

## **SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 240 and 249**

**Release No. 34-69284; File No. S7-29-11**

**RIN 3235-AL18**

### **Amendment to Rule Filing Requirements for Dually-Registered Clearing Agencies**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission (“SEC” or “Commission”) is affirming recent amendments to Rule 19b-4 under the Securities Exchange Act of 1934 (“Exchange Act”) in connection with filings of proposed rule changes by certain registered clearing agencies and is expanding on those amendments in response to comments received (collectively, “Final Rule”).

The Commission also is making corresponding technical modifications to the General Instructions for Form 19b-4 under the Exchange Act. The amendments to Rule 19b-4 and the instructions to Form 19b-4 are intended to streamline the rule filing process in areas involving certain activities concerning non-security products that may be subject to duplicative or inconsistent regulation as a result of, in part, certain provisions under Section 763(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”).

**EFFECTIVE DATE:** June 10, 2013.

**FOR FURTHER INFORMATION CONTACT:** Joseph P. Kamnik, Assistant Director; Gena Lai, Senior Special Counsel; and Neil Lombardo, Attorney, Office of Clearance and Settlement, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010 at (202) 551-5710.

**SUPPLEMENTARY INFORMATION:** The Commission is adopting a Final Rule that

affirms and expands upon recent amendments to Rule 19b-4 under the Exchange Act concerning categories of proposed rule changes that qualify for effectiveness upon filing under Section 19(b)(3)(A) of the Exchange Act. The Commission also is making a corresponding technical modification to the General Instructions for Form 19b-4 under the Exchange Act.

## **I. Introduction**

### **A. Background on the Commission’s Process for Proposed Rule Changes**

Section 19(b)(1) of the Exchange Act<sup>1</sup> requires each self-regulatory organization (“SRO”), including any Registered Clearing Agency,<sup>2</sup> to file with the Commission copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such SRO (collectively, “proposed rule change”),<sup>3</sup> which must be submitted on Form 19b-4<sup>4</sup> in accordance with the General Instructions thereto. Once a proposed rule change has been filed, the Commission is required to publish it in the Federal Register to provide an opportunity for public

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> See Section 3(a)(26) of the Exchange Act, 15 U.S.C. 78c(a)(26) (defining the term “self-regulatory organization” to mean any national securities exchange, registered securities association, registered clearing agency, and, for purposes of Section 19(b) and other limited purposes, the Municipal Securities Rulemaking Board) (emphasis added).

<sup>3</sup> 15 U.S.C. 78s(b)(1). Section 3(a)(27) of the Exchange Act defines “rules” to include “the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing . . . and such of the stated policies, practices, and interpretations of such exchange, association, or clearing agency as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange, association, or clearing agency.” 15 U.S.C. 78c(a)(27). Rule 19b-4(b) under the Exchange Act defines “stated policy, practice, or interpretation” to mean, in part, “[a]ny material aspect of the operation of the facilities of the self-regulatory organization” or “[a]ny statement made generally available” that “establishes or changes any standard, limit, or guideline” with respect to the “rights, obligations, or privileges” of persons or the “meaning, administration, or enforcement of an existing rule.” 17 CFR 240.19b-4(b).

<sup>4</sup> See 17 CFR 249.819.

comment.<sup>5</sup> A proposed rule change generally may not take effect unless the Commission approves it,<sup>6</sup> or it otherwise becomes effective under Section 19(b).<sup>7</sup>

Section 19(b)(2) of the Exchange Act sets forth the standards and time periods for Commission action either to approve, disapprove, or institute proceedings to determine whether the proposed rule change should be disapproved.<sup>8</sup> The Commission must approve a proposed rule change if it finds that the underlying rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the SRO proposing the rule change.<sup>9</sup>

At the same time, Section 19(b)(3)(A) of the Exchange Act provides that a proposed rule change may become effective upon filing with the Commission, without pre-effective notice and opportunity for comment, if it is appropriately designated by the SRO as: (i) constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the SRO; (ii) establishing or changing a due, fee, or other charge imposed by the SRO on any person, whether or not the person is a member of the SRO; or (iii) relating solely to the administration of the SRO.<sup>10</sup>

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<sup>5</sup> See 15 U.S.C. 78s(b)(1). The SRO is required to prepare the notice of its proposed rule change on Exhibit 1 of Form 19b-4 that the Commission then publishes in the Federal Register.

<sup>6</sup> See 15 U.S.C. 78s(b)(2). However, as provided in Section 19(b)(2)(D) of the Exchange Act, 15 U.S.C. 78s(b)(2)(D), a proposed rule change shall be “deemed to have been approved by the Commission” if the Commission does not take action on a proposal that is subject to Commission approval within the statutory time frames specified in Section 19(b)(2).

<sup>7</sup> See, e.g., 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> See 15 U.S.C. 78s(b)(2).

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

Section 19(b)(3)(B) of the Exchange Act also separately provides that a proposed rule change may be put into effect summarily if it appears to the Commission that such action is necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds, and provides that any proposed rule change so put into effect shall be filed promptly thereafter with the Commission under Section 19(b)(1) of the Exchange Act.<sup>11</sup> Accordingly, a proposed rule change put into effect summarily under Section 19(b)(3)(B) of the Exchange Act is also subject to the procedures of Section 19(b)(2) of the Exchange Act – in other words, that it is summarily effective only until such time as the Commission: (i) enters an order, pursuant to Section 19(b)(2)(A) of the Act, to approve or disapprove such proposed rule change; or (ii) institutes proceedings to determine whether the proposed rule change should be disapproved.<sup>12</sup>

Under Section 19(b)(3)(C) of the Exchange Act, the Commission summarily may temporarily suspend a proposed rule change of an SRO that has taken effect pursuant to either Section 19(b)(3)(A) or 19(b)(3)(B) of the Exchange Act within sixty days of its filing if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.<sup>13</sup> If the Commission takes such action, it is then required to institute proceedings to determine whether the proposed rule change should be approved or disapproved.<sup>14</sup>

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(B).

<sup>12</sup> See Securities Exchange Act Release Nos. 11461 (June 11, 1975); 11554 (July 28, 1975); 11555 (July 28, 1975); and 11556 (July 28, 1975). See also 17 CFR 249.819.

<sup>13</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>14</sup> Id. Temporary suspension of a proposed rule change and any subsequent action to approve or disapprove such change shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under Section 25 of the

In addition to the matters expressly set forth in the statute, Section 19(b)(3)(A) also provides the Commission with the authority, by rule and when consistent with the public interest, to designate other types of proposed rule changes that may be effective upon filing with the Commission.<sup>15</sup> The Commission has previously used this authority to designate, under Rule 19b-4 of the Exchange Act, certain rule changes that qualify for effectiveness upon filing under Section 19(b)(3)(A).<sup>16</sup> On July 7, 2011, the Commission adopted an interim final rule (“Interim Final Rule”) to amend Rule 19b-4 to include in the list of categories that qualify for effectiveness upon filing under Section 19(b)(3)(A) of the Exchange Act any matter effecting a change in an existing service of a Registered Clearing Agency that (i) primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and (ii) does

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Exchange Act, nor shall it be deemed to be “final agency action” for purposes of 5 U.S.C. 704. Id.

<sup>15</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>16</sup> For example, Rule 19b-4(f) under the Exchange Act currently permits SROs to declare rule changes to be immediately effective pursuant to Section 19(b)(3)(A) if properly designated by the SRO as: (i) effecting a change in an existing service of a Registered Clearing Agency that: (A) does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible; and (B) does not significantly affect the respective rights or obligations of the clearing agency or persons using the service; (ii) effecting a change in an existing order-entry or trading system of an SRO that: (A) does not significantly affect the protection of investors or the public interest; (B) does not impose any significant burden on competition; and (C) does not have the effect of limiting the access to or availability of the system; or (iii) effecting a change that: (A) does not significantly affect the protection of investors or the public interest; (B) does not impose any significant burden on competition; and (C) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the SRO has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. See 17 CFR 240.19b-4(f).

not significantly affect any securities<sup>17</sup> clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service.<sup>18</sup> The Interim Final Rule also made corresponding technical modifications to the General Instructions for Form 19b-4. These actions were intended to provide a streamlined process for making effective, subject to certain conditions, proposed rule changes that primarily concern the futures clearing operations of a Registered Clearing Agency and are not linked to securities clearing operations.

**B. Clearing Agencies Deemed Registered Under the Dodd-Frank Act**

Section 763(b) of the Dodd-Frank Act<sup>19</sup> provides that (i) a depository institution registered with the Commodities Futures Trading Commission (“CFTC”) that cleared swaps as a multilateral clearing organization prior to the date of enactment of the Dodd-Frank Act and (ii) a derivatives clearing organization (“DCO”) registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act will be deemed registered with the Commission as a clearing agency solely for

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<sup>17</sup> Section 3(a)(10) of the Exchange Act defines “security” to include “any note, stock, treasury stock, security future, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or substitution, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any instrument commonly known as a ‘security’; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing . . . .” 15 U.S.C. 78c(a)(10).

