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Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b–4 and Form 19b–4 Applicable to All Self-Regulatory Organizations; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–67286; File No. S7–44–10]

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Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b–4 and Form 19b–4 Applicable to All Self-Regulatory Organizations

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: In accordance with Section 763(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''), the Securities and Exchange Commission (''Commission'') is adopting rules under the Securities Exchange Act of 1934 (''Exchange Act'') to specify the process for a registered clearing agency's submission for review of any security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing, the manner of notice the clearing agency must provide to its members of such submission and the procedure by which the Commission may stay the requirement that a security-based swap is subject to mandatory clearing while the clearing of the security-based swap is reviewed. The Commission also is adopting a rule to specify that when a security-based swap is required to be cleared, the submission of the security-based swap for clearing must be for central clearing to a clearing agency that functions as a central counterparty. In addition, the Commission is adopting rules to define and describe when notices of proposed changes to rules, procedures or operations are required to be filed by designated financial market utilities in accordance with Section 806(e) of Title VIII of the Dodd-Frank Act and to set forth the process for filing such notices with the Commission. Finally, the Commission is adopting rules to make conforming changes as required by the amendments to Section 19(b) of the Exchange Act contained in Section 916 of the Dodd-Frank Act.

DATES: *Effective Dates:* August 13, 2012 for §§ 240.3Ca–1, 240.3Ca–2, and the amendments to 240.19b–4; December 10, 2012 for all amendments to § 249.819 and Form 19b–4.

Compliance Dates: August 13, 2012 for §§ 240.3Ca–1, 240.3Ca–2, and the amendments to § 240.19b–4, except for the compliance date for § 240.19b–4(o), which is discussed in the section of the release titled ''II.G. Effective and Compliance Dates''; December 10, 2012 for all amendments to § 249.819 and Form 19b–4.

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I. Background

On July 21, 2010, the President signed the Dodd-Frank Act into law.[1] The Dodd-Frank Act was enacted, among other reasons, to promote the financial stability of the United States by improving accountability and transparency in the financial system.[2] Title VII and Title VIII of the Dodd-Frank Act, among other things, impose new requirements with respect to clearance and settlement systems.

Title VII of the Dodd-Frank Act (''Title VII'') provides the Commission and the Commodity Futures Trading

[1] The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, H.R. 4173).

[2] *See* Pub. L. 111–203, Preamble.

Commission (''CFTC'') with authority to regulate certain over-the-counter (''OTC'') derivatives in response to the recent financial crisis.[3] The Dodd-Frank Act is intended to bolster the existing regulatory structure and provide regulatory tools to oversee the OTC derivatives market, which has grown exponentially in recent years. Title VII provides that the CFTC will regulate ''swaps,'' the Commission will regulate ''security-based swaps,'' and the CFTC and the Commission will jointly regulate ''mixed swaps.''[4]

Title VII was designed to provide greater certainty that, wherever possible and appropriate, swap and security-based swap contracts formerly traded exclusively in the OTC market are centrally cleared.[5] The swaps and security-based swaps markets traditionally have been characterized by privately negotiated transactions entered into by two counterparties, in which each assumes the credit risk of the other counterparty.[6] Clearing of swaps and security-based swaps was at the heart of Congressional reform of the derivatives markets in Title VII.[7]

Clearing agencies are broadly defined under the Exchange Act and undertake a variety of functions.[8] One such function is to act as a central counterparty (''CCP''), which is an entity that interposes itself between the counterparties to a trade.[9] For example, when a security-based swap contract between two counterparties that are members of a CCP is executed and submitted for clearing, it is typically replaced by two new contracts—separate contracts between the CCP and each of the two original counterparties. At that point, the original counterparties are no longer counterparties to each other. Instead, each acquires the CCP as its counterparty, and the CCP assumes the counterparty credit risk of each of the original counterparties that are members of the CCP.[10] Structured and operated appropriately, CCPs may improve the management of counterparty risk and may provide additional benefits such as multilateral netting of trades.[11]

One key way in which the Dodd-Frank Act promotes clearing of such contracts is by requiring a process by which the Commission would determine whether a security-based swap is required to be cleared. Section 3C of the Exchange Act, as added by Section 763(a) of the Dodd-Frank Act (''Exchange Act Section 3C''),[12] creates, among other things, a clearing requirement with respect to certain security-based swaps. Specifically, this section provides that ''[i]t shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this Act or a clearing agency that is exempt from registration under this Act if the security-based swap is required to be cleared.''[13] Exchange Act Section 3C requires the Commission to adopt rules for a clearing agency's submission of security-based swaps, or any group, category, type or class of security-based swaps, that a clearing agency plans to accept for

[3] *See, e.g.,* Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010, S. Rep. No. 111–176 at 29 (2010) (stating that ''[m]any factors led to the unraveling of this country's financial sector and the government intervention to correct it, but a major contributor to the financial crisis was the unregulated [OTC] derivatives market.'')

[4] Section 712(d) of the Dodd-Frank Act provides that the Commission and the CFTC, in consultation with the Board of Governors of the Federal Reserve System (''Board''), shall further define the terms ''swap,'' ''security-based swap,'' ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant,'' ''eligible contract participant,'' and ''security-based swap agreement.'' The Commission and the CFTC jointly have proposed to further define the terms ''swap,'' ''security-based swap,'' and ''security-based swap agreement.'' *See Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement;'' Mixed Swaps; Security-Based Swap Agreement Recordkeeping,* Securities Act Release No. 9204, Securities Exchange Act Release No. 64372 (Apr. 29, 2011), 76 FR 29818 (May 23, 2011), corrected in Securities Act Release No. 9204A, Securities Exchange Act Release No. 64372A (June 1, 2011), 76 FR 32880 (June 7, 2011) (''Product Definition Proposing Release''). Further, the Commission and CFTC jointly have adopted rules to further define the terms ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant,'' and eligible contract participant,'' *See Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant'',* Securities Exchange Act Release No. 66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012). Moreover, section 712(a)(8) of the Dodd-Frank Act provides that the Commission and the CFTC, after consultation with the Board, shall jointly promulgate such regulations regarding ''mixed swaps'' as may be necessary to carry out the purposes of Title VII. The Commission and the CFTC have jointly proposed such regulations. *See* Product Definition Proposing Release.

[5] *See, e.g.,* Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010, S. Rep. No. 111–176 at 34 (stating that ''[s]ome parts of the OTC market may not be suitable for clearing and exchange trading due to individual business needs of certain users. Those users should retain the ability to engage in customized, uncleared contracts while bringing in as much of the OTC market under the centrally cleared and exchange-traded framework as possible.'').

