

# SECURITIES AND EXCHANGE COMMISSION

## 17 CFR Part 240

Release No. 34-64832; File No. S7-29-11

RIN 3235-AL18

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

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Interim final rule; request for comment.

**SUMMARY:** The Securities and Exchange Commission (“SEC” or “Commission”) is adopting an interim final rule to amend Rule 19b-4 under the Securities Exchange Act of 1934 (“Exchange Act”). The amendment expands the list of categories that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange Act to include any matter effecting a change in an existing service of a clearing agency registered with the Commission (“Registered Clearing Agency”) that both primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and does 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. The Commission also is making a corresponding technical modification to the General Instructions for Form 19b-4 under the Exchange Act. The amendments to Rule 19b-4 and 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 overlapping 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”) that would deem some clearing agencies to be registered with the Commission as of July 16, 2011.

**DATES:** Effective Date: July 15, 2011.

Comment Date: Comments on the interim final rule should be submitted on or before September 15, 2011.

**ADDRESSES:** Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-29-11 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-29-11. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F St., NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey S. Mooney, Assistant Director; Joseph P. Kamnik, Senior Special Counsel; and Andrew R. Bernstein, Attorney-Adviser, 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 an amendment to Rule 19b-4 under the Exchange Act as an interim final rule to expand the list of categories that qualify for summary effectiveness 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. We will carefully consider the comments that we receive and intend to respond as necessary or appropriate.

## **I. Introduction**

### **A. Background on Commission 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

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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

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 comment.<sup>5</sup> A Proposed Rule Change generally may not take effect unless the Commission approves it,<sup>6</sup> or it is otherwise permitted to become 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>

The SRO rule filing process for Registered Clearing Agencies serves two important policy goals. First, the notice and comment requirement helps assure that interested persons have an opportunity to provide input on proposed actions by Registered Clearing Agencies that

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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.

<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 may be “deemed to have been approved by the Commission” if the Commission fails to 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).

could have a significant impact on the market, market participants (both professionals and individual investors) and others.<sup>10</sup> Second, the rule filing process allows the Commission to review Registered Clearing Agencies' Proposed Rule Changes to determine whether they are consistent with the Exchange Act, including the goals of prompt and accurate clearance and settlement of securities transactions and the safeguarding of investors' securities and funds.<sup>11</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 notice and opportunity for hearing, 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) concerned solely with the administration of the SRO.<sup>12</sup> The Commission has the power summarily to temporarily suspend the change in rules of the SRO 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>10</sup> See Securities Exchange Act Release No. 49505 (Mar. 30, 2004), 69 FR 17864 (Apr. 4, 2004) (Proposed Rules Regarding Proposed Rule Changes of Self-Regulatory Organizations) (noting that SROs “exercise certain quasi-governmental powers over members through their ability to impose disciplinary sanctions, deny membership, and require members to cease doing business entirely or in specified ways.”).

<sup>11</sup> See 15 U.S.C. 78q-1(a)(1).

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<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

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 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 utilized this authority to designate, under Rule 19b-4 of the Exchange Act, certain rule changes that qualify for summary effectiveness under Section 19(b)(3)(A).<sup>16</sup>

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

Section 763(b) of the Dodd-Frank Act<sup>17</sup> provides that (i) a depository institution registered with the Commodity 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

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during the period it was in effect and shall not be reviewable under Section 25 of the Exchange Act, nor shall it be deemed to be “final agency action” for purposes of 5 U.S.C. 704.

<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 a 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).

<sup>17</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat.1376 (2010).