<sup>18</sup> See Amendment to Rule Filing Requirements for Dually-Registered Clearing Agencies, Securities Exchange Act Release No. 34-64832 (July 7, 2011), 76 FR 41056 (July 13, 2011).

<sup>19</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

the purpose of clearing security-based swaps (“Deemed Registered Provision”).<sup>20</sup> On July 16, 2011, the Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, became effective,<sup>21</sup> thereby requiring each affected clearing agency to comply with all requirements of the Exchange Act and the rules and regulations thereunder applicable to Registered Clearing Agencies including, for example, the obligation to file proposed rule changes under Section 19(b) of the Exchange Act. The clearing of swaps,<sup>22</sup> futures, options on futures, and forwards is generally regulated by the CFTC in connection with its oversight and supervision of DCOs. DCOs are generally permitted to implement rule changes by self-certifying that the new rule complies with the CEA and the CFTC’s regulations.<sup>23</sup> The changes effected by the Interim Final Rule were intended to eliminate unnecessary delays that could arise due to the differences between the Commission’s rule filing process and the CFTC’s self-certification process, which generally allows rule changes to become effective either before

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<sup>20</sup> See Section 763(b) of the Dodd-Frank Act (adding new Section 17A(l) to the Exchange Act, 15 U.S.C. 78q-1(1)). Under this Deemed Registered Provision, each of the Chicago Mercantile Exchange Inc. (“CME”), ICE Clear Europe Limited (“ICE Clear Europe”) and ICE Clear Credit LLC (“ICC”), as the successor entity of ICE Trust US LLC, became Registered Clearing Agencies solely for the purpose of clearing security-based swaps. Registered Clearing Agencies that currently conduct a swaps or a futures business are The Options Clearing Corporation (“OCC”), CME, ICE Clear Europe and ICC.

<sup>21</sup> Section 774 of the Dodd-Frank Act states, “[u]nless otherwise provided, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle.”

<sup>22</sup> Section 721 of the Dodd-Frank Act amended Section 1a of the Commodity Exchange Act (“CEA”) to define the term “swap.” Among other things, the definition of “swap” specifically excludes any security-based swap other than a mixed swap. 7 U.S.C. 1a(47)(B)(x). See also Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48207 (August 13, 2012) (“Adopting Release”); 76 FR 29818 (May 23, 2011) (“Proposing Release”).

<sup>23</sup> See 7 U.S.C. 7a-2(c) and 17 CFR 40.6.

or within ten days after filing.<sup>24</sup>

### C. The Interim Final Rule

The Interim Final Rule amended Rule 19b-4 to expand the list of categories that qualify for effectiveness immediately upon filing pursuant to Section 19(b)(3)(A) of the Exchange Act to include proposed rule changes made by Registered Clearing Agencies with respect to certain futures clearing operations.<sup>25</sup> Specifically, the Interim Final Rule amended Rule 19b-4(f)(4)(ii) to allow a proposed rule change concerning futures clearing operations filed by a Registered Clearing Agency to take effect upon filing with the Commission pursuant to Section 19(b)(3)(A) so long as it is properly designated by the Registered Clearing Agency as effecting a change in a service of the Registered Clearing Agency that meets two conditions.<sup>26</sup> The first condition, set forth in Interim Final Rule 19b-4(f)(4)(ii)(A), is that the proposed rule change must primarily affect the futures clearing operations of the clearing agency with respect to futures that are not security futures.<sup>27</sup> For purposes of this requirement, a Registered Clearing Agency's "futures

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<sup>24</sup> See 7 U.S.C. 7a-2(c) and 17 CFR 40.6.

<sup>25</sup> When an SRO designates a proposed rule change as becoming effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Exchange Act, the Commission has the power summarily to temporarily suspend the change within sixty days of its filing if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. See 15 U.S.C. 78s(b)(3)(A). See also *supra* note 14 and accompanying text.

<sup>26</sup> 17 CFR 240.19b-4(f)(4)(ii) (as amended by the Interim Final Rule).

<sup>27</sup> 17 CFR 240.19b-4(f)(4)(ii)(A) (as amended by the Interim Final Rule). For example, rules of general applicability that apply equally to securities clearing operations, including security-based swaps, would not be considered to primarily affect such futures clearing operations. In addition, changes to general provisions in the constitution, articles, or bylaws of the Registered Clearing Agency that address the operations of the entire clearing agency would not be considered to primarily affect such futures clearing operations. See Interim Final Rule, Securities Exchange Act Release No. 64832 (July 7, 2011), 76 FR 41056, 41058 (July 13, 2011).



clearing operations” includes any activity that would require the Registered Clearing Agency to register with the CFTC as a DCO in accordance with the CEA.<sup>28</sup> In addition, to “primarily affect” such futures clearing operations means that the proposed rule change is targeted to affect matters related to the clearing of futures specifically, and that any effect on other clearing operations would be incidental in nature and not significant in extent. Because a security futures product is a security for purposes of the Exchange Act,<sup>29</sup> a Registered Clearing Agency may not invoke Rule 19b-4(f)(4)(ii) to designate proposed rule changes concerning the agency’s security futures operations as taking effect upon filing with the Commission pursuant to Section 19(b)(3)(A). Instead, the Commission reviews such proposed rule changes in accordance with Section 19(b)(2), unless there is another basis for the change to be filed under Section 19(b)(3)(A).

The second condition, contained in Interim Final Rule 19b-4(f)(4)(ii)(B), is that the proposed rule change must not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service.<sup>30</sup> The phrase “significantly affect” is used elsewhere in Rule 19b-4 in the context of defining other categories of proposed rule changes that qualify for effectiveness upon filing

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<sup>28</sup> See 7 U.S.C. 7a-1 (providing that it shall be unlawful for a DCO, unless registered with the CFTC, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a DCO (as described in 7 U.S.C. 1a(9)) with respect to a contract of sale of a commodity for future delivery (or option on such a contract) or option on a commodity, in each case unless the contract or option is (i) otherwise excluded from registration in accordance with certain sections of the CEA or (ii) a security futures product cleared by a Registered Clearing Agency); see also Interim Final Rule, Securities Exchange Act Release No. 64832 (July 7, 2012), 76 FR 41056, 41058 (July 13, 2011).

<sup>29</sup> 15 U.S.C. 78c(a)(10).

<sup>30</sup> 17 CFR 240.19b-4(f)(4)(ii)(B) (as amended by the Interim Final Rule).

under Section 19(b)(3)(A) of the Exchange Act.<sup>31</sup> Accordingly, “significantly affect” has the same meaning and interpretation as that phrase has in Rules 19b-4(f)(4)(i) (as amended by the Interim Final Rule), 19b-4(f)(5), and 19b-4(f)(6). The Commission believes that a Registered Clearing Agency’s “securities clearing operations . . . or any related rights or obligations of the clearing agency or persons using such service” would include activity that would require the Registered Clearing Agency to register as a clearing agency in accordance with the Exchange Act.

## **II. Final Rule**

### **A. Comments Received on the Interim Final Rule**

The Commission received three comment letters on the Interim Final Rule.<sup>32</sup> Two commenters urged the Commission to modify the Interim Final Rule to broaden the list of rule changes that qualify for effectiveness upon filing pursuant to Section 19(b)(3)(A) to include changes related to all products that are regulated by the CFTC.<sup>33</sup>

In their comment letters, both CME and ICE Clear Europe urged the Commission to expand Rule 19b-4(f)(4)(ii) to include proposed rule changes related to the swaps clearing

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<sup>31</sup> See, e.g., 17 CFR 240.19b-4(f)(4)(i) (as amended by the Interim Final Rule) (in respect of a proposed rule change in an existing service of a Registered Clearing Agency that: (1) does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible and (2) does not significantly affect the respective rights or obligations of the clearing agency or persons using the service); see also Interim Final Rule, Securities Exchange Act Release No. 64832 (July 7, 2012), 76 FR 41056, 41059 (July 13, 2011).

<sup>32</sup> Copies of comments received on the proposal are available on the Commission’s website at: <http://www.sec.gov/comments/s7-29-11/s72911.shtml>.

<sup>33</sup> See, e.g., comment letter of Craig Donohue, Chief Executive Office, CME Group, Inc. (Sep. 15, 2011) (“CME Letter”) and comment letter of Shearman & Sterling LLP, on behalf of ICE Clear Europe Limited (Sept. 15, 2011) (“ICE Clear Europe Letter”).

operations of a Registered Clearing Agency.<sup>34</sup> In particular, CME noted that its current business involves the clearing of both futures and swaps, including agricultural swaps, interest rate swaps, certain over-the-counter (“OTC”) commodity products (including gold forwards and freight forwards) and, potentially, energy and foreign exchange swaps.<sup>35</sup> CME raised concerns that, by omitting swaps and certain other OTC products from the types of products covered by Rule 19b-4(f)(4)(ii), it is “now subject to substantial potential delays” when implementing rule changes that deal with products over which the Commission is not its primary regulator.<sup>36</sup> ICE Clear Europe raised similar concerns with respect to its non-security-based swaps business, particularly its longstanding energy derivatives clearing business.<sup>37</sup> Specifically, ICE Clear Europe requested that Rule 19b-4(f)(4)(ii) be expanded to include proposed rule changes that relate solely to swaps, and are not related to security-based swaps.<sup>38</sup>

CME also requested that the Commission revise Rule 19b-4(f)(4)(ii) generally such that only proposed rule changes that relate directly to security-based swap clearing activities would be subject to the Commission’s review in accordance with Section 19(b)(2).<sup>39</sup> CME further requested that Rule 19b-4(f)(4)(ii) permit proposed rule change filings to be made pursuant to Section 19(b)(3)(A) with respect to “rules of general applicability for product categories, such as [credit default swaps], where clearing is offered for both swaps and security-based swaps” and that a Section 19(b)(2) filing not be required for any other swap or “OTC product categories with

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<sup>34</sup> See CME Letter and ICE Clear Europe Letter.