[6] *See, e.g.,* Financial Stability Board, *Implementing OTC Derivatives Market Reforms* (Oct. 25, 2010), available at: *http://www.financialstabilityboard.org/publications/r_101025.pdf.*

[7] As previously noted, the Dodd-Frank Act seeks to ensure that, wherever possible and appropriate, derivatives contracts formerly traded exclusively in the OTC market be cleared. *See supra* note 5; *see also* Letter from Christopher Dodd, Chairman, Committee on Banking, Housing and Urban Affairs, United States Senate and Blanche Lincoln, Chairman, Committee on Agriculture, Nutrition, and Forestry, United States Senate, to Barney Frank, Chairman, Financial Services Committee, United States House of Representatives and Colin Peterson, Chairman, Committee on Agriculture, United States House of Representatives (June 30, 2010) (on file with the United States Senate).

[8] Section 3(a)(23)(A) of the Exchange Act defines the term ''clearing agency'' to mean any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or who provides facilities for the comparison of data regarding the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or the allocation of securities settlement responsibilities. Such term also means any person, such as a securities depository, who acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates. 15 U.S.C. 78c(a)(23)(A).

[9] *See id.* An entity that acts as a CCP for securities transactions is a clearing agency as defined in the Exchange Act and is required to register with the Commission.

[10] *See* Cecchetti, Gyntelberg and Hollanders, *Central counterparties for over-the-counter derivatives,* BIS Quarterly Review, Sept. 2009, available at: *http://www.bis.org/publ/qtrpdf/r_qt0909f.pdf.*

[11] *See id.* at 46 (stating that the structure of a CCP ''has three clear benefits. First, it improves the management of counterparty risk. Second, it allows the CCP to perform multilateral netting of exposures as well as payments. Third, it increases transparency by making information on market activity and exposures—both prices and quantities—available to regulators and the public''); *see also* Bank for International Settlements' Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions, *Guidance on the application of the 2004 CPSS–IOSCO Recommendations for Central Counterparties to OTC derivatives CCPs: Consultative report,* (May 2010), available at: *http://www.bis.org/publ/cpss89.pdf.*

[12] 15 U.S.C. 78c–3 *et seq.*

[13] *See* 15 U.S.C. 78c–3(a)(1) (as added by Section 763(a) of the Dodd-Frank Act). The requirement that a security-based swap be cleared will stem from the determination to be made by the Commission. Such determination may be made in connection with the review of a clearing agency's submission regarding a security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing. *See* 15 U.S.C. 78c–3(b)(2)(C)(ii) (as added by Section 763(a) of the Dodd-Frank Act) (''[t]he Commission shall * * * review each submission made under subparagraphs (A) and (B), and determine whether the security-based swap, or group, category, type, or class of security-based swaps, described in the submission is required to be cleared.''). In addition, Exchange Act Section 3C(b)(1) provides that ''[t]he Commission on an ongoing basis shall review each security-based swap, or any group, category, type, or class of security-based swaps to make a determination that such security-based swap, or group, category, type, or class of security-based swaps should be required to be cleared.''

clearing (''Security-Based Swap Submission'') and to determine the manner of notice the clearing agency must provide to its members of such Security-Based Swap Submission.[14]

If the Commission makes a determination that a security-based swap is required to be cleared, then parties may not engage in such security-based swap without submitting it for clearing to a clearing agency that is either registered with the Commission (or exempt from registration) unless an exception to the clearing requirement applies.[15] If the Commission determines that a security-based swap is not required to be cleared, such security-based swap may still be cleared on a non-mandatory basis by the clearing agency if the clearing agency has rules that permit it to clear such security-based swap. In addition, Exchange Act Section 3C(b)(1) provides that ''[t]he Commission on an ongoing basis shall review each security-based swap, or any group, category, type, or class of security-based swaps to make a determination that such security-based swap, or group, category, type, or class of security-based swaps should be required to be cleared'' (''Commission-initiated Review'').[16]

Title VIII of the Dodd-Frank Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'' or ''Title VIII''), provides for enhanced regulation of financial market utilities, such as clearing agencies, that manage or operate a multilateral system for the purpose of transferring, clearing or settling payments, securities or other financial transactions among financial institutions or between financial institutions and the financial market utility.[17] The regulatory regime in Title VIII will only apply, however, to financial market utilities that the Financial Stability Oversight Council (''Council'') designates as systemically important (or likely to become systemically important) in accordance with Section 804 of the Clearing Supervision Act.[18] Among other requirements prescribed under Title VIII, Section 806(e) of the Clearing Supervision Act (''Section 806(e)'') requires any financial market utility designated by the Council as systemically important to file 60 days advance notice of changes to its rules, procedures or operations that could materially affect the nature or level of risk presented by the financial market utility (''Advance Notice'').[19] In addition, Section 806(e) requires each Supervisory Agency[20] to adopt rules, in consultation with the Board, that define and describe when a designated financial market utility is required to file an Advance Notice with its Supervisory Agency.[21]

Clearing agencies registered with the Commission are financial market utilities, as defined in Section 803(6) of Title VIII;[22] thus, the Commission may be the Supervisory Agency of a clearing agency that is designated as systemically important by the Council (''designated clearing agency'').[23] A clearing agency must begin filing Advance Notices pursuant to Section 806(e) once the Council designates the clearing agency as systemically important as of the compliance date of new Rule 19b–4(o), which the Commission is adopting today.

On December 15, 2010, the Commission proposed amendments to Rule 19b–4 under the Exchange Act to implement these new requirements by requiring that Security-Based Swap Submissions under Exchange Act Section 3C and Advance Notices under Section 806(e) be filed with the Commission on Form 19b–4.[24] The Proposing Release also contained two new rules that were proposed in accordance with the authority granted to the Commission pursuant to Exchange Act Section 3C: (i) Proposed Rule 3Ca–1, which would establish a procedure by which the Commission, at the request of a counterparty or on its

[14] *See* 15 U.S.C. 78c–3(b)(2)(A) and (5) (as added by Section 763(a) of the Dodd-Frank Act). For purposes of the amendments to Rule 19b–4 and Form 19b–4 that the Commission is adopting today, and as generally used in this release, the term ''Security-Based Swap Submission'' means both the identifying information that clearing agencies are required to submit to the Commission pursuant to Exchange Act Section 3C(b)(2) for each security-based swap (or any group, category, type or class of security-based swaps) that such clearing agency plans to accept for clearing, and, in addition, the accompanying information that a clearing agency is required to provide pursuant to new Rule 19b–4(o)(3).

Exchange Act Section 3C(b)(2)(C)(i) requires that the Commission make available to the public any submission received under Exchange Act Section 3C(b)(2)(A). 15 U.S.C. 78c3–1(b)(2)(C)(i) (as added by Section 763(a) of the Dodd-Frank Act). Also, the additional information that clearing agencies are required to provide pursuant to the amendments being adopted today with respect to Rule 19b–4 and Form 19b–4 in general will be published in the notice of the Security-Based Swap Submission and required to be posted on the clearing agency's Web site. The Commission notes, however, that a clearing agency may request confidential treatment of the additional information pursuant to Rule 24b–2 under the Exchange Act regarding information it desires be kept undisclosed. 17 CFR 240.24b–2.

[15] 15 U.S.C. 78c–3(a)(1) (as added by Section 763(a) of the Dodd-Frank Act).