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 the purpose of clearing security-based swaps (“Deemed Registered Provision”).<sup>18</sup> The Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011.<sup>19</sup> Once a clearing agency is deemed to be a Registered Clearing Agency, it will be required to comply with all requirements of the Exchange Act, and the rules and regulations thereunder, applicable to Registered Clearing Agencies to the extent it clears security-based swaps after the effective date of the Deemed Registered Provision, including, for example, the obligation to file Proposed Rule Changes under Section 19(b) of the Exchange Act.<sup>20</sup> Clearing of futures and options on futures 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 Commodity Exchange Act (“CEA”) and the CFTC’s regulations.<sup>21</sup> The change effected by this interim final

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<sup>18</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 Trust US LLC, or a successor entity of ICE Trust (“ICE Trust”) will become Registered Clearing Agencies solely for the purpose of clearing security-based swaps.

<sup>19</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>20</sup> The Commission anticipates that as of July 16, 2011, OCC (formerly known as The Options Clearing Corporation), CME and ICE Clear Europe will be the only Registered Clearing Agencies that will be subject to new Rule 19b-4(f)(4)(ii). Although it also will be a dually-registered clearing agency, ICE Trust does not have an existing futures clearing business for which it would file Proposed Rule Changes.

<sup>21</sup> See 7 U.S.C. 7a-2(c) and 17 CFR 40.6.

rule is intended to eliminate any burdens resulting from 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 immediately upon or shortly after filing.<sup>22</sup>

The Commission has limited time to act without exposing certain dually registered clearing agencies to potential legal uncertainty and market disruption caused by delays that could result from the requirement that the Commission undertake a full review of Proposed Rule Changes related to a Registered Clearing Agency's futures clearing operations before these Proposed Rule Changes may be made effective. Specifically, and as discussed in greater detail in Section IV, the Commission only recently received urgent requests for the relief to be provided by the interim final rule. Accordingly, and in the interest of adopting the changes to Rule 19b-4 and the General Instructions for Form 19b-4 prior to effective date of the Deemed Registered Provision of the Dodd-Frank Act on July 16, 2011, the Commission finds that it has good cause to adopt the interim final rule immediately and without the notice and public comment procedures that would ordinarily apply to this type of rulemaking.

## **II. Interim Final Rule**

### **A. Amendment to Rule 19b-4**

The Commission is amending Rule 19b-4 to expand the list of categories that qualify for summary effectiveness under 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>23</sup> Specifically, new Rule 19b-4(f)(4)(ii) will allow a Proposed Rule Change

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<sup>22</sup> See 7 U.S.C. 7a-2(c) and 17 CFR 40.6.

<sup>23</sup> When an SRO submits a Proposed Rule Change to the Commission pursuant to Section 19(b)(3)(A) of the Exchange Act, the Commission still reviews the filing and has the



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>24</sup> The first condition, contained in new Rule 19b-4(f)(4)(ii)(A), is that the Proposed Rule Change primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures.<sup>25</sup> For purposes of this requirement, a Registered Clearing Agency's "futures clearing operations" would generally include any activity that would require the Registered Clearing Agency to register with the CFTC as a DCO in accordance with the CEA.<sup>26</sup> In addition, to "primarily affect" such futures clearing operations would mean 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

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power summarily to temporarily suspend the change in rules of the SRO 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. 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. 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 Exchange Act, nor shall it be deemed to be "final agency action" for purposes of 5 U.S.C. 704. See 15 U.S.C. 78s(b)(3)(A).

<sup>24</sup> 17 CFR 240.19b-4(f)(4)(ii) (as amended by this interim final rule).

<sup>25</sup> 17 CFR 240.19b-4(f)(4)(ii)(A) (as amended by this interim final rule).

<sup>26</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).

would be incidental in nature and not significant in extent.<sup>27</sup> However, because a security futures product is a security for purposes of the Exchange Act,<sup>28</sup> a Registered Clearing Agency will not be permitted to file Proposed Rule Changes related to its security futures business pursuant to Section 19(b)(3)(A) of the Exchange Act in reliance on new Rule 19b-4(f)(ii). Instead, such clearing agency will continue to be required to file Proposed Rule Changes with the Commission related to its respective security futures operations in accordance with Section 19(b)(1) of the Exchange Act, which the Commission will review in accordance with Section 19(b)(2), unless there is another basis for the Proposed Rule Change to be filed under Section 19(b)(3)(A).