<sup>35</sup> See CME Letter.

<sup>36</sup> Id.

<sup>37</sup> See ICE Clear Europe Letter.

<sup>38</sup> Id.

<sup>39</sup> See CME Letter.

no direct or significant impact on security-based swaps,” and should also not be required for “broad rules of general applicability as to clearing operations that will not have any particular or significant impact on security-based swaps clearing.”<sup>40</sup> CME stated that, at present, its entire business, including the clearing of credit default swaps on broad-based indices, falls under the exclusive jurisdiction of the CFTC, and that the effect of the Interim Final Rule has been to replace the rule filing regime of the CEA with the pre-approval rule filing regime of the Exchange Act. CME stated that it believes the Deemed Registered Provision was intended to allow clearing agencies already authorized to clear and engaged in the clearing of credit default swaps and other products under the authority of the CFTC to continue to do so without undue disruption to its service offerings, and that Congress did not intend to change this fundamental division of responsibilities.

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<sup>40</sup> Id. In its comment letter, CME noted that Executive Order 13563, which the President signed on January 18, 2011, requires, among other things, that all executive branch agencies identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public, in each case where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law. While this order does not apply to independent agencies, the President separately signed Executive Order 13579 on July 11, 2011, which requires each independent agency to develop and release a public plan to periodically review its existing significant regulations “to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.” The Commission notes that the purpose of Rule 19b-4(f)(4)(ii) is to reduce burdens that would otherwise apply to Registered Clearing Agencies by virtue of certain statutory provisions contained in the Exchange Act, as amended by the Dodd-Frank Act. Specifically, the Final Rule permits Registered Clearing Agencies to submit to the Commission for effectiveness upon filing proposed rule changes that effect changes in their existing services that primarily affect their clearing of products that are not securities, including futures that are not security futures, swaps that are not securities-based swaps or mixed swaps, and forwards that are not security forwards, and that do not significantly affect the clearing agency’s securities clearing operations or the rights or obligations of the clearing agency with respect to securities clearing or persons using such securities clearing services.

## **B. Amendments to the Interim Final Rule**

The Commission hereby affirms the amendments effected by the Interim Final Rule. As set forth herein, and after giving consideration to the comments received concerning the Interim Final Rule, the Commission is hereby modifying Rule 19b-4(f)(4)(ii) in two further respects.

### **1. Inclusion of Other Products That Are Not Securities, Including Certain Swaps and Forwards<sup>41</sup>**

First, the Commission is revising Rule 19b-4(f)(4)(ii) to add certain rule changes primarily affecting a Registered Clearing Agency's clearing operations for other non-securities products to the list of changes that qualify for effectiveness upon filing pursuant to Section 19(b)(3)(A). In particular, in response to commenters,<sup>42</sup> the Commission is broadening Rule 19b-4(f)(4)(ii)(A) to encompass proposed rule changes that primarily affect not only a Registered Clearing Agency's clearing of futures that are not security futures, but also other products that are not securities, including swaps that are not security-based swaps<sup>43</sup> or mixed swaps,<sup>44</sup> and forwards that are not security forwards.<sup>45</sup> The Commission believes that also including proposed

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<sup>41</sup> Section 721 of the Dodd-Frank Act defines the term "swap" broadly to encompass a variety of derivatives products. The definition includes, for example, interest rate swaps, commodity swaps, currency swaps, equity swaps, and credit default swaps. It also extends to certain types of forward contracts, as well as certain types of options, but excludes, among other things, options on any security or group or index of securities, including any interest therein or based on the value thereof. See 7 U.S.C. § 1a(47).

<sup>42</sup> See CME Letter and ICE Clear Europe Letter.

<sup>43</sup> See 15 U.S.C. 78(c)(68).

<sup>44</sup> See 15 U.S.C. 78(c)(68)(D).

<sup>45</sup> The Commission notes that it would not regard a clearing agency's filing of proposed rule changes relating to a product the legal status of which may not be clear pursuant to Section 19(b)(2) or Section 19(b)(3)(B) of the Act as a determination or presumption by the clearing agency that such proposed rule changes involve products that are securities. Similarly, the Commission's acceptance of proposed rule changes for filing under paragraph (f)(4)(ii) would not constitute a presumption or determination by the Commission that the products involved are not securities. The Commission also notes

rule changes that primarily affect a Registered Clearing Agency's clearing operations with respect to these non-securities products in the list of changes that would qualify for effectiveness upon filing under Section 19(b)(3)(A) is consistent with the Commission's purposes for initially amending Rule 19b-4 pursuant to the Interim Final Rule. Specifically, this approach should help limit potential delays to the effectiveness of rule changes that primarily concern a Registered Clearing Agency's clearing operations with respect to products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards, subject to the limitations contained in Rule 19b-4(f)(4)(ii)(B).<sup>46</sup>

For purposes of Rule 19b-4(f)(4)(ii)(A), a Registered Clearing Agency's clearing operations with respect to products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards, would include an activity that would require the Registered Clearing Agency to register with the CFTC as a DCO in accordance with the CEA.<sup>47</sup> In addition, a proposed rule

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that Section 718 of the Dodd-Frank Act ("Section 718") established a process through which the Commission and the CFTC could work together to determine the status of "novel derivative products" that may have elements of both securities and contracts of sale of a commodity for future delivery (or options on such contracts or options on commodities). In this regard, the Commission notes that the filing of a proposed rule change pursuant to Section 19(b)(2) or Section 19(b)(3)(B) of the Act, or paragraph (f)(4)(ii), would not be considered a notice under Section 718 to the Commission.

<sup>46</sup> 17 CFR 240.19b-4(f)(ii)(B) (providing, as the second condition for satisfying Rule 19b-4(f)(ii), that the proposed rule change "[d]oes not significantly affect any securities clearing operations of the clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service.").

<sup>47</sup> See 7 U.S.C. 7a-1 (providing that it shall be unlawful for a DCO, unless registered with the CFTC, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a DCO (as described in 7 U.S.C. 1a(9)) with respect to a contract of sale of a commodity for future delivery (or option on

change “[p]rimarily affects” a clearing agency’s clearing operations with respect to products that are not securities when it is targeted to matters related only to the clearing of those products.<sup>48</sup>

For example, rules of general applicability that would apply equally to securities clearing operations, including security-based swaps, would not be considered to primarily affect a Registered Clearing Agency’s non-securities clearing operations. While CME requested that rules of general applicability be eligible for effectiveness upon filing, the Commission believes rules that would have equal applicability to securities clearing operations must be filed for Commission review in accordance with Section 19(b)(2), which will enable the Commission to fulfill its statutory obligations under the Exchange Act. If rules that have a significant impact on securities operations were permitted to become immediately effective, the Commission would not have the ability to review the impact of the rules against Exchange Act standards before their effectiveness, which would undercut the scope of the Commission’s oversight of registered clearing agencies. In addition, changes to general provisions in the constitution, articles, or bylaws of the Registered Clearing Agency that address the operations of the entire clearing agency also would not be considered to primarily affect such Registered Clearing Agency’s clearing operations with respect to products that are not securities.

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such a contract) or option on a commodity, in each case unless the contract or option is (i) otherwise excluded from registration in accordance with certain sections of the CEA or (ii) a security futures product cleared by a Registered Clearing Agency).

<sup>48</sup> If a proposed rule change filed pursuant to Section 19(b)(3)(A) has an incidental but significant effect on clearing operations with respect to products that are not securities and does not qualify under new Rule 19b-4(f)(4)(ii)(B)(II), the Commission summarily may, within 60 days after the proposed rule change becomes effective under Section 19(b)(3)(A), temporarily suspend the rule change and institute proceedings to determine whether to approve or disapprove the rule change pursuant to the provisions of Section 19(b)(2). Alternatively, as with other filings that do not meet the requirements of Section 19(b)(3)(A) and Rule 19b-4(f), the Commission may reject the filing as technically deficient within seven business days, pursuant to Section 19(b)(10)(B). 15 USC 78s(b)(10)(B).