[16] *See* 15 U.S.C. 78c–3(b)(1) (as added by Section 763(a) of the Dodd-Frank Act). The Dodd-Frank Act does not require rulemaking with respect to Commission-initiated Reviews.

[17] The definition of ''financial market utility'' in Section 803(6) of the Clearing Supervision Act contains a number of exclusions that include, but are not limited to, certain designated contract markets, registered futures associations, swap data repositories, swap execution facilities, national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, security-based swap execution facilities, brokers, dealers, transfer agents, investment companies and futures commission merchants. 12 U.S.C. 5462(6)(B) (as added by Title VIII).

[18] Pursuant to Section 803(9) of the Clearing Supervision Act, a financial market utility is systemically important if the failure of or a disruption to the functioning of such financial market utility could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States. 12 U.S.C. 5462(9) (as added by Title VIII). Under Section 804 of the Clearing Supervision Act, the Council has the authority, on a non-delegable basis and by a vote of not fewer than two-thirds of the members then serving, including the affirmative vote of its chairperson, to designate those financial market utilities that the Council determines are, or are likely to become, systemically important. The Council may, using the same procedures as discussed above, rescind such designation if it determines that the financial market utility no longer meets the standards for systemic importance. Before making either determination, the Council is required to consult with the Board and the relevant Supervisory Agency (as determined in accordance with Section 803(8) of the Clearing Supervision Act). Finally, Section 804 of the Clearing Supervision Act sets forth the procedures for giving entities a 30-day notice and the opportunity for a hearing prior to a designation or rescission of the designation of systemic importance. 12 U.S.C. 5463 (as added by Title VIII). On July 18, 2011, the Council adopted final rules describing the criteria that will inform and the processes and procedures established under the Clearing Supervision Act for the Council's designation of financial market utilities as systemically important. *See Authority to Designate Financial Market Utilities as Systemically Important,* 76 FR 44763 (July 27, 2011).

[19] *See* 12 U.S.C. 5465(e)(1)(A) (as added by Title VIII).

[20] Section 803(8) of the Clearing Supervision Act defines the term ''Supervisory Agency'' in reference to the primary regulatory authority for the financial market utility. For example, Section 803(8) of the Clearing Supervision Act provides that the Commission is the Supervisory Agency for any financial market utility that is a Commission-registered clearing agency. *See* 12 U.S.C. 5462(8) (as added by Title VIII). To the extent that an entity is both a Commission-registered clearing agency and registered with another agency, such as a CFTC-registered derivatives clearing organization, the statute requires the two agencies to agree on one agency to act as the Supervisory Agency, and if the agencies cannot agree on which agency has primary jurisdiction, the Council shall decide which agency is the Supervisory Agency for purposes of the Clearing Supervision Act. 12 U.S.C. 5462(8) (as added by Title VIII).

[21] *See* 12 U.S.C. 5465(e)(1)(B) (as added by Title VIII).

[22] 12 U.S.C. 5462(6) (as added by Title VIII).

[23] *See supra* note 20 discussing the definition of ''Supervisory Agency'' under the Dodd-Frank Act.

[24] *See Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b–4 and Form 19b–4 Applicable to All Self-Regulatory Organizations,* Securities Exchange Act Release No. 34–63557 (Dec. 15, 2010), 75 FR 82490 (Dec. 30, 2010) (''Proposing Release'').

own initiative, may stay the requirement that a security-based swap is subject to mandatory clearing, and (ii) proposed Rule 3Ca–2, which was intended to prevent evasions of the clearing requirement by specifying that security-based swaps required to be cleared must be submitted for central clearing to a clearing agency that functions as a CCP. Finally, the Commission proposed technical, conforming and clarifying amendments to Rule 19b–4 and Form 19b–4 to conform the rule and form with new deadlines and approval, disapproval and temporary suspension standards with respect to proposed rule changes filed under Section 19(b) of the Exchange Act, as modified by Section 916 of the Dodd-Frank Act (''Exchange Act Section 19(b)'').[25]

The Commission received 19 comment letters on the Proposing Release from clearing agencies, financial institutions, industry trade groups and other interested persons.[26] Commenters were generally supportive of the Commission's proposals. Some commenters did, however, urge the Commission to take a different approach to certain parts of the proposal. For example, a number of commenters provided suggestions on the proposed rules setting forth the information that clearing agencies will need to provide to the Commission in connection with a Security-Based Swap Submission. As discussed below, the Commission is adopting these rules substantially as proposed, with certain modifications to address commenters' concerns.[27]

II. Discussion

The Commission is adopting rules to implement the new requirements imposed by Title VII and Title VIII discussed above. In accordance with the requirements set forth in Exchange Act Section 3C (as added by Title VII), the Commission is adopting amendments to Rule 19b–4 and Form 19b–4 and new Rule 3Ca–1 under the Exchange Act to establish processes for (i) how clearing agencies registered with the Commission must submit Security-Based Swap Submissions to the Commission for a determination by the Commission of whether the security-based swap (or group, category, type or class of security-based swaps) referenced in the submission is required to be cleared, and to determine the manner of notice the clearing agency must provide to its members of such submission and (ii) how the Commission may stay the requirement that a security-based swap is subject to mandatory clearing. The Commission also is adopting new Rule 3Ca–2 to prevent evasion of the clearing requirement.

In addition, the Commission is adopting amendments to Rule 19b–4 and Form 19b–4 to implement Section 806(e), which requires any designated clearing agency for which the Commission is the Supervisory Agency to provide an Advance Notice to the Commission. Moreover, the Commission is adopting amendments to Rule 19b–4 and Form 19b–4 to conform to the requirements specified in Exchange Act Section 19(b), as amended by Section 916 of the Dodd Frank Act.[28] Section 916 provided for new deadlines by which the Commission must publish and act upon a proposed rule change submitted by a self-regulatory organization (''SRO'') and new standards for the approval, disapproval and temporary suspension of a proposed rule change. Finally, the Commission is adopting a number of technical and clarifying amendments to Rule 19b–4 and Form 19b–4.

As set forth in the Proposing Release, Security-Based Swap Submissions and Advance Notices will be required to be filed with the Commission on Form 19b–4 using the existing Electronic Form 19b–4 Filing System (''EFFS''). Currently, EFFS is used by SROs, which include registered clearing agencies,[29] to file proposed rule changes electronically with the Commission pursuant to Exchange Act Section 19(b) and Rule 19b–4.[30] The Commission is requiring clearing agencies to use EFFS for the filing of Security-Based Swap Submissions and Advance Notices because registered clearing agencies already use this system for Exchange Act Section 19(b) filings and because there are similarities between the existing requirement to file proposed rule changes with the Commission under Exchange Act Section 19(b) and the new requirements under the Dodd-Frank Act to file Security-Based Swap Submissions and under the Clearing Supervision Act to file Advance Notices.