The second condition, contained in new Rule 19b-4(f)(4)(ii)(B), is that the Proposed Rule Change does 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>29</sup> The Commission notes that the phrase “significantly affect” currently is used elsewhere in Rule 19b-4 in the context of defining other categories of Proposed Rule Changes that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange Act.<sup>30</sup> Accordingly,

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<sup>27</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 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 entire clearing agency would not be considered to primarily affect such futures clearing operations.

<sup>28</sup> 15 U.S.C. 78c(a)(10).

<sup>29</sup> 17 CFR 240.19b-4(f)(4)(ii)(A) (as amended by this interim final rule).

<sup>30</sup> See e.g., 17 CFR 240.19b-4(f)(4)(i) (as amended by this 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); 17 CFR 240.19b-4(f)(5) (in respect of a Proposed Rule Change in an existing order-entry

“significantly affect” has the same meaning and interpretation as that phrase has in Rules 19b-4(f)(4)(i) (as amended by this interim final rule), 19b-4(f)(5) and 19b-4(f)(6). Also for purposes of this requirement, a Registered Clearing Agency’s “securities clearing operations . . . or any related rights or obligations of the clearing agency or persons using such service” would generally include any activity that would require the Registered Clearing Agency to register as a clearing agency in accordance with the Exchange Act.

The Commission believes that permitting clearing agencies to submit Proposed Rule Changes that meet the two conditions referenced above (i.e., (A) primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and (B) does 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) for immediate effectiveness 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 process for allowing rule changes to become effective that primarily concern the futures clearing operations of a clearing agency which, unless such 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 the

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or trading system of a SRO that: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not have the effect of limiting the access to or availability of the system); and 17 CFR 240.19b-4(f)(6) (in respect of a Proposed Rule Change that (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) 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).

Registered Clearing Agency in a filing made pursuant to Section 19(b)(1) 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 Commission would retain the power summarily to temporarily suspend the change in rules of the Registered Clearing Agency 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>31</sup> Finally, and as discussed more fully in Section IV of this release, changes to a clearing agency's futures clearing operations will continue to be subject to the CFTC's normal process for reviewing rule changes.

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

In order 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 to 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 would revise Item 7(b)(iv) to include the option to file the form in accordance with new Rule 19b-4(f)(4)(ii), which provides for situations where a Registered Clearing Agency is effecting a change in an existing service that both (i) primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security

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<sup>31</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.

futures and (ii) does 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.

### **C. Effective Date**

The amendments to Rule 19b-4 and to the General Instructions for Form 19b-4 will be effective as of July 15, 2011.

### **III. Request for Comment**

We are requesting comments from all members of the public. We will carefully consider the comments that we receive. We seek comment generally on all aspects of the interim final rule. In addition, we seek comment on the following:

1. Do the amendments contemplated by this interim final rule adequately address concerns regarding the application of the Commission's process for reviewing Proposed Rule Changes once the Deemed Registered Provision becomes effective?
2. Given that the objectives and statutory authority of the CFTC differ from the Commission's, does the degree to which the interim final rule uses a process that is similar to the CFTC's process for reviewing rule changes by a Registered Clearing Agency that primarily affect its futures clearing operations and do not significantly affect its securities clearing operations provide for sufficient protection for investors and the securities markets? Why or why not?
3. Are there other amendments the Commission should consider making to Rule 19b-4, such as further expanding the list of categories that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange Act? If so, please describe any amendments the Commission should consider and reasons why.

4. Should any additional restrictions be placed on the ability of a Registered Clearing Agency to file Proposed Rule Changes under Exchange Act Section 19(b)(3)(A)?