Further, because security futures, security-based swaps, mixed swaps, security forwards, and options on securities are considered securities for purposes of the Exchange Act,<sup>49</sup> a Registered Clearing Agency would not be permitted to file proposed rule changes related to these lines of business pursuant to Section 19(b)(3)(A) of the Exchange Act in reliance on Rule 19b-4(f)(4)(ii). Instead, such clearing agency would continue to be required to file proposed rule changes related to its clearing of security futures, security-based swaps, mixed swaps, security forwards, options on securities, or other securities products for Commission review in accordance with Section 19(b)(2) of the Exchange Act, unless there is another basis for the proposed rule change to be filed under Section 19(b)(3)(A).

The Commission generally believes that it is appropriate to review proposed rule changes in accordance with the process set forth in Section 19(b)(2) of the Exchange Act whenever the changes “significantly affect” any securities clearing operations of the clearing agency (unless there is another basis for the proposed rule change to be filed under Section 19(b)(3)(A)), even in circumstances when such effects may be indirect.<sup>50</sup>

The Commission is charged with determining whether the rules of a Registered Clearing Agency are designed, among other things, “to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible . . . and,

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<sup>49</sup> 15 U.S.C. 78c(a)(10). As previously noted, however, the definition of “swap” specifically excludes any security-based swap other than a mixed swap. See supra note 22.

<sup>50</sup> For example, in instances where the swap and security-based swap business of a clearing agency are intertwined, such as when a clearing agency has established one clearing fund or pool of financial resources for both products, changes applicable to such swaps are unlikely to meet the requirement that the change not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service.



to protect investors and the public interest.”<sup>51</sup> The Commission’s oversight responsibility over Registered Clearing Agencies extends to the clearing agency as a whole and is entity-based, rather than product-based.<sup>52</sup> If Registered Clearing Agencies did not file proposed rule changes with the Commission that relate to their clearing operations, as required under Section 19(b) of the Exchange Act, the Commission would not be able to meet its statutory oversight responsibilities.

## **2. Addition of the “Fair and Orderly Markets” Provision**

In light of the issues identified by the commenters in connection with the Interim Final Rule, the Commission has determined to further revise Rule 19b-4(f)(4)(ii)(B) by adding a second clause that will permit clearing agencies to file a proposed rule change under Section 19(b)(3)(A) when the rule change primarily affects the clearing operations of the clearing agency with respect to products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards, even when the proposed rule “significantly affects” any securities clearing operations of the clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service, if the clearing agency can demonstrate that the rule change is “necessary to maintain fair and orderly markets for products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards.”

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<sup>51</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>52</sup> See S. Rep. No. 94-75, at 34 (1975), reprinted in 1975 U.S.C.C.A.N. 179, 212 (“The Commission has oversight responsibility with respect to the self-regulatory organizations to insure that they exercise their delegated governmental power effectively to meet regulatory needs in the public interest and that they do not exercise that delegated power in a manner inimical to the public interest or unfair to private interests.”).

A proposed rule change filed by a clearing agency relying on this “fair and orderly markets” provision must, in addition to being filed for approval pursuant to Section 19(b)(3)(A), be separately filed for approval pursuant to Section 19(b)(2), and this second filing must be made within fifteen calendar days after the proposed rule change was filed for approval under Section 19(b)(3)(A). Accordingly, in most cases, a rule that is effective upon filing under Section 19(b)(3)(A) that relies upon the “fair and orderly markets” provision of Rule 19b-4(f)(4)(ii)(B) shall be effective until such time as the Commission enters an order, pursuant to Section 19(b)(2)(A) of the Exchange Act, to approve such proposed rule change or, depending on the circumstances, until such time as the Commission summarily temporarily suspends the rule change pursuant to Section 19(b)(3)(C) or, alternatively, until such time as the Commission, at the conclusion of proceedings to determine whether to approve or disapprove the proposed rule change, enters an order, pursuant to Section 19(b)(2)(B), approving or disapproving such proposed rule change.<sup>53</sup>

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<sup>53</sup> Because proposed rule changes filed pursuant to Rule 19b-4(f)(4)(ii)(B)(II) are submitted in accordance with the Commission’s statutory authority set forth in Section 19(b)(3)(A), the Commission would retain the power to summarily temporarily suspend the rule change within 60 days of its filing if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. See 15 U.S.C. 78s(b)(3)(C). The Commission would then be required to institute proceedings to determine whether the rule should be approved or disapproved. Id. As a practical matter, however, the Commission expects that proposed rule changes filed under the “fair and orderly markets” provision would remain in effect while they are reviewed in accordance with Section 19(b)(2) which, among other things, requires the Commission to approve, disapprove, or institute proceedings to determine whether to disapprove a proposed rule change within 45 days of its date of publication in the Federal Register, subject in certain circumstances to an extension of up to an additional 45 days. The Commission would nonetheless retain the ability, within 60 days after a proposed rule change becomes effective under 19(b)(3)(A), to summarily temporarily suspend the rule change and institute proceedings or, after the 60-day summary suspension deadline, to disapprove the rule change pursuant to the provisions of Section 19(b)(2).

To demonstrate that a proposed rule change is “necessary to maintain fair and orderly markets,” a clearing agency must include in both of its filings with the Commission a detailed explanation of the following: (i) why the proposed rule change is necessary to maintain fair and orderly markets for products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards; (ii) why the proposed rule change cannot achieve this goal unless it takes effect immediately; (iii) how, and to what extent, markets would be adversely affected if the proposed rule change were not implemented immediately; (iv) whether the proposed rule change is temporary or permanent; (v) how the proposed rule change significantly affects any securities clearing operations of the clearing agency or the rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service; and (vi) why the proposed rule change would have no adverse effect on maintaining fair and orderly markets for securities.

The Commission believes that the new “fair and orderly markets” provision directly addresses the specific concerns raised by commenters, while preserving the core features of the Commission’s existing notice and comment rule filing process. In particular, this provision is intended to respond to commenters’ observations that the pre-effective notice and comment requirement of the Commission’s Section 19(b)(2) rule filing process may unnecessarily burden existing non-securities markets. The new rule provision in Rule 19b-4(f)(4)(ii)(B)(II) allows Registered Clearing Agencies that are also DCOs to have rules that are necessary to maintain fair and orderly markets and that have a significant effect on securities operations of the Registered Clearing Agencies to take effect immediately upon filing, while the traditional notice and comment period under the Exchange Act proceeds thereafter.

The Commission believes the limited period of effectiveness while the notice and comment period proceeds is justified in the specific circumstances contemplated by the Final Rule given the nature of the issues raised by commenters and the substantial protections that will continue to exist under the Final Rule. In particular, the Dodd-Frank Act represents a significant reform of the national market system for securities and the national system for the clearance and settlement of securities transactions in which cooperation between the Commission and the CFTC is explicitly contemplated. Moreover, the clearly established time periods and procedures associated with the Commission’s notice and comment process should lead to a greater level of assurance that rules enacted in this manner that will have significant direct or indirect effects on the securities clearing activities of the clearing agency either immediately or in the future will be given due consideration by the Commission with the benefit of views from outside parties.

The Commission does not intend or expect the new “fair and orderly markets” provision to become, in practice, a common method for Registered Clearing Agencies to submit proposed rule changes that affect their clearing operations with respect to products that are not securities, including futures that are not securities futures, swaps that are not securities-based swaps or mixed swaps, and forwards that are not security forwards, but which also affect their securities clearing operations.<sup>54</sup> The “necessary to maintain fair and orderly markets” language central to the new provision is intended to be narrowly circumscribed, and will permit clearing agencies to

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<sup>54</sup> One court that interpreted a “fair and orderly markets” standard appearing in another area of the Exchange Act found the phrase to be an indication that relevant Commission actions are to be evaluated primarily by reference to the Congressional purposes of the Securities Act Amendments of 1975 involving the establishment of a national market system for securities and a national system for the clearance and settlement of securities transactions. See *Ludlow Corp. v. SEC*, 604 F.2d 704 (D.C. Cir. 1979) (discussing origins and purposes of “fair and orderly markets” provision in Section 12(f)(2) of the Exchange Act).

use the new provision for rule filings that may be necessary to respond promptly to major market emergencies and other situations of significant importance to the functioning of markets for products that are not securities. In instances when securities clearing operations are significantly affected, but the proposed rule change is not necessary to maintain fair and orderly markets for products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards, a Registered Clearing Agency must file the proposed rule change pursuant to Section 19(b)(1) of the Exchange Act for approval under Section 19(b)(2) without reliance on Rule 19b-4(f)(4)(ii)(B)(II).

Finally, the Commission notes that Section 19(b)(2) of the Exchange Act permits the Commission to approve a proposed rule change on an accelerated basis if it finds good cause to do so and publishes its reasons for so finding.<sup>55</sup> The application of this provision will be determined by the Commission on a case-by-case basis depending on the facts and circumstances pertaining to the proposed rule change.