A. Security-Based Swap Submissions

1. Process for Making Security-Based Swap Submissions to the Commission

Exchange Act Section 3C requires each clearing agency that plans to accept a security-based swap for clearing to file a Security-Based Swap Submission with the Commission for a determination by the Commission of whether the security-based swap (or any group, category, type or class of security-based swaps) referenced in the submission is required to be cleared.[31] Accordingly, the Commission is adopting new Rule 19b–4(o)(1), which sets forth the underlying requirement to make these submissions, substantially as proposed, with slight modifications made solely for the purpose of eliminating duplicative language in other parts of the rule and conforming the rule as necessary for certain other non-substantive changes made to other parts of Rule 19b–4 (as discussed below).

To facilitate this filing requirement, the Commission is adopting Rule 19b–4(o)(2) to require clearing agencies to use EFFS and Form 19b–4 for Security-Based Swap Submissions. As discussed in the Proposing Release, registered clearing agencies, as SROs, are already required to file proposed rule changes on Form 19b–4 on EFFS. Using the same filing process for Security-Based Swap Submissions would leverage existing technology and reduce the resources clearing agencies would have to expend on meeting Commission filing requirements. Moreover, in situations where a single clearing agency action would trigger more than one filing requirement, allowing for each filing to be made pursuant to a single Form 19b–4 submission would improve efficiency in the filing process. The Commission is adopting the requirements in new Rule 19b–4(o)(2) substantially as proposed, with modifications made to allow for

[25] 15 U.S.C. 78s(b) (as amended by Section 916 of the Dodd-Frank Act).

[26] Copies of comments received on the proposal are available on the Commission's Web site at: *http://www.sec.gov/comments/s7-44-10/s74410.shtml.*

[27] In addition to the changes discussed throughout this release, the Commission has made a number of minor typographical and clarifying revisions to the final rules as compared to what was included in the Proposing Release, including: (i) Inserting a missing word in each of new Rule 3Ca–1(d) and new Rule 19b–4(n)(3), (ii) amending the header to Rule 19b–4 to reflect the two new types of filings, (iii) replacing the word ''or'' with ''of'' in new Rule 19b–4(n)(2)(iii), (iv) replacing the term ''designated financial market utility'' with ''designated clearing agency'' in new Rules 19b–4(n)(2)(iii)(A) and (B) and (v) making numerous changes to the rule text to reflect the style requirements for proper inclusion of the final rules into the Code of Federal Regulations. Based on the non-substantive nature of these revisions, the Commission finds notice of the revisions is not necessary. *See* 5 U.S.C. 553(b).

[28] 15 U.S.C. 78s(b) (as amended by Section 916 of the Dodd-Frank Act).

[29] The definition of SRO in Section 3(a)(26) of the Exchange Act includes any registered clearing agency. 15 U.S.C. 78c(a)(26).

[30] SROs are required to file with the Commission, in accordance with rules prescribed by the Commission, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of the SRO (collectively referred to as a ''proposed rule change''). *See* 15 U.S.C. 78s(b)(1).

[31] *See* 15 U.S.C. 78c–3(b)(2) (as added by Section 763(a) of the Dodd-Frank Act).

the transition to EFFS filing. Specifically, the Commission is currently in the process of designing and implementing the Commission system upgrades that are necessary in order for Security-Based Swap Submissions to be filed on EFFS. The Commission expects the system upgrades to EFFS to be completed no later than December 10, 2012. In order to avoid delaying clearing agencies from making Security-Based Swap Submissions, the Commission has decided to provide for a temporary means of submission. As a result, the Commission is adopting Rule 19b–4(o)(2) to provide that Security-Based Swap Submissions filed before December 10, 2012 must be filed with the Commission by submitting the Security-Based Swap Submission to a dedicated email inbox to be established by the Commission. A clearing agency that files a Security-Based Swap Submission by email must include in the submission the same information that is required to be included for Security-Based Swap Submissions in the General Instructions for Form 19b–4, as such form has been modified by the rules the Commission is adopting today. Security-Based Swap Submissions filed on or after December 10, 2012 on Form 19b–4 would include the same substantive information.[32] Additional conforming changes have been made to Rule 19b–4(o)(2) to accommodate the phased implementation of the submission process.

The Commission did not receive any comments on its proposal to use EFFS and the existing Form 19b–4 filing process for Security-Based Swap Submissions. Some commenters did, however, raise questions related to other processes involving the clearing of security-based swaps, namely the interplay between the process by which the Commission will determine whether to approve a new security-based swap for clearing and the process by which the Commission will determine whether a security-based swap is required to be cleared.[33] Although these comments were not directly responsive to the proposed process by which clearing agencies will file Security-Based Swap Submissions, the Commission appreciates receiving feedback and questions from interested persons regarding how it should ultimately make determinations on which security-based swaps will be subject to mandatory clearing. Of the commenters that discussed the relationship between a mandatory clearing determination and an action approving the voluntary clearing of security-based swaps, one commenter requested that the Commission clarify the circumstances under which a clearing agency would be required to make a Security-Based Swap Submission with the Commission when it already has Commission-approved rules permitting it to clear the security-based swap in question.[34] Another commenter requested that the Commission ''de-couple the determination that a clearing agency may clear a security-based swap from the determination that a security-based swap should be subject to a mandatory clearing obligation.'' [35] Finally, one commenter asked for confirmation that ''the Commission intends that a clearing agency 'eligibility to clear' review is to be separate from and precede a security-based swap mandatory clearing review and [that] it is not intended that both reviews can commence simultaneously.'' [36]

In response to the three comments described above, the Commission notes that its process for determining whether a security-based swap is required to be cleared pursuant to Exchange Act Section 3C (which process is triggered by the filing of a Security-Based Swap Submission in accordance with the amendments being adopted today to Rule 19b–4 and Form 19b–4) is separate and distinct from the Commission's process for determining whether to approve a request by a clearing agency to commence voluntary clearing of a security-based swap (which process will be triggered by the filing of a proposed rule change pursuant to Exchange Act Section 19(b)).[37] Each filing process, as well as each resulting Commission determination, is governed by separate sections of the Exchange Act, and each operates under separate timeframes. Thus, a clearing agency will be required to make a Security-Based Swap Submission regardless of whether it has existing rules permitting it to clear the security-based swap referred to in the submission.

However, the Commission anticipates that a clearing agency's decision to plan to clear a security-based swap (or any group, category, type or class of security-based swaps) could require filings under both Exchange Act Section 19(b) and Exchange Act Section 3C. This is because a clearing agency's decision to clear a security-based swap may require the clearing agency to change its rules and thus file with the Commission a proposed rule change under Exchange Act Section 19(b). In this scenario, the clearing agency would be required to file a Security-Based Swap Submission with the Commission for a determination by the Commission of whether the security-based swap (or any group, category, type or class of security-based swaps) referenced in the submission is required to be cleared.[38] In other words, the two filing requirements are not mutually exclusive. Because a clearing agency may be required to file the same proposal under Exchange Act Section 3C and Exchange Act Section 19(b), and because there may be instances where the same information is required under both statutory provisions,[39] the Commission believes that the most efficient use of the Commission's and clearing agencies' resources would be to require clearing agencies to use the existing EFFS system for these two related, though legally separate, types of filings (and, to the extent that the filings are made at the same time, pursuant to a single Form 19b–4 submission).