#### **IV. Other Matters**

The Administrative Procedure Act (“APA”)<sup>32</sup> generally requires an agency to publish, before adopting a rule, notice of a proposed rulemaking in the Federal Register.<sup>33</sup> This requirement does not apply, however, if the agency “for good cause finds . . . that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.”<sup>34</sup> Further, the APA also generally requires that an agency publish a rule in the Federal Register 30 days before the rule becomes effective.<sup>35</sup> This requirement, however, does not apply if the agency finds good cause for making the rule effective sooner.<sup>36</sup>

The Commission finds that it has good cause to have these rules take effect on July 15, 2011, on an interim final basis and that notice and solicitation of comment before the effective date of the proposed amendments to Rule 19b-4 and to the General Instructions for Form 19b-4 is impracticable, unnecessary, or contrary to the public interest.

Specifically, Section 763(b) of the Dodd-Frank Act provides that both (i) a depository institution registered with the CFTC that cleared swaps as a multilateral clearing organization prior to the date of enactment of the Dodd-Frank Act and (ii) a DCO registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the

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<sup>32</sup> 5 U.S.C. 551 et seq.

<sup>33</sup> See 5 U.S.C. 553(b).

<sup>34</sup> Id.

<sup>35</sup> See 5 U.S.C. 553(d).

<sup>36</sup> Id.

date of enactment of the Dodd-Frank Act will be deemed registered with the Commission as a clearing agency solely for the purpose of clearing security-based swaps.<sup>37</sup> The Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011.<sup>38</sup>

The Commission recognizes that the differences between the Commission's rule filing process for Registered Clearing Agencies and the CFTC's process for reviewing rule changes by DCOs could result in additional burdens on certain clearing agencies subject to the Deemed Registered Provision, which are discussed in greater detail below.<sup>39</sup> Specifically, DCOs are generally permitted to implement new rules or rule amendments by filing with the CFTC a certification that the new rule or rule amendment complies with the CEA and the CFTC's regulations.<sup>40</sup> Alternatively, DCOs may request direct CFTC approval of a rule or amendment

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<sup>37</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)).

<sup>38</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>39</sup> The CFTC's requirements and procedures for self-certification filings and approval requests for new and amended rules and the clearing of new products are set forth in 17 CFR 40.6, 17 CFR 40.5 and 17 CFR 40.2.

<sup>40</sup> See 7 U.S.C. 7a-2(c). Unless designated by the DCO as an emergency rule certification, rule changes submitted to the CFTC pursuant to the self-certification process may take effect immediately so long as the CFTC receives the submission by the open of business on the business day preceding implementation of the rule. See 17 CFR 40.6. However, Section 745 of the Dodd-Frank Act amended Section 5c(c) of the CEA to include a new 10-day certification review period for all rules and rule amendments submitted to the CFTC and to permit the CFTC to stay the certification of rules or rule amendments that, among other things, present novel or complex issues that require additional time to analyze. Pursuant to Section 754 of the Dodd-Frank Act, this change to the timing of the self-certification process takes effect on the later of 360 days after the date of the enactment of the statute or not less than 60 days after publication of the final rule or regulation implementing such provision.

thereunder after it has been filed with the CFTC pursuant either to its self-certification process or as a request for direct approval of a rule or amendment.<sup>41</sup> Because of the differences between the CFTC's process and the Commission's rules for reviewing Proposed Rule Changes, a rule or rule amendment proposed by a dually-registered clearing agency related exclusively to its futures clearing operations could be delayed by the Commission's rule filing process despite being permitted to become effective by the CFTC immediately upon or shortly after filing.<sup>42</sup>

This interim final rule takes effect on July 15, 2011. For several reasons, including those discussed above, we have acted on an interim final basis. Specifically, affected clearing agencies requested action with respect to Registered Clearing Agencies' obligations under Section 19(b) of the Exchange Act only shortly before the effective date of the Deemed Registered Provision. Based on discussions with these affected clearing agencies, the Commission understands that market participants believe that the Commission needs to provide relief prior to the effective date of the Deemed Registered Provision of the Dodd-Frank Act on July 16, 2011 in order to avoid operational problems, legal uncertainty and market disruptions.