### **3. Conclusion**

The Commission believes that permitting clearing agencies to submit proposed rule changes that meet the two conditions in Rule 19b-4(f)(4)(ii) for immediate effectiveness upon filing pursuant to Section 19(b)(3)(A) of the Exchange Act is consistent with the public interest and the purposes of the Exchange Act. In particular, this approach should help limit the potential for delays by providing a streamlined filing process for rule changes that primarily affect the clearing agency's clearing operations with respect to products that are not securities, including

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<sup>55</sup> See 15 U.S.C. 78s(b)(2)(C)(iii) (“[t]he Commission may not approve a proposed rule change earlier than 30 days after the date of publication under paragraph (1), unless the Commission finds good cause for so doing and publishes the reason for the finding.”).

futures that are not securities futures, swaps that are not securities-based swaps or mixed swaps, and forwards that are not security forwards which, unless such clearing operations were linked to securities clearing operations, would not be subject to regulation by the Commission. In addition, the information provided to the Commission by a Registered Clearing Agency in a filing submitted for review in accordance with Section 19(b)(2) of the Exchange Act is virtually identical to the information required to be included in a filing made pursuant to Section 19(b)(3)(A). At the same time, the Final Rule will specifically require clearing agencies relying on the new “fair and orderly markets” provision to continue to submit to the Section 19(b)(2) approval process while the rule change is in effect, and the Commission will retain the power to temporarily suspend the Registered Clearing Agency’s rule change on a summary basis within sixty days after the rule is filed under Section 19(b)(3)(A) if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.<sup>56</sup>

**B. Amendment to the General Instructions for Form 19b-4**

To accommodate the amendment to Rule 19b-4 being adopted today, the Commission also is making a corresponding technical modification to the General Instructions for Form 19b-4 under the Exchange Act. Specifically, the Commission is amending Item 7(b) of the General Instructions for Form 19b-4 (Information to be Included in the Completed Form), which requires the respondent SRO to cite the statutory basis for filing a proposed rule change pursuant to Section 19(b)(3)(A) in accordance with the existing provisions of Rule 19b-4(f). This amendment revises Item 7(b)(iv) to include the option to file the form in accordance with Rule

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<sup>56</sup> 15 U.S.C. 78s(b)(3)(C). If the Commission takes such action, it is then required to institute proceedings to determine whether the proposed rule change should be approved or disapproved.

19b-4(f)(4)(ii), which provides for situations when a Registered Clearing Agency is effecting a change in an existing service that (i) primarily affects the clearing operations of the clearing agency with respect to products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards and (ii) either (a) does not significantly affect any securities clearing operations of the clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service, or (b) does significantly affect any securities clearing operations of the clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service, but is necessary to maintain fair and orderly markets for products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards. Additional language is also being added to specify that clearing agencies using the “fair and orderly markets” provision will also be subject to the provisions of Section 19(b)(2) of the Exchange Act, in a manner equivalent to the process now used by the Commission for filings that are summarily approved by the Commission under Section 19(b)(3)(B) of the Exchange Act, and to specify the information clearing agencies must include in order to demonstrate that a proposed rule change is “necessary to maintain fair and orderly markets for products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards.”

### **III. Paperwork Reduction Act**

The Commission does not believe that the Final Rule contains any “collection of information” requirements as defined by the Paperwork Reduction Act of 1995, as amended

(“PRA”).<sup>57</sup> The Final Rule affirms and further modifies recent amendments to Rule 19b-4 under the Exchange Act, such that the list of categories that qualify for effectiveness upon filing under Section 19(b)(3)(A) of the Exchange Act include any matter effecting a change in an existing service of a Registered Clearing Agency that: (i) primarily affects the clearing operations of the clearing agency with respect to products that are not securities, including futures that are not security futures, swaps that are not securities-based swaps or mixed swaps, and forwards that are not security forwards; and (ii) either (a) does not significantly affect any securities clearing operations of the clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service, or (b) does significantly affect any securities clearing operations of the clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service, but is necessary to maintain fair and orderly markets for products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards. In addition, a proposed rule change filed by a Registered Clearing Agency relying on the “fair and orderly markets” provision set forth in new Rule 19b-4(f)(4)(ii)(B)(II) would also be filed for approval pursuant to Section 19(b)(2) of the Exchange Act.<sup>58</sup> Lastly, the Final Rule also makes a corresponding technical modification to

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<sup>57</sup> 44 U.S.C. 3501, et seq.

<sup>58</sup> Accordingly, in most cases, a rule that is effective upon filing under Section 19(b)(3)(A) that relies upon the “fair and orderly markets” provision of Rule 19b-4(f)(4)(ii)(B)(II) shall be effective only until such time as the Commission enters an order, pursuant to Section 19(b)(2)(A) of the Exchange Act, to approve such proposed rule change or, depending on the circumstances, until such time as the Commission summarily temporarily suspends the rule change pursuant to Section 19(b)(3)(C) or, alternatively, until such time as the Commission, at the conclusion of proceedings to determine whether to approve or disapprove the proposed rule change, enters an order, pursuant to Section 19(b)(2)(B), approving or disapproving such proposed rule change.



the General Instructions for Form 19b-4 under the Exchange Act.

The Commission does not believe that these amendments would require any new or additional collection of information, as such term is defined in the PRA. The PRA defines a “collection of information” as “the obtaining, causing to be obtained, soliciting or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for . . . answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons . . . .”<sup>59</sup> The Commission does not believe that the reporting and recordkeeping provisions in this Final Rule contain “collection of information requirements” within the meaning of the PRA because fewer than ten persons are expected to rely on Rule 19b-4(f)(4)(ii). At present, only four Registered Clearing Agencies maintain a futures or swaps clearing business regulated by the CFTC.

#### **IV. Economic Analysis**

##### **A. Introduction**

The Commission is sensitive to the economic effects of the amendments to Rule 19b-4, including their costs and benefits. Section 23(a)<sup>60</sup> of the Exchange Act requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Section 23(a)(2) of the Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act<sup>61</sup> requires the Commission, when engaging in rulemaking that requires it to consider whether an action is

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<sup>59</sup> 44 U.S.C. 3502(3)(A).

<sup>60</sup> 15 U.S.C. 78w(a).

<sup>61</sup> 15 U.S.C. 78c(f).

necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. We have considered and discussed below the effects of the rules we are adopting today on efficiency, competition, and capital formation, as well as the benefits and costs associated with the rulemaking.

As noted above, the Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, became effective on July 16, 2011. Accordingly, the four Registered Clearing Agencies that currently maintain a futures, swaps, or forwards clearing business regulated by the CFTC are generally required to file proposed rule changes with the Commission under Section 19(b) of the Exchange Act, and to comply separately with the CFTC's process for self-certification or direct approval of rules or rule amendments.<sup>62</sup> The Commission is sensitive to the increased burdens these obligations will impose, and agrees that it is in the public interest to eliminate any potential inefficiencies and undue delays that could result from the requirement that the Commission review changes to rules primarily affecting clearing operations with respect to products that are not securities, including futures that are not securities futures, swaps that are not securities swaps or mixed swaps, and forwards that are not security forwards before these changes may be considered effective.

In connection with the Interim Final Rule, the Commission identified certain costs and benefits of the amendments to Rule 19b-4 and Form 19b-4, and requested commenters to provide views and supporting information regarding the costs and benefits associated with the proposals, including estimates of these costs and benefits, as well as any costs and benefits not already identified. Although the Commission did not receive any comments on the specific cost-benefit

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<sup>62</sup> These include OCC, CME, ICC, and ICE Clear Europe.

analysis conducted in connection with the Interim Final Rule, one commenter expressed a general view questioning whether the Commission’s rulemaking in this area adequately respects the jurisdictional boundaries established by Congress when it passed the Dodd-Frank Act, noting that the requirement to file with the Commission for review in accordance with Section 19(b)(2) proposed rule changes that primarily affect the futures and swaps operations of a clearing agency registered with the Commission and the CFTC (“Dually-Registered Clearing Agency”) is an unreasonable outcome under a costs-benefits analysis.<sup>63</sup> Specifically, this commenter argued that the Commission should not impose a rule that subjects a proposed rule change to a “lengthy public comment review process” in cases when the change relates to a matter that falls within the “exclusive or primary jurisdiction” of another agency (i.e., the CFTC).<sup>64</sup> The commenter argued that duplicative regulatory oversight is inherently unreasonable and imposes “tremendous” costs, but did not adduce any empirical evidence to support its assertion.

The Commission disagrees with the commenter’s assertion that the rule will result in unnecessarily duplicative regulatory oversight. The Exchange Act imposes upon the Commission an independent statutory responsibility to oversee the operations of Registered Clearing Agencies as a whole, and not solely in regard to specific products.<sup>65</sup> The Commission’s role in reviewing rule filings ensures that the Commission has complete information regarding

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<sup>63</sup> See CME Letter.

<sup>64</sup> Id. In its letter, CME also noted that it currently does not clear any security-based swaps and is registered with the Commission solely by operation of the Deemed Registered Provision (although it does have plans to offer clearing services for credit default swaps that are security-based swaps in the near future). See also ICE Clear Europe Letter (expressing the view that “rulemaking in furtherance of the purposes of the Dodd-Frank Act should, as much as possible, (i) respect the jurisdictional boundaries delegated to the CFTC and the Commission under that Act, and (ii) pursue efficiency and reduce the costs of rulemaking wherever possible”).