In addition, while the Commission recognizes the concerns raised by the commenter requesting that these two processes not commence

[32] The Commission notes that a clearing agency must also continue to meet the filing requirements of Rule 19b–4 and Form 19b–4. For example, if the decision to clear a security-based swap referenced in a Security-Based Swap Submission also requires the clearing agency to file a proposed rule change under Exchange Act Section 19(b), the clearing agency must file the proposed rule change with the Commission on Form 19b–4 using EFFS and separately file the Security-Based Swap Submission with the Commission by email.

[33] *See, e.g.,* comment letter of CME Group, Inc. (Feb. 14, 2011) (''CME Letter''); comment letter of LCH.Clearnet Group (Feb. 14, 2011) (''LCH.Clearnet Letter''); comment letter of the International Swaps and Derivatives Association, Inc. (''ISDA'') (Feb. 14, 2011) (''ISDA Letter''); and comment letter of The Options Clearing Corporation (Feb. 14, 2011) (''OCC Letter'').

[34] *See* OCC Letter at 3.

[35] *See* LCH.Clearnet Letter at 2–3.

[36] *See* ISDA Letter at 4.

[37] A more detailed discussion regarding the separation of the two filing requirements (and subsequent Commission actions) is contained in section II.F of this release. Notably, the requirement to submit a proposed rule change is not affected by the rules the Commission is adopting today related to the process for filing Security-Based Swap Submissions.

[38] A clearing agency rule is defined broadly in the Exchange Act 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.'' *See* 15 U.S.C. 78c(a)(27). The Commission anticipates that a proposal to clear a new type, category or class of security-based swap will, in many cases, also be a change to the rules of a registered clearing agency that must be filed with the Commission for approval pursuant to Exchange Act Section 19(b).

[39] *See infra* section II.F.

simultaneously,[40] the Commission notes that the timing and sequencing of each of these processes ultimately will be determined based on the individual facts and circumstances of a particular filing. The Commission generally believes that when a security-based swap is submitted for review under Exchange Act Section 3C and concurrently filed under Exchange Act Section 19(b) as a proposed rule change, the two separate reviews will be carried out on the same general timeline and likely involving the same staff, both as a practical matter and to promote efficiency in the use of Commission resources. However, in circumstances where no proposed rule change filing would be required, such as a case where a clearing agency's rules already permit it to clear the security-based swap in question, EFFS and Form 19b–4 still will be used for the Security-Based Swap Submission.

The Commission also received a comment letter that attached a copy of a separate letter that the commenter submitted to the CFTC requesting, among other things, that the CFTC clarify that a designated clearing organization (''DCO'') would not be required to make any submission to the CFTC for swaps previously listed for clearing by a DCO prior to the date of enactment of Section 723 of the Dodd-Frank Act (''pre-enactment swaps'') or for any swaps that a DCO cleared prior to the effective date of the CFTC's final rules setting forth its swap submission process.[41] While this commenter did not explicitly make a concurrent request with respect to security-based swaps, the Commission notes that it will need to have certain information regarding any security-based swap (or any group, category, type, or class of security-based swaps) listed for clearing by a clearing agency as of the date of enactment of Exchange Act Section 3C (*i.e.,* July 21, 2010) (''pre-enactment security-based swaps'') in light of Exchange Act Section 3C(b)(2)(B) on which to base its determination of whether the security-based swap is required to be cleared.[42] Accordingly, the Commission will continue to work directly with any clearing agency that listed pre-enactment security-based swaps as of the date of enactment of Exchange Act Section 3C to obtain any information necessary for making a mandatory clearing determination.[43]

Finally, one commenter requested that the Commission clarify that, to the extent that a rule of a clearing agency is changed ''not through any action of the clearing agency but through the action of ISDA or other external authority, such an event would not constitute a rule change or necessitate an additional [Security-Based Swap] Submission.'' [44] This commenter noted that clearing agencies sometimes have rules that incorporate ISDA terms by reference or state that determinations made by an ISDA committee will apply to the security-based swaps that the clearing agency clears.[45] In response to this commenter, the Commission notes that as a general matter, registered clearing agencies have an ongoing responsibility to ensure that their rules are in compliance with Section 17A of the Exchange Act, regardless of the source of, or justification behind, a new rule or rule change. Accordingly, the Commission would need to review actions on a case-by-case basis to determine whether specific actions taken by ISDA or another industry organization would require the filing of a separate proposed rule change or Security-Based Swap Submission. In that respect, the Commission encourages clearing agencies to discuss particular actions with Commission staff in order to determine whether a filing is required.

a. Substance of Security-Based Swap Submissions: Consistency With Section 17A of the Exchange Act

New Rule 19b–4(o)(3)(i), which the Commission is adopting as proposed, requires that each Security-Based Swap Submission contain a statement explaining how the submission is consistent with Section 17A of the Exchange Act. The requirement to submit the information specified in Rule 19b–4(o)(3)(i) is intended to assist the Commission in its review of the Security-Based Swap Submission in accordance with the standards set forth in Exchange Act Section 3C(b)(4)(A).[46] Section 17A specifies, among other things, that the Commission is directed, having due regard for the public interest, the protection of investors, the safeguarding of securities and funds and maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents, to use its authority to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities.[47]

In complying with this requirement, registered clearing agencies should be able to utilize their prior experience with the requirement to comply with a similar rule in the context of filing proposed rule changes with the Commission pursuant to Exchange Act Section 19(b). Specifically, Exchange Act Section 19(b)(2)(C)(i) requires the Commission, prior to approving a proposed rule change filed by any SRO (including a registered clearing agency), to determine that the proposed rule change is consistent with the requirements of the Exchange Act (which would include Section 17A) and the rules and regulations issued thereunder applicable to such organization.[48] In connection with proposed rule changes, an SRO is required to ''explain why the proposed rule change is consistent with the requirements of the [Exchange] Act and the rules and regulations thereunder applicable to the [SRO]. A mere assertion that the proposed rule change is consistent with those requirements is not sufficient.'' [49]

[40] *See supra* note 36 and accompanying text.

[41] *See* Exhibit A to CME Letter.

[42] 15 U.S.C. 78c–3(b)(2)(B) (as added by Section 763(a) of the Dodd-Frank Act) (''[a]ny security-based swap or group, category, type, or class of security-based swaps listed for clearing by a clearing agency as of the date of enactment of this subsection shall be considered submitted to the Commission.'').