Specifically, one clearing agency subject to the Deemed Registered Provision contacted staff in late April 2011 to alert the Commission that it had determined that, absent the approach set out in the interim final rule we are adopting today, the clearing agency would encounter a

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<sup>41</sup> See 7 U.S.C. 7a-2(c) and 17 CFR 40.5.

<sup>42</sup> During 2010, CME self-certified 11 rule changes with the CFTC related to its activities as a DCO. ICE Clear Europe, which became a registered DCO on January 22, 2010, did not self-certify any rule changes during 2010, but has self-certified 11 rule changes with the CFTC since January 1, 2011. Currently, OCC, which is registered with the Commission as a clearing agency with respect to its clearing services for options and security futures listed and traded on its participant exchanges, also is registered with the CFTC as a DCO with respect to its clearing services for transactions in futures and options on futures. During 2010, OCC filed 19 Proposed Rule Changes with the Commission and 19 rule changes with the CFTC, of which 15 were resolved through the CFTC's self-certification process and four were resolved or are pending pursuant to the CFTC's direct approval process.



number of negative consequences.<sup>43</sup> For example, delays resulting from the requirement that the Commission undertake a full review of Proposed Rule Changes related to a Registered Clearing Agency's futures clearing operations before these Proposed Rule Changes may be made effective could impair a clearing agency's ability to bring beneficial enhancements or other changes into the futures markets, such as those related to improving the operational efficiency of its futures clearing business. These delays could also lead to legal uncertainty regarding the status of Proposed Rule Changes after they have been self-certified with the CFTC but prior to the date on which the Commission makes a final determination in accordance with Section 19(b) of the Exchange Act. As a result, both the clearing agency and market participants could potentially be required to develop contingency plans with alternative approaches related to the clearing of futures which would likely result in substantial operational burdens and increased costs. As a result, the clearing agency requested<sup>43</sup> that the Commission provide relief on the basis that subjecting Proposed Rule Changes that relate primarily to its futures clearing operations to the routine Commission approval process would needlessly delay effectiveness of these Proposed Rule Changes and could affect the clearing agency's operations as well as ability to provide enhancements that promote efficiencies with respect to its futures related activities. In May 2011, another clearing agency contacted the Commission to convey the need for urgent rulemaking by the Commission to address these same issues.

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<sup>43</sup> The Commission's staff discussed with this clearing agency in late February 2011, among other things, the regulatory requirements for Registered Clearing Agencies under the Exchange Act in light of the Deemed Registered Provision including with respect to Proposed Rule Changes. Subsequently, in late April 2011, that clearing agency articulated an urgent need for relief prior to the effectiveness of the Deemed Registered Provision.

Notwithstanding the limited amount of time before the Deemed Registered Provision becomes effective, and therefore the limited time the Commission has to act, these clearing agencies expressed their strong view that the Commission should provide relief immediately in order to prevent the above-described potential operational problems, legal uncertainty and market disruptions from manifesting into actual issues for Registered Clearing Agencies once the Deemed Registered Provision becomes effective on July 16, 2011.

In light of the concerns raised by these clearing agencies, the Commission believes that adopting an interim final rule to immediately amend Rule 19b-4 in the manner as set forth above would benefit the public interest by eliminating any undue delays and operational inefficiencies that could result from the requirement that the Commission review changes to rules primarily concerning futures clearing operations before they become effective. This could potentially benefit market participants (including investors) by, among other things, preventing delays to beneficial enhancements within the futures markets. Accordingly, the Commission finds that there is good cause to have the rule effective as an interim final rule on July 15, 2011, and that notice and public procedure in advance of effectiveness of the interim final rule are impracticable, unnecessary and contrary to the public interest.<sup>44</sup> The Commission is requesting comments on the interim final rule and will carefully consider any comments received and respond to them as necessary or appropriate.