<sup>65</sup> See 15 U.S.C. 78q-1(b); see also supra note 52.

the overall scope of operations and financial condition of the clearing agency, so that the Registered Clearing Agency's ability to continue to provide clearing services for security futures, security-based swaps, mixed swaps, security forwards, options on securities, and other securities products in a manner consistent with the Exchange Act can be fully understood and placed in proper context. Accordingly, the Commission believes that its continued review of rule filings that primarily affect a Dually-Registered Clearing Agency's operations involving futures that are not securities futures, swaps that are not securities swaps or mixed swaps, forwards that are not security forwards, and other non-securities products is a necessary and appropriate part of the Commission's statutory mandate.

With respect to the commenter's assertion concerning unnecessary additional costs, the Commission observes that the Final Rule is not imposing an additional requirement to submit a proposed rule change to the Commission. As previously noted, Section 19(b)(1) of the Exchange Act requires each SRO, including all Registered Clearing Agencies, to file with the Commission copies of "any proposed rule or any proposed change in, addition to, or deletion from the rules of such SRO" (emphasis added).<sup>66</sup> On its face, this provision applies to all proposed rule changes without regard to the extent to which the affected product is subject to the jurisdiction of another agency. The changes made to Rule 19b-4 pursuant to the Interim Final Rule were intended to utilize the Commission's statutory authority in Section 19(b)(3)(A) of the Exchange Act to provide relief to Dually-Registered Clearing Agencies and to avoid undue delays that could result from the requirement that the Commission review proposed rule changes primarily concerning a clearing agency's non-security futures clearing operations before they may be considered effective. This Final Rule is intended to affirm and expand this relief to changes to

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<sup>66</sup> See supra note 3.

rules primarily concerning a clearing agency's clearing operations with respect to swaps that are not securities-based swaps or mixed swaps, forwards that are not security forwards, and other non-securities products. The underlying obligation to file proposed rule changes arises entirely from Section 19(b)(1) of the Exchange Act and not from any action taken by the Commission pursuant to the Interim Final Rule or this Final Rule.

Accordingly, and for the reasons discussed below, the Commission believes that its analysis of the benefits and costs of the amendments to Rule 19b-4 and the General Instructions for Form 19b-4, as set forth in the Interim Final Rule and described herein, are appropriate. Further, the Commission believes that any impact on competition would be neutral, as all Registered Clearing Agencies may avail themselves of the Final Rule if the circumstances meet the requirements of the Final Rule. Also, this rule does not increase barriers for new clearing agencies to enter the clearing markets, and implementation of the Final Rule will not favor larger entities over smaller ones, and hence the impact on competition is negligible. Finally, the Commission does not believe that the Final Rule contributes towards the promotion of capital formation of Registered Clearing Agencies in any appreciable manner.

The Commission discusses below a number of the costs and benefits that will attend the Final Rule. Many of these costs and benefits are difficult to quantify with any degree of certainty, particularly as it is difficult to predict the number of rule filings that will qualify for approval pursuant to Section 19(b)(3)(A) under the Final Rule. Thus, while much of the discussion is qualitative in nature, the Commission attempts to quantify certain burdens, when possible. The Commission believes that the changes brought about by the Final Rule—which will require Registered Clearing Agencies to file under Section 19(b)(1) both for Section 19(b)(2) approval and for Section 19(b)(3)(A) approval only in the rare situations in which the

“fair and orderly markets” provision is invoked—will lead to only a negligible increase in the costs associated with filing proposed rule changes. The Commission further believes that these additional costs are justified by the efficiency gains that will result from the Final Rule’s broadening of the types of rule changes that may become effective upon filing.

#### **B. Justification for the Final Rule**

The Final Rule is intended to improve regulatory processes. Allowing proposed rule changes that (i) primarily affect the clearing of products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards; and (ii) do not significantly affect any securities clearing operations of the clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service, to be filed under Section 19(b)(3)(A) would further streamline rule filing procedures and reduce the potential for duplicative or inconsistent regulation affecting Registered Clearing Agencies. With regard to the addition of the “fair and orderly markets” provision and its attendant rule filing requirements, clearing agencies and the markets potentially benefit from the expedited effectiveness of the rule change, while a meaningful notice and comment process is preserved without the disruption of a summary suspension of the rule.

#### **C. Affected Parties**

As indicated in the PRA section above, the Final Rule will affect four Registered Clearing Agencies.

#### **D. Baseline**

The Interim Final Rule serves as the appropriate baseline for purposes of this analysis. Under the Interim Final Rule, the four Dually-Registered Clearing Agencies may file a proposed

rule change and request that it become effective immediately upon filing if the rule change (i) primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and (ii) does not significantly affect any securities clearing operations of the clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service. Registered Clearing Agencies seeking approval for proposed rule changes involving the clearing of other products that are not securities, including swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards, providing the changes are not eligible for immediate effectiveness under Section 19(b)(3)(A) pursuant to one of the other eligibility categories, must do so pursuant to Section 19(b)(2), which requires a pre-effective notice and comment period, as well as formal Commission approval. Thus, in the ordinary case, Dually-Registered Clearing Agencies currently may not implement proposed rule changes with respect to certain products that are not securities, including swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards until the Commission: (i) issues a notice of the proposed rule change for a period of time within which the public can comment; (ii) reviews and considers comments received regarding the proposed rule change, if any; and (iii) issues an order approving the proposed rule change. This review process ordinarily takes anywhere from forty-five to sixty calendar days after the Commission receives the proposed rule change from the clearing agency.<sup>67</sup>

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<sup>67</sup> The Commission has fifteen calendar days from the date of receipt of the proposed rule change to deliver notice of the proposed rule change for publication in the Federal Register, providing the clearing agency posted the notice of the proposed rule change, together with the substantive terms of the proposed change, that it delivered to the Commission on its website within two days of sending it to the Commission. 15 U.S.C. 78s(b)(2)(E). The Commission may not approve a proposed rule change until the

Since the Interim Final Rule took effect on July 15, 2011,<sup>68</sup> Dually-Registered Clearing Agencies have utilized it on nine occasions to obtain immediate effectiveness for proposed rule changes that would not otherwise have been eligible to become effective upon filing.<sup>69</sup> An examination of proposed rule filings made during the 2012 calendar year, however, indicates the number of proposed rule changes eligible for immediate effectiveness under Section 19(b)(3)(A) would have more than doubled had the changes contemplated by the Final Rule been in place. Specifically, between January 1 and October 1, 2012, the Commission received 75 rule filings from Dually-Registered Clearing Agencies, 52 of which were not already eligible for immediate effectiveness under Section 19(b)(3)(A). Of these 52, the Commission believes that 23 additional filings, or approximately 44%, likely would have been eligible for filing under Rule 19b-4(f)(4)(ii) had the Final Rule been in effect.<sup>70</sup>

The Commission believes that requiring the Dually-Registered Clearing Agencies to seek

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thirtieth day after publication of the notice in the Federal Register and is required to approve, disapprove, or institute proceedings to determine whether to approve or disapprove a proposed rule change within forty-five days after publication of the notice in the Federal Register. See 15 U.S.C. 78s(b)(2)(C)(iii), (b)(2)(A).

<sup>68</sup> See Exchange Act Release No. 64832 (July 7, 2011), 76 FR 41056 (July 13, 2011).

<sup>69</sup> The Chicago Mercantile Exchange, Inc. filed seven of these proposed rule changes, while The Options Clearing Corporation and ICE Clear Credit LLC each filed one. All of these rule filings were made pursuant to Rule 19b-4(f)(4)(ii), which allows a proposed rule change to take effect upon filing if it primarily affects the clearing agency's futures clearing operations with respect to futures that are not securities futures and does not have a significant effect upon the clearing agency's securities clearing operations.

<sup>70</sup> See, e.g., Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Amend Certain Aspects of the Performance Bond Regime Applicable to Cleared Only OTC FX Swaps, Exchange Act Release No. 66354 (Feb. 8, 2012), 77 FR 8318 (Feb. 14, 2012) (SR-CME-2012-03); Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Regarding Acceptance of Additional Interest Rate Swaps and Related Interbank Rates for Clearing, Exchange Act Release No. 66786 (Apr. 11, 2012), 77 FR 22825 (Apr. 17, 2012) (SR-CME-2012-10).



approval under Section 19(b)(2) for the 23 proposed rule changes described above created inefficiencies and unnecessary delay because the Interim Final Rule did not permit these proposed rule changes—which primarily affected the Dually-Registered Clearing Agencies’ handling of non-security products, and had no significant effect on securities clearing operations or any related rights or obligations—to be filed for immediate effectiveness. As noted, the Section 19(b)(2) process requires the Commission to solicit public comments, review them, and issue an order approving or denying the rule change, a process that can take between 45 and 60 days, and possibly longer. This engenders a substantial degree of timing uncertainty for clearing agencies, as they must await the Commission’s approval order before they can implement the proposed changes. This uncertainty, in turn, raises the transaction costs associated with implementing rule changes. The Commission believes this delay and the associated increase in transactional costs to be unnecessary because these rule changes are similar to the futures-related rule changes that presently qualify for immediate effectiveness under the Interim Final Rule.