[43] The Commission notes that only two clearing agencies listed security-based swaps for clearing as of July 21, 2010. To begin the process of reviewing pre-enactment swaps, Commission staff has requested, pursuant to Section 17A of the Exchange Act, that each registered clearing agency submit information similar to that which will be required under Rule 19b–4(o)(3) so that the Commission can make the statutorily required determination. The Commission believes that receiving this information directly from the clearing agencies, as opposed to having to gather it from other sources, should help ensure that the Commission is able to make mandatory clearing determinations. Moreover, such information would be based on timely, accurate and comprehensive information obtained from the party most directly involved in the clearing process as it pertains to a particular security-based swap. In addition, providing this information in response to a Commission request is consistent with a clearing agency's general obligations in connection with its registration with the Commission. After the effective date of Rule 19b–4(o) and once the Commission has verified that the previously submitted information is complete on its face, the Commission will publish the submissions for public comment. The Commission confirms that a clearing agency that is clearing pre-enactment security-based swaps may continue to clear them on a voluntary basis and does not have to wait for a determination from the Commission as to whether the security-based swaps are required to be cleared.

[44] *See* OCC Letter at 4.

[45] *See id.*

[46] *See* 15 U.S.C. 78c–3(b)(4)(A) (as added by Section 763(a) of the Dodd-Frank Act) (''[i]n reviewing a [Security-Based Swap Submission], the Commission shall review whether the submission is consistent with section 17A.'').

[47] 15 U.S.C. 78q–1.

[48] *See* 15 U.S.C. 78s(b)(2)(C)(i).

[49] Item 3(b) of the General Instructions for Form 19b–4. 17 CFR 240.819. *See also* Exchange Act Section 19(b), which requires that an SRO provide a statement of the basis of the proposed rule change and provides that the Commission shall approve a

Continued

Presently, in complying with the requirement to file proposed rule changes with the Commission pursuant to Exchange Act Section 19(b), registered clearing agencies are required to specify, among other things, how the proposed rule change is consistent with the requirements under Section 17A(b)(3) of the Exchange Act. In addition, all registered clearing agencies must comply with the standards in Section 17A of the Exchange Act, which include requirements under Section 17A(b)(3) of the Exchange Act to maintain rules for promoting the prompt and accurate clearance and settlement of securities transactions, assuring the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, fostering cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, removing impediments to and perfecting the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, protecting investors and the public interest.[50] A registered clearing agency also is required under Section 17A(b)(3) of the Exchange Act to provide fair access to clearing and to have the capacity to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible, as well as to safeguard securities and funds in its custody or control or for which it is responsible.[51]

The Commission did not receive any comments on the requirement contained in Rule 19b–4(o)(3)(i) that a clearing agency explain how the Security-Based Swap Submission is consistent with Section 17A of the Exchange Act. However, one commenter recommended that the Commission provide further specificity as to precisely what elements of Section 17A(b)(3) of the Exchange Act ''are relevant to the decision to clear a security-based swap and thus must be addressed in a clearing agency's submission.'' [52] Because each Security-Based Swap Submission will be tailored to a particular security-based swap (or group, category, type or class of security-based swaps) and to the clearing arrangement established by the particular clearing agency filing the submission, each submission will raise different issues for the Commission to consider. As such, the Commission is unable to state definitely which elements of Section 17A(b)(3) would be relevant to individual submissions. However, the Commission notes that all registered clearing agencies are required to maintain compliance with each of the standards set forth in Section 17A of the Exchange Act as a condition to registration, and a clearing agency should have considered whether clearing a security-based swap (or group, category, type or class of security-based swaps) is consistent with the requirements of Section 17A of the Exchange Act at the time the clearing agency first reached a decision to clear the particular instrument. Accordingly, and in response to the question raised by the commenter, a clearing agency should consider whether it needs to include a statement in the submission discussing the process the clearing agency followed when it reached its initial decision to clear the security-based swap (or group, category, type or class of security-based swaps). To the extent possible, such discussion could include information on the clearing agency's consideration of the factors set forth in Rule 19b–4(o)(3)(ii) at the time the clearing agency decided to commence clearing the product and the weight, if any, each such factor (or other factors determined to be appropriate by the clearing agency) was given in reaching its conclusion. If additional procedures were followed, over and above those associated with other types of rule changes or designed to assist the clearing agency in considering the particular risk or other characteristics of the security-based swap (or group, category, type or class of security-based swaps) that is the subject of the submission, the clearing agency could specify such procedures. The Commission also encourages clearing agencies to specify and briefly describe any departures from processes contemplated by clearing agency rules in reaching a decision to commence clearing the security-based swap, such as exercises of discretion not to consult established management committees, board committees or participant committees.

To the extent relevant to its initial conclusion to clear a security-based swap, the clearing agency could include a clear statement whether it believes that the security-based swap (or group, category, type or class of security-based swaps) that is the subject of the Security-Based Swap Submission should or should not be required to be cleared by the Commission, together with a discussion of the reasons for its belief. If the Commission's decision to require or not to require the security-based swap (or group, category, type or class of security-based swaps) that is the subject of the submission to be cleared would or would not materially affect the clearing agency's judgment that the clearing proposal is consistent with Section 17A of the Exchange Act, the clearing agency is encouraged to include a statement of this nature and explain why this is the case.[53]

b. Substance of Security-Based Swap Submissions: Quantitative and Qualitative Factors

The Commission also is adopting new Rule 19b–4(o)(3)(ii) to specify what qualitative and quantitative factors should be discussed by a clearing agency in its Security-Based Swap Submission. This rule is being adopted substantially as proposed, with certain non-substantive changes having been made to correct paragraph numbering. To provide context for the requirements to provide this information, Exchange Act Section 3C(b)(4)(B) requires the Commission, prior to making a mandatory clearing determination, to analyze five specific qualitative and quantitative factors.[54] New Rule 19b–4(o)(3)(ii) requires clearing agencies to submit information to assist the Commission in its consideration of the five factors specified in Exchange Act

proposed rule change only if it finds that it is consistent with the requirements of the Exchange Act and the rules and regulations thereunder. 15 U.S.C. 78s(b).

[50] *See* 15 U.S.C. 78q–1(b)(3)(F).

[51] *See* 15 U.S.C. 78q–1(b)(3)(A), (B) and (F).

[52] *See* CME Letter at 2, n.1. In its comment letter, CME Group, Inc. states that Exchange Act Section 3C ''governs the Commission's responsibility to determine whether a security-based swap that a clearing agency chooses to clear may be cleared'' and also ''requires the Commission to make determinations respecting whether a security-based swap is subject to the mandatory clearing requirement.'' The Commission notes, however, that Exchange Act Section 3C only relates to mandatory clearing determinations. The question of whether a clearing agency *may* clear a security-based swap will depend on whether clearing of the security-based swap is permitted under the clearing agency's rules. To the extent that a clearing agency's rules must also be modified to permit clearing of a new security-based swap (or group, category, type or class of security-based swaps), such change would need to be approved as a proposed rule change governed by Exchange Act Section 19(b). Other than certain technical changes made pursuant to Section 916 of the Dodd-Frank Act, the process for submitting proposed rule changes with the Commission is not being modified by the rules being adopted today. *See supra* note 37 and accompanying text.

[53] As compliance with each of the standards of Section 17A of the Exchange Act is required of each registered clearing agency, the information specified throughout this paragraph is expected to be provided by each clearing agency for any security-based swap (or group, category, type or class of security-based swaps) being considered by the Commission, including pre-enactment swaps.