## **V. Paperwork Reduction Act**

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<sup>44</sup> This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rules to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are “impractical, unnecessary or contrary to the public interest,” a rule “shall take effect at such time as the federal agency promulgating the rule determines.”)

The Commission does not believe that the amendments to Rule 19b-4 and to the General Instructions for Form 19b-4 adopted pursuant to the interim final rule contain any “collection of information” requirements as defined by the Paperwork Reduction Act of 1995, as amended (“PRA”).<sup>45</sup> The interim final rule amends Rule 19b-4 under the Exchange Act to expand the list of categories that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange Act to include any matter effecting a change in an existing service of a Registered Clearing Agency that both primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and does 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. The interim final rule also makes a corresponding technical modification to 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.<sup>46</sup>

## **VI. Cost-Benefit Analysis**

As noted above, the Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011. At such time, the

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<sup>45</sup> 44 U.S.C. 3501, et seq.

<sup>46</sup> 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 . . .” 44 U.S.C. 3502(3)(A). The Commission preliminarily does not believe that the reporting and recordkeeping provisions in this interim 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). Based on discussions with market participants, the Commission believes that only three Registered Clearing Agencies will maintain a futures clearing business regulated by the CFTC as of the effective date of the Deemed Registered Provision.

Commission expects that there will be three Registered Clearing Agencies that maintain a futures clearing business regulated by the CFTC.<sup>47</sup> Accordingly, these entities will be 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. 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 concerning futures clearing operations before they may be considered effective.

**A. Benefits**

New Rule 19b-4(f)(4)(ii) will eliminate the requirement for Registered Clearing Agencies to submit a significant number of Proposed Rule Changes that primarily affect their futures clearing operations with the Commission for pre-approval pursuant to Section 19(b)(1) of the Exchange Act. As a result, the rule would eliminate any potential inefficiencies and undue delays that could result from the requirement that the Commission review the Proposed Rule Change before it may be considered effective. At the same time, the Commission would retain the power summarily to temporarily suspend the change in rules of the Registered Clearing Agency 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>48</sup>

As a result, the Commission would be providing the Registered Clearing Agency with the ability to declare the Proposed Rule Change immediately effective, thereby limiting potential

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<sup>47</sup> These include OCC, CME and ICE Clear Europe.

<sup>48</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.

delays to activities related to its futures operations that may be beneficial to both the clearing agency and market participants, in a manner that does not impair the Commission's ability to review the filing 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 the issues.

## **B. Costs**

As noted above, the amendments to Rule 19b-4 would expand the list of categories that qualify for summary effectiveness 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. As a result, new Rule 19b-4(f)(4)(ii) would impose minimal, if any, costs on a Registered Clearing Agency, which would consist solely of the time spent determining whether a Proposed Rule Change qualifies for summary effectiveness pursuant to new Rule 19b-4(f)(4)(ii).

The Commission requests that commenters provide views and supporting information regarding the costs and benefits associated with the proposals. The Commission seeks estimates of these costs and benefits, as well as any costs and benefits not already identified.

## **VII. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation**

Section 23(a)<sup>49</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

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<sup>49</sup> 15 U.S.C. 78w(a).

the purposes of the Exchange Act. Section 3(f) of the Exchange Act<sup>50</sup> requires the Commission, when engaging in rulemaking that requires it to consider whether an action is 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.