**E. Benefits and Costs and Consideration of the Final Rule’s Effects on Efficiency, Competition, and Capital Formation**

1. Benefits

Rule 19b-4(f)(4)(ii), as amended by this Final Rule, will streamline the rule filing process by permitting Registered Clearing Agencies to utilize Section 19(b)(3)(A) for proposed rule changes that primarily affect the clearing operations of the clearing agency with respect to products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards, and either do not significantly affect any securities clearing operations of the clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service, or do significantly affect any securities clearing operations of the

clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service, but are necessary to maintain fair and orderly markets for products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards. As such rule changes will become effective upon filing, the Final Rule should eliminate any potential inefficiencies and undue delays that could result from the requirement that the Commission review these proposed rule changes before they take effect. At the same time, the Commission retains the power to temporarily suspend these rule changes summarily within sixty days of their filing if it appears to the Commission that taking such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.<sup>71</sup>

As a result, the Commission is providing Registered Clearing Agencies with the ability to make these proposed rule changes effective upon filing, thereby limiting potential delays in implementing changes to the clearing agencies' clearing operations with respect to products that are not securities that may be beneficial to both the clearing agencies and market participants. As the figures cited in the preceding section indicate, the number of proposed rule changes that could become effective upon filing may increase under the Final Rule. This, in turn, should enhance the efficiency of the filing process for affected clearing agencies, without impairing the Commission's ability to review the filings and to determine whether it would be necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act, to conduct a more thorough analysis of any issues the filings

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<sup>71</sup> 15 U.S.C. 78s(b)(3)(C). If the Commission takes such action, it is then required to institute proceedings to determine whether the proposed rule change should be approved or disapproved.

may present. As noted, these amendments to Rule 19b-4 and the General Instructions for Form 19b-4 by the Commission are intended to streamline the rule filing process in areas involving certain activities concerning products that are not securities that may be subject to duplicative or inconsistent regulation as a result of, in part, certain provisions under Section 763(b) of the Dodd-Frank Act. The Commission recognizes the importance of the proper allocation of regulatory resources and will monitor and evaluate the implementation and effects of these rule changes.

## 2. Costs

As noted above, the Final Rule will expand the list of categories that qualify for effectiveness upon filing under Section 19(b)(3)(A) of the Exchange Act. These amendments will not materially increase or decrease the costs of complying with Rule 19b-4, nor will they modify an SRO's obligation to submit a proposed rule change to the Commission. Rather, the amendments will change the statutory basis under which a rule change is filed. This is because the costs associated with the 19(b)(3)(A) filing would approximately be the same as the 19(b)(2) filing, and, because of the nature of the occasion in which such a filing would be applicable, only under rare circumstances would a clearing agency file under the "fair and orderly markets" provision.

A proposed rule change filed by a Registered Clearing Agency relying on the "fair and orderly markets" provision set forth in Rule 19b-4(f)(4)(ii)(B)(II) would be subject to the procedures of both Section 19(b)(2) and Section 19(b)(3)(A) of the Exchange Act. Accordingly, in most cases, the proposed rule change shall be effective until such time as the Commission enters an order, pursuant to Section 19(b)(2)(A) of the Exchange Act, to approve such proposed rule change or, depending on the circumstances, until such time as the Commission summarily

temporarily suspends the rule change pursuant to Section 19(b)(3)(C) or, alternatively, until such time as the Commission, at the conclusion of proceedings to determine whether to approve or disapprove the proposed rule change, enters an order, pursuant to Section 19(b)(2)(B), approving or disapproving such proposed rule change.

This new requirement applicable to Rule 19b-4(f)(4)(ii)(B)(II), which is in addition to the requirements that the Commission considered in connection with the cost-benefit analysis contained in the Interim Final Rule, would impose only a minimal additional burden on Registered Clearing Agencies that rely on the “fair and orderly markets” provision. Although a clearing agency seeking to use this provision would be required to make a separate filing under Section 19(b)(3)(A) in addition to the Section 19(b)(2) filing that is currently required, the information contained in both filings is virtually identical. Moreover, the Commission believes that clearing agencies will use the “fair and orderly markets” provision only on rare occasions, and thus the additional costs of making a Section 19(b)(3)(A) filing will seldom be incurred. The Commission concludes that the incremental costs associated with the Final Rule are negligible.<sup>72</sup>

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<sup>72</sup> The time required to complete a filing varies significantly and is difficult to separate from the time an SRO spends internally developing the proposed rule change. Accordingly, it is difficult to assess the impact of the Final Rule in terms of the additional amount of time SROs will have to devote to filing proposed rule changes. The Commission believes, however, that the Final Rule would have only a negligible effect in this regard. The Commission has estimated that 34 hours is the amount of time that would be required to complete an average proposed rule change filing, and 129 hours is the amount of time required to complete a novel or complex proposed rule change filing. Since the information contained in a Section 19(b)(2) filing is virtually identical to the information required if the same filing were made under Section 19(b)(3)(A), the Commission believes that the 34 hour figure remains an appropriate estimate of the time it would take an SRO to prepare a proposed rule change for filing pursuant to the broadened scope of Section 19(b)(3)(A). Moreover, as the information contained in the Section 19(b)(2) filing that will be required under the “fair and orderly markets” provision is also virtually

The Commission believes that the changes embodied in the Final Rule will not impair its ability to protect investors. Although the Final Rule will expand the types of proposed rule changes eligible to become effective upon filing, such rule changes remain subject to public comment after they take effect. Furthermore, the Commission summarily may temporarily suspend such rule changes within sixty days of filing if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.<sup>73</sup> Given these safeguards, the Commission perceives only minimal, if any, new risks to investors stemming from the Final Rule.

### 3. Effects on Competition

The Commission has also considered whether the Final Rule will have an appreciable effect on competition vis-à-vis the Interim Final Rule. Currently, the market for clearing services is segmented by financial instrument, and clearing agencies often specialize in particular instruments. As such, some market segments may tend to sustain natural monopolies, despite the existence of competitors that could potentially enter those segments.<sup>74</sup> For example, following a period of consolidation facilitated by Section 17(A) of the Exchange Act, only one clearing agency processes equities listed in the United States, and only one clearing agency handles exchange traded options. At the same time, there are three clearing agencies that clear swaps and

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identical to the information contained in the Section 19(b)(3)(A) filing that is currently required, the Commission believes that the time estimates for a rule filing of average complexity and one involving novel issues remain unchanged at 34 and 129 hours, respectively, under all scenarios of the Final Rule.

<sup>73</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>74</sup> A natural monopoly exists when a single provider is more efficient than multiple providers because economies of scale allow the single provider to have lower average costs.

security-based swaps. Although two of these clearing agencies are affiliated, they do not compete with each other; one serves the market in the United States, and the other serves the European market. Further, the affiliate serving the market in the United States has a dominant market share, though the Commission believes this may be subject to change as a result of competition from other clearing agencies.

The Commission believes that the impact of the Final Rule on competition would be neutral, as the Final Rule would apply equally to similarly-situated Registered Clearing Agencies. As noted in the PRA section of this Release, the Final Rule will affect only the four Dually-Registered Clearing Agencies. Every Dually-Registered Clearing Agency that clears any of the products described in the Final Rule may avail itself of the Final Rule's benefits if the circumstances warrant, and may avail itself of the "fair and orderly markets" provision if the proposed rule change also meets those qualifications, namely that the proposed rule change is necessary to maintain fair and orderly markets for futures that are not security futures, swaps that are not security-based swaps or mixed swaps, or forward contracts that are not security forwards. Further, the Final Rule does not increase barriers for clearing agencies to enter this market, and its implementation will not favor larger entities over smaller ones. The Final Rule's impact on competition is therefore negligible.

#### **F. Alternatives Considered**

The Commission considered CME's proposal that the Commission require only proposed rule changes relating directly to security-based swap clearing activities to be subject to the Commission's review in accordance with Section 19(b)(2). Specifically, CME posited that (i) the Commission should defer to the CFTC's rule filing processes with respect to proposed changes involving broad rules of general applicability as to clearing operations that would have

only a peripheral impact on security-based swap clearing, and (ii) the Commission would still have the authority to abrogate rule changes by a clearing agency that do not meet the requirements of the Exchange Act.<sup>75</sup> The Commission believes that, while this approach would increase efficiency for some Registered Clearing Agencies, it would undermine the Commission's ability to carry out its statutory obligations under Section 19(b) and the Exchange Act, as discussed in Section IV.A., above. For example, in June 2012, CME implemented a rule change that altered the amount of CME's capital contribution to its financial safeguards package in connection with losses arising from products other than credit default swaps and interest rate swaps.<sup>76</sup> This amount would be applied to such losses before any amounts are applied from CME's Base Guaranty Fund. Although not directly applicable to products under the Commission's jurisdiction, the proposed rule change affects the operations and financial stability of the clearing agency. In another example, ICE Clear Credit LLC implemented a rule change in 2012 that permitted its participants to use US Treasuries to satisfy the initial margin-related liquidity requirements for all client-related positions cleared in a clearing participant's customer account,<sup>77</sup> representing a rule of general applicability that, pursuant to CME's alternative approach, may not have been subject to Commission review. As the Commission is tasked with ensuring that a clearing agency's rules are designed, among other things, to assure the safeguarding of securities and funds, the Interim Final Rule required, and the Final Rule continues to require, that proposed rule changes of general applicability be subject to the

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<sup>75</sup> See CME Letter.