[54] *See* 15 U.S.C. 78c–3(b)(4)(B)(i)–(v) (as added by Section 763(a) of the Dodd-Frank Act).

Section 3C(b)(4)(B), including, but not limited to:

(i) The existence of significant outstanding notional exposures, trading liquidity and adequate pricing data.

(ii) The availability of a rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded.

(iii) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the clearing agency available to clear the contract.

(iv) The effect on competition, including appropriate fees and charges applied to clearing.

(v) The existence of reasonable legal certainty in the event of the insolvency of the relevant clearing agency or one or more of its clearing members with regard to the treatment of customer and security-based swap counterparty positions, funds, and property.

Some commenters requested that the Commission limit the breadth of the information that clearing agencies will be required to submit to the Commission pursuant to Rule 19b–4(o)(3)(ii) pertaining to the five qualitative and quantitative factors.[55] For example, one commenter urged Commission staff to exercise judgment and flexibility in determining the scope of information required in connection with the five qualitative and quantitative factors, noting that some of these factors would require ''at most a very cursory mention'' in a specific Security-Based Swap Submission, particularly where the responsive information is already well-known to the Commission or where the Commission has extensive knowledge of the clearing agency's rules or operations.[56] Further, this commenter requested that the Commission clarify that when a Rule 19b–4 filing is both a proposed rule change and a Security-Based Swap Submission, any information that is self-evident from the text of the proposed rule need not be repeated for the Security-Based Swap Submission aspect of the filing.[57]

In response to this comment, the Commission reiterates that registered clearing agencies will be required to submit Security-Based Swap Submissions for the sole purpose of submitting the information necessary for the Commission to determine, pursuant to Exchange Act Section 3C(b)(2)(C)(ii), whether the security-based swap described in the submission is required to be cleared (*i.e.,* subject to mandatory clearing). As discussed in section II.A.1 and throughout this release, the process by which the Commission will determine whether a security-based swap is required to be cleared following the submission of a Security-Based Swap Submission is separate and distinct from the process by which the Commission will determine whether to approve a new security-based swap for voluntary clearing following the filing of a proposed rule change pursuant to Exchange Act Section 19(b).[58] In cases where the Rule 19b–4 filing is both a proposed rule change and a Security-Based Swap Submission, each filing should be complete in accordance with the particular rules applicable to the different types of filings. At the same time, the Commission agrees with this commenter that clearing agencies should not be required to provide unnecessarily duplicative information. Accordingly, if more than one type of filing is made pursuant to a single Form 19b–4 submission, clearing agencies may be able to refer to and cross-reference relevant information in the proposed rule change that also is relevant to the Security-Based Swap Submission filing so long as the requirements of each applicable rule are individually satisfied and if the clearing agency clearly explains how the information included in the proposed rule change is applicable to the specific information required to be provided in the Security-Based Swap Submission.

Another commenter suggested that the Commission should limit the information required to be in a Security-Based Swap Submission to include only information addressing whether clearing a security-based swap comports with Section 17A of the Exchange Act.[59] In particular, this commenter maintained that the qualitative and quantitative factors set forth in Exchange Act Section 3C(b)(4)(B) were most relevant to the Commission in making its determination as to whether a security-based swap is required to be cleared and less relevant in the context of a submission by a clearing agency seeking approval to clear a security-based swap.[60] This commenter maintained that requiring clearing agencies to perform an analysis of the qualitative and quantitative factors set forth in Exchange Act Section 3C(b)(4)(B) in connection with seeking approval to clear a security-based swap would be ''broad and burdensome,'' noting that the Commission has a great deal of information necessary to address the statutory factors by virtue of the extensive reporting requirements under the Dodd-Frank Act.[61]

Similarly, a separate commenter requested that the Commission amend the information requirements in the proposed rule ''such that a clearing agency is required to include in its submission only that information which is necessary for determining the suitability of a security-based swap for clearing and the *eligibility* of a clearing agency to clear that security-based swap (but not the information required to support the determination of whether a security-based swap should be subject to a mandatory clearing obligation).''[62] In furtherance of this suggestion, the commenter suggested specific deletions to the information requirements in the proposed rules that were based on the five statutory factors set forth in Exchange Act Section 3C(b)(4)(B).[63]

In response to the commenters discussed in the two preceding paragraphs, the Commission notes that the factors specified in new Rule 19b–4(o)(3)(ii) are identical to the qualitative and quantitative factors that the Commission is required to consider pursuant to Exchange Act Section 3C(b)(4)(B) when determining whether a security-based swap (or group, category, type or class of security-based swaps) will be subject to a mandatory clearing requirement. Moreover, and in response to the commenter that requested that the information required in the submission relate only to the suitability of the security-based swap for clearing and the

[55] *See, e.g.,* CME Letter, LCH.Clearnet Letter and OCC Letter.

[56] *See* OCC Letter at 3–5.

[57] *See id.*

[58] As previously noted, although the Commission will accept both Security-Based Swap Submissions and proposed rule changes on Form 19b–4 through EFFS for the sake of efficiency, each filing will be considered a separate submission to be reviewed in accordance with the appropriate statutory provision—even to the extent that both filings are made at the same time using the same form.

[59] *See* CME Letter at 3. In addition, the CME Letter attached as an exhibit a comment letter, dated Jan. 3, 2011, that CME Group, Inc. submitted to the CFTC in connection with a similar set of proposed rules. *See* Exhibit A to CME Letter. In this letter, CME Group, Inc. recommended that the CFTC delete a number of items required to be included in a submission to the CFTC in connection with a mandatory clearing determination for swaps. These recommended deletions included each of the five qualitative and quantitative factors set forth in Section 2(h)(2)(D) of the Commodity Exchange Act (which are identical to the factors contained in Exchange Act Section 3C(b)(4)(B)). Specifically, CME Group, Inc. expressed its belief that these requirements were unclear, unduly burdensome, could defeat the purposes of the Dodd-Frank Act and, in some cases, called for information that the clearing agency does not possess.

[60] *See id.*

[61] *See id.*

[62] *See* LCH.Clearnet Letter at 3.

[63] *See id.* at 4

eligibility of the clearing agency to clear the security-based swap, the Commission notes that the information related to the statutory factors are necessary in connection with the Commission's statutory obligation to make a mandatory clearing determination. The Commission believes that it is appropriate to require such information to be included in Security-Based Swap Submissions because clearing agencies ordinarily have primary access to this information, making it easier for them to submit the information to the Commission than it would be for the Commission to gather the information from other sources, resulting in a more effective and efficient process for both the Commission and clearing agencies.

