OF COMMENTS

When Treasury issued the March 6, 2009 and January 28, 2010 orders, we solicited comment on all aspects of the temporary exemptions, and specifically requested comment as to the duration of the temporary exemptions and the appropriateness of the exemptive conditions. We received no comments.

In connection with this order, we reiterate our request for comments on the relief we are granting and whether the conditions we have placed on the relief adequately protect customer funds and securities from the threat posed by a clearing member's insolvency.

Treasury will continue to monitor ICE Trust's progress and the development of CCPs for the CDS market and determine to what extent, if any, additional action might be necessary. For example, as circumstances warrant, certain conditions could be added, altered, or eliminated from this order.

Treasury also will continue to consult with the staffs of the SEC, the CFTC, and the appropriate regulatory agencies for financial institutions on this matter.

You may send comments to: Government Securities Regulations Staff, Bureau of the Public Debt, 799 9th Street N.W., Washington, D.C. 20239-0001. You may also send comments by e-mail to govsecreg@bpd.treas.gov. Please provide your full name and mailing address. You may download this order, and review the comments we receive, from the Bureau of the Public Debt's website at www.treasurydirect.gov. The order and comments also will be available for public inspection and copying at the Treasury

Department Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, N.W., Washington, D.C. 20220. To visit the library, call (202) 622-0990 for an appointment.

IV. CONCLUSION

IT IS HEREBY ORDERED, pursuant to Section 15C(a)(5) of the Exchange Act, that, until November 30, 2010:

(a) Conditional Temporary Exemption for Certain ECPs and ICE Trust Clearing Members.

(1) Persons eligible. This exemption is available to any ECP¹⁹ and any ICE Trust clearing member except for: ICE Trust clearing members and ECPs that are registered or noticed as government securities brokers or government securities dealers under Section 15C(a)(1) of the Exchange Act; ECPs as defined in Section 1a(12)(C) of the Commodity Exchange Act; and ECPs that are not ICE Trust clearing members and that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding cleared CDS positions for other persons.

(2) Scope of exemption. Subject to the conditions specified in paragraph (3) of this section, ECPs and ICE Trust clearing members, solely with respect to cleared CDS, are exempt from the provisions of Section 15C(a), (b), and (d) (other than subsection (d)(3)) of the Exchange Act, and the rules thereunder.

(3) Conditions for ICE Trust clearing members.

(i) Each ICE Trust clearing member relying on this exemption must be in material compliance with ICE Trust rules.

¹⁹ See note 5, *supra*.

(ii) Each ICE Trust clearing member relying on this exemption that participates in the clearing of cleared CDS transactions on behalf of its customers must promptly provide a certification to ICE Trust that states that it is relying on the temporary exemption.

(4) Additional conditions for certain ICE Trust clearing members. Each ICE Trust clearing member relying on the exemption that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding cleared CDS positions for U.S. persons (or for any persons if the ICE Trust clearing member is a U.S. clearing member) – other than for an affiliate that controls, is controlled by, or is under common control with the ICE Trust clearing member – also must comply with the following six conditions with respect to such activities:

(i) No natural persons. The U.S. persons (or any persons if the ICE Trust clearing member is a U.S. clearing member) for whom the ICE Trust clearing member receives or holds such funds or securities may not be natural persons.

(ii) Disclosures. The ICE Trust clearing member must disclose to such U.S. persons (or to any such persons if the ICE Trust clearing member is a U.S. clearing member) that: (A) the ICE Trust clearing member is not regulated by Treasury or the SEC with respect to activities covered by this exemption; (B) U.S. government securities broker and government securities dealer segregation requirements and protections under the Securities Investor Protection Act will not apply to any funds or securities held by the ICE Trust clearing member; (C) the insolvency law of the applicable jurisdiction may affect such persons' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding; and (D) if applicable, non-U.S. clearing members

may be subject to an insolvency regime that is materially different from that applicable to U.S. persons.

(iii) Prompt transfer of funds and securities. As promptly as practicable after receipt, the ICE Trust clearing member must transfer such funds and securities (other than those promptly returned to such other person) to: (A) the ICE Trust clearing member's Custodial Client Omnibus Margin Account at ICE Trust; or (B) an account held by a third-party custodian, subject to the requirements in paragraph (vi) of this section.

(iv) Segregation until transfer. To the extent there is any delay in transferring such funds and securities (collateral) to the third parties identified in paragraph (iii) of this section, the ICE Trust clearing member must segregate the collateral in a way that, pursuant to applicable law, is reasonably expected to protect such collateral from the ICE Trust clearing member's creditors. The ICE Trust clearing member must not permit persons for whom it receives or holds such funds and securities to "opt out" of such segregation even if regulations or laws otherwise would permit it.

(v) Cooperation with SEC. The ICE Trust clearing member must be in compliance with any request from the SEC for information, documents, or assistance related to CDS transactions cleared by ICE Trust.

(vi) Requirements for third-party custodian account. An ICE Trust clearing member that transfers customer assets to an account held by a third-party custodian under paragraph (iii) of this section must be in material compliance with the SEC's

requirements set forth in its related exemptive order concerning third-party custodian accounts.²⁰

(b) Temporary Exemption for Registered or Noticed Government Securities Brokers and Government Securities Dealers that are not Financial Institutions.

Registered or noticed government securities brokers and government securities dealers that are not financial institutions are exempt from the regulations in 17 CFR parts 402, 403, 404, and 405. However, this order does not exempt registered or noticed government securities brokers or government securities dealers that are not financial institutions from the following:

(1) the capital requirements for registered government securities brokers and government securities dealers in part 402 of the GSA regulations (which are comparable to SEC Rule 15c3-1 on net capital);

(2) the provisions of part 403 of the GSA regulations that incorporate and modify SEC Rule 15c3-3 on reserves and custody of securities;

(3) the provisions of parts 404 and 405 of the GSA regulations that incorporate and modify SEC Rules 17a-3 through 17a-5, 17h-1T and 17h-2T, on records and reports; and

(4) the provisions of part 404 of the GSA regulations that incorporate and modify SEC Rule 17a-13 on quarterly security counts.

This temporary exemption applies to these entities' transactions in cleared CDS.

The temporary exemptions contained in this order are based on the facts and circumstances presented in the request and are conditioned on compliance with the terms of this order. These temporary exemptions could become unavailable if the facts or

²⁰ See note 13 *infra*.

circumstances change such that the representations in the request are no longer materially accurate or in the event of non-compliance. If the SEC were to withdraw or modify the terms of its order, Treasury may revoke or modify this order accordingly. The status of cleared CDS submitted to ICE Trust prior to such change would be unaffected.

V. PAPERWORK REDUCTION ACT

This order includes two requests that fall within the definition of "information" under the regulations implementing the Paperwork Reduction Act (PRA). 5 CFR 1320.3(h). One is the certification that ICE Trust clearing members must provide to ICE Trust under paragraph (a)(3)(ii) of this order, concerning their reliance on Treasury's temporary exemption. The second is the disclosures that certain ICE Trust clearing members must make if they receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding cleared CDS positions for U.S. persons, under paragraph (a)(4)(ii) of this order.

However, Treasury at this time estimates that there will not be 10 or more ICE Trust clearing members that will be relying on this order to clear CDS that reference a government security. As a result, these requests do not constitute "collections of information" subject to the PRA. 5 CFR 1320.3(c). Therefore, the PRA does not apply to this order.

Mary J. Miller,

Assistant Secretary for Financial Markets.