<sup>76</sup> Securities Exchange Act Rel. No. 67232 (June 21, 2012), 77 FR 38350 (June 27, 2012) (SR-CME-2012-24).

<sup>77</sup> Securities Exchange Act Rel. No. 66825 (Apr. 18, 2012), 77 FR 24546 (Apr. 24, 2012) (SR-ICC-2012-01).

Commission’s pre-effective notice and comment process or, if such proposed rule change is filed pursuant to the fair and orderly markets provision in Rule 19b-4(f)(4)(ii)(B), notice and comment after the change is temporarily effective under Section 19(b)(3)(A).

## **V. Regulatory Flexibility Certification**

The Regulatory Flexibility Act (“RFA”)<sup>78</sup> requires the Commission, in promulgating rules, to consider the impact of those rules on small entities. The Commission certified in the Interim Final Rule release, pursuant to Section 605(b) of the RFA,<sup>79</sup> that the rule would not have a significant impact on a substantial number of small entities. The Commission received no comments on this certification.

For the purposes of Commission rulemaking in connection with the RFA, a small entity includes a clearing agency that: (i) compared, cleared, and settled less than \$500 million in securities transactions during the preceding fiscal year; (ii) had less than \$200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or at any time that it has been in business, if shorter) and (iii) is not affiliated with any person (other than a natural person) that is not a small business or small organization.<sup>80</sup> Under the standards adopted by the Small Business Administration, small entities in the finance industry include the following: (i) for entities engaged in investment banking, securities dealing and securities brokerage activities, entities with \$6.5 million or less in annual receipts; (ii) for entities engaged in trust, fiduciary and custody activities, entities with \$6.5 million or less in annual receipts; and

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<sup>78</sup> 5 U.S.C. 601 et seq.

<sup>79</sup> See 5 U.S.C. 605(b).

<sup>80</sup> 17 CFR 240.0-10(d).



(iii) funds, trusts and other financial vehicles with \$6.5 million or less in annual receipts.<sup>81</sup>

The amendments to Rule 19b-4 and to the General Instructions for Form 19b-4 apply to all Registered Clearing Agencies. There are currently seven clearing agencies with active operations registered with the Commission. Of the seven Registered Clearing Agencies with active operations, four currently maintain a futures or swaps clearing business. Based on the Commission’s existing information about these four Registered Clearing Agencies, as well as on the entities likely to register with the Commission in the future, the Commission believes that such entities will not be small entities, but rather part of large business entities that exceed the thresholds defining “small entities” set out above.

For the reasons stated above, the Commission certifies that the amendments to Rule 19b-4 and to the General Instructions for Form 19b-4 would not have a significant economic impact on a substantial number of small entities for the purposes of the RFA.

## **VI. Statutory Basis and Text of Amendments**

Pursuant to the Exchange Act, and particularly Section 19(b) thereof, 15 U.S.C. 78s(b), the Commission amends Rule 19b-4 as set forth below.

### **List of Subjects in 17 CFR Parts 240 and 249**

Brokers, Reporting and recordkeeping requirements, Securities.

#### **Text of Rule**

In accordance with the foregoing, Title 17, chapter II of the Code of Federal Regulations is amended as follows:

### **PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934**

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<sup>81</sup> 13 CFR 121.201, Sector 52.

1. The general authority citation for part 240 continues to read as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; 12 U.S.C. 5221(e)(3), 15 U.S.C. 8302, and 18 U.S.C. 1350, , unless otherwise noted.

\* \* \* \* \*

2. Revise § 240.19b-4(f)(4)(ii) to read as follows:

**§ 240.19b-4 Filings with respect to proposed rule changes by self-regulatory organizations.**

\* \* \* \* \*

(f) \* \* \*

(4) \* \* \*

(ii)(A) Primarily affects the clearing operations of the clearing agency with respect to products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards; and

(B) Either

(1) Does not significantly affect any securities clearing operations of the clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service, or

(2) Does significantly affect any securities clearing operations of the clearing agency or the rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service, but is necessary to maintain fair and orderly markets for products that are not securities, including futures that are not security futures, swaps that are not

security-based swaps or mixed swaps, and forwards that are not security forwards. Proposed rule changes filed pursuant to this subparagraph II must also be filed in accordance with the procedures of Section 19(b)(1) for approval pursuant to Section 19(b)(2) and the regulations thereunder within fifteen days of being filed under Section 19(b)(3)(A).

\* \* \* \* \*

**PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934**

4. The general authority citation for part 249 continues to read in part as follows:

**Authority:** 15 U.S.C. 78a et seq. and 7201et seq.; and 18 U.S.C. 1350, unless otherwise noted.

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5. Form 19b-4 (referenced in §249.819) is amended by revising Item 7(b)(iv) of the General Instructions for Form 19b-4 as set forth in the attached Appendix A.

**Note: The following Appendix A will not appear in the Code of Federal Regulations.**

By the Commission.

Elizabeth M. Murphy  
Secretary

Dated: April 3, 2013

**APPENDIX A**

**GENERAL INSTRUCTIONS FOR FORM 19b-4**

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**Information to be Included in the Completed Form (“Form 19b-4 Information”)**

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**7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)**

\* \* \* \* \*

(b) \* \* \*

(iv) Effects a change in an existing service of a registered clearing agency that either (A)(1) does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible and (2) does not significantly affect the respective rights or obligations of the clearing agency or persons using the service or (B)(1) primarily affects the clearing operations of the clearing agency with respect to products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards and (2) either (a) does not significantly affect any securities clearing operations of the clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service, or (b) does significantly affect any securities clearing operations of the clearing agency or the rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service, but is necessary to maintain fair and orderly markets for products that are not securities, including futures that are not security futures,

swaps that are not securities-based swaps or mixed swaps, and forwards that are not security forwards, and set forth the basis on which such designation is made, including, in the case of the fair and orderly markets provision, the following: (i) why the proposed rule change is necessary to maintain fair and orderly markets for products that are not securities, including futures that are not security futures, swaps that are not security-based swaps or mixed swaps, and forwards that are not security forwards; (ii) why the proposed rule change cannot achieve this goal unless it takes effect immediately; (iii) the nature and the extent of the effect upon the relevant markets if the proposed rule change were not implemented immediately; (iv) whether the proposed rule change is temporary or permanent; (v) how the proposed rule change significantly affects any securities clearing operations of the clearing agency or any rights or obligations of the clearing agency with respect to securities clearing or persons using such securities-clearing service; and (vi) why the proposed rule change would have no adverse effect on maintaining fair and orderly markets for securities.

(c) \* \* \*

NOTE. The Commission has the power under Section 19(b)(3)(C) of the Act summarily to temporarily suspend within sixty days of its filing any proposed rule change which has taken effect upon filing pursuant to Section 19(b)(3)(A) of the Act or was put into effect summarily by the Commission pursuant to Section 19(b)(3)(B) of the Act. In exercising its summary power under Section 19(b)(3)(B), the Commission is required to make one of the findings described above but may not have a full opportunity to make a determination that the proposed rule change otherwise is consistent with the requirements of the Act and the rules and regulations thereunder. The Commission will generally exercise its summary power under Section 19(b)(3)(B) on condition that the proposed rule change to be declared effective summarily shall also be subject

to the filing procedures of Section 19(b)(1) of the Act, for approval pursuant to Section 19(b)(2). Accordingly, in most cases, a summary order under Section 19(b)(3)(B) shall be effective until such time as the Commission enters an order, pursuant to Section 19(b)(2)(A) of the Exchange Act, to approve such proposed rule change or, depending on the circumstances, until such time as the Commission summarily temporarily suspends the rule change pursuant to Section 19(b)(3)(C) or, alternatively, until such time as the Commission, at the conclusion of proceedings to determine whether to approve or disapprove the proposed rule change, enters an order, pursuant to Section 19(b)(2)(B), approving or disapproving such proposed rule change. Similarly, the Commission requires that any proposed rule change which has taken effect upon filing pursuant to paragraph (B)(II) of Rule 19b-4(f)(4)(ii) shall also be subject to the filing procedures of Section 19(b)(1) of the Act, for approval pursuant to Section 19(b)(2) of the Act. Accordingly, such rule change shall be effective until such time as the Commission enters an order, pursuant to Section 19(b)(2)(A) of the Exchange Act, to approve such proposed rule change or, depending on the circumstances, until such time as the Commission summarily temporarily suspends the rule change pursuant to Section 19(b)(3)(C) or, alternatively, until such time as the Commission, at the conclusion of proceedings to determine whether to approve or disapprove the proposed rule change, enters an order, pursuant to Section 19(b)(2)(B), approving or disapproving such proposed rule change.