As discussed above, the amendment to Rule 19b-4 will expand the list of categories that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange Act to include any matter that both (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 related rights or obligations of the clearing agency or persons using such service. Specifically, new Rule 19b-4(f)(4)(ii) is intended to avoid undue delays that could result from the requirement that the Commission review changes to rules primarily concerning futures clearing operations before they may be considered effective. Without new Rule 19b-4(f)(4)(ii), certain clearing agencies would be required to submit a significant number of Proposed Rule Changes to the Commission for consideration and approval pursuant to Section 19(b)(1) that relate primarily to their futures clearing operations. Accordingly, the Commission believes such changes would not result in any burden to competition and would instead contribute to a better capital formation and more efficient markets by limiting the potential for any undue delays for services or changes that may benefit market participants.

### **VIII. Regulatory Flexibility Certification**

The Regulatory Flexibility Act (“RFA”)<sup>51</sup> requires the Commission, in promulgating

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<sup>50</sup> 15 U.S.C. 78c(f).

<sup>51</sup> 5 U.S.C. 601 et seq.

rules, to consider the impact of those rules on small entities. Section 603(a) of the APA,<sup>52</sup> as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules to determine the impact of such rulemaking on “small entities.”<sup>53</sup> Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule which, if adopted, would not have a significant economic impact on a substantial number of small entities.<sup>54</sup>

For the purposes of Commission rulemaking in connection with the RFA, a small entity includes, when used with reference to a clearing agency, 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>55</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 (iii) funds, trusts and other financial vehicles with \$6.5 million or less in annual receipts.<sup>56</sup>

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<sup>52</sup> 5 U.S.C. 603(a).

<sup>53</sup> Section 601(b) of the RFA permits agencies to formulate their own definitions of “small entities.” The Commission has adopted definitions for the term “small entity” for the purposes of rulemaking in accordance with the RFA. These definitions, as relevant to this proposed rulemaking, are set forth in Rule 0-10, 17 CFR 240.0-10.

<sup>54</sup> See 5 U.S.C. 605(b).

<sup>55</sup> 17 CFR 240.0-10(d).

<sup>56</sup> 13 CFR 121.201, Sector 52.

The amendments to Rule 19b-4 and to the General Instructions for Form 19b-4 would apply to all Registered Clearing Agencies. As of July 16, 2011, there likely will be seven clearing agencies with active operations registered with the Commission. Of the seven Registered Clearing Agencies with active operations, three currently maintain a futures clearing business. Based on the Commission's existing information about these three Registered Clearing Agencies, as well as on the entities likely to register with the Commission in the future, the Commission preliminarily 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 proposed 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. The Commission encourages written comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities, including clearing agencies, and provide empirical data to support the extent of the impact.

## **IX. 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 proposes to amend 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 proposed to be amended as follows:

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



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, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7210 et seq., 18 U.S.C. 1350, and 12 U.S.C. 5221(e)(3), unless otherwise noted.

\* \* \* \* \*

2. Amend Section 240.19b-4 by:

- a. Adding the word “either” before the colon in the introductory text in paragraph (f)(4);
- b. Redesignating paragraph (f)(4)(i) as (f)(4)(i)(A);
- c. Redesignating paragraph (f)(4)(ii) as (f)(4)(i)(B);
- d. Adding the word “or” after the semicolon after paragraph (f)(4)(i)(B);
- e. Adding new paragraph (f)(4)(ii)(A); and
- f. Adding new paragraph (f)(4)(ii)(B).

3. The additions read as follows:

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

\* \* \* \* \*

(f) \* \* \*  
(4) \* \* \*

(ii)(A) Primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures; and

(B) Does 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;

\* \* \* \* \*

**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.

\* \* \* \* \*

5. Amend Form 19b-4 (referenced in §249.819) by:

a. Amending paragraph (b)(iv) in Item 7 of the General Instructions

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

follows:

**Note: The text of Form 19b-4 does not, and the amendments will not, appear in the Code of Federal Regulations.**

**Form 19b-4**

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

**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 futures clearing operations of the clearing agency with respect to futures that are not security futures and (2) does 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, and set forth the basis on which such designation is made,

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By the Commission.

Cathy H. Ahn  
Deputy Secretary

Dated: July 7, 2011