Furthermore, the Commission does not believe that requiring clearing agencies to submit information responsive to new Rule 19b–4(o)(3)(ii) would be overly burdensome or require clearing agencies to provide material that is not in their possession. In particular, and based on its prior experience with the operations and governance of clearing agencies, the Commission would expect that clearing agencies would consider the factors set forth in the statute and the rule as part of their decision-making process, particularly in connection with determining whether to list the relevant security-based swaps for clearing (and knowing that such listing could result in the Commission determining that the security-based swap may be required to be cleared). Based on all of the reasons outlined above, particularly the requirement that the Commission consider each of the factors set forth in Exchange Act Section 3C(b)(4)(B) prior to making a mandatory clearing determination, each Security-Based Swap Submission will be required to include information regarding the factors listed in paragraphs (A) through (E) of Rule 19b–4(o)(3)(ii).

In addition, the Proposing Release included examples of information that a clearing agency ''could'' consider including in its Security-Based Swap Submission in order to respond to the quantitative and qualitative factors specified in Exchange Act Section 3C.[64] Some commenters urged the Commission to incorporate these examples into its final rules, thereby requiring all of this information to be included in a clearing agency's Security-Based Swap Submission.[65] For example, one commenter suggested that the proposed rules did not include requirements to ensure that Security-Based Swap Submissions provide sufficiently detailed information; this commenter stated that the range of information discussed in the proposed rule as information a clearing agency ''could'' include appears to be essential information that the Commission could use to ''efficiently and effectively determine whether the clearing agency should be allowed to clear the swap, or whether the swap should be required to clear.'' [66] A second commenter requested that the Commission, at a minimum, replace the word ''could'' with ''shall'' in the list of disclosures required to be included in a Security-Based Swap Submission.[67]

A third commenter urged the Commission to ''require every clearing agency to submit all of the information identified in the [Proposing] Release and in the instructions as potentially relevant to the five factors'' set forth in Exchange Act Section 3C(b)(4)(B).[68] The same commenter also requested that the proposed rules be expanded to require clearing agencies to submit additional information regarding pricing, liquidity and risk management as part of a Security-Based Swap Submission, and to include an explicit statement in the final rules whereby the Commission would make clear that ''a given level of contract-specific systemic risk is not a prerequisite for a determination that a security-based swap is subject to mandatory clearing.'' [69] Finally, this commenter urged the Commission to require clearing agencies to include information regarding the decision-making process they follow when deciding whether or not to make a Security-Based Swap Submission.[70]

In response to the three commenters discussed above, the Commission believes that the requirements contained in new Rule 19b–4(o)(3)(ii) strike an appropriate balance by requiring clearing agencies to submit the

[64] *See* Proposing Release, *supra* note 24, at section II.A.1.b.

[65] *See, e.g.,* comment letter of Americans for Financial Reform (Feb. 14, 2011) (''AFR Letter''); comment letter of American Federation of State, County and Municipal Employees (''AFSCME'') (Feb. 14, 2011) (''AFSCME Letter''); and comment letter of Better Markets, Inc. (Feb. 14, 2011) (''Better Markets Letter'').

[66] *See* AFR Letter at 2.

[67] *See* AFSCME Letter at 3–4. While AFSCME suggested that all of the examples identified in the release be incorporated into the rule, it highlighted as particularly relevant the reference to information on product specifications, including copies of any standardized legal documentation, generally accepted contract terms, standard practices for managing and communicating any life cycle events associated with the security-based swap and related adjustments, and the manner in which the information contained in the confirmation of the security-based swap trade is transmitted.

[68] *See* Better Markets Letter at 3–5.

[69] *See id* at 5–7. The additional information suggested by Better Markets, Inc. (''Better Markets'') includes: (1) Information about any price indices used for pricing the security-based swap; (2) information regarding liquidity over the life of a security-based swap; (3) information regarding risk management procedures, particularly with respect to cross-contract netting and credits relating to initial margin, including correlations to be used and algorithms that result in the netting or credits; and (4) certain information on the hedging relationships between the security-based swaps proposed to be cleared and other security-based swaps that are cleared by the clearing agency or by other clearing agencies.

[70] *See* Better Markets Letter at 7–8. Specifically, Better Markets urged the Commission to require clearing agencies to: (1) Include a summary of member support for clearing the security-based swap as proposed, as well as member objections; (2) notify the Commission and the public of the type of security-based swap being considered at the time it notifies members of the submission or possible submission; (3) submit input from both the public and customers regarding the decision to make a submission, which can be considered alongside member views (including the methods used to solicit such input and the outcome); and (4) notify the Commission of the decision not to make a submission if the decision is made after the clearing agency risk committee (or similar body) solicits input from members, customers or others regarding a submission, which notification should include the objections and supporting statements received regarding the proposed submission. Similarly, Americans for Financial Reform urged the Commission to require clearing agencies to file submissions (which should be made publicly available) when the clearing agency ''rejects a class of swaps for clearing.'' *See* AFR Letter at 2.

While the Commission has provided full responses to these comments later in this section, with respect to the commenters requesting that a clearing agency notify the Commission when it decides not to make a Security-Based Swap Submission or when it ''rejects a class'' of security-based swaps for clearing, the Commission notes that, to the extent that these commenters' suggestion is directed toward the Commission's ability to ensure that clearing agencies do not reject new security-based swaps for clearing for improper reasons, such as anticompetitive reasons, other provisions of the Exchange Act provide the Commission with the ability to investigate and address potential anticompetitive behavior if it occurs. For example, Section 17A of the Exchange Act provides that clearing agency rules must not be designed to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency and that the rules may not impose a burden of competition that is not necessary or appropriate in furtherance of the provisions of the Exchange Act. *See* 15 U.S.C. 78q–1(b)(3)(F) and (I). All proposed rule changes filed by clearing agency with the Commission under Exchange Act Section 19(b)(2) are subject to approval by the Commission and all Security-Based Swap Submissions will be subject to Commission review to determine whether a security-based swap should be required to be cleared. Pursuant to Rule 17a–1, a registered clearing agency must keep copies of all documents made or received by it in the course of its business as such and provide copies of any such documents to the Commission upon request. *See* 17 CFR 17a–1. The Commission has broad authority under Section 17(b) of the Exchange Act to conduct examinations of clearing agencies. *See* 15 U.S.C. 78q. And ultimately, under Section 19(h) of the Exchange Act, the Commission has the authority to bring an enforcement action against a clearing agency that has violated or is unable to comply with any provision of the Exchange Act, the rules or regulations thereunder, or its own rules. *See* 15 U.S.C. 78s.

information necessary to allow the Commission to make informed and timely mandatory clearing determinations. In particular, the Commission believes that the information requirements contained in Rule 19b–4(o)(3)(ii) provide for the submission of a comprehensive set of information to be included in a preliminary Security-Based Swap Submission. For example, the Commission believes that most of the information discussed in the proposed rule as information a clearing agency ''could'' include in a Security-Based Swap Submission is already contemplated by the rules the Commission is adopting today. In fact, in the discussion set forth both the Proposing Release and in the paragraph immediately below, the Commission has attempted to tie each example identified as information a clearing agency ''could'' include in a Security-Based Swap Submission to a specific section of new Rule 19b–4(o)(3)(ii). As a result, the Commission does not believe that it is necessary to incorporate this information directly into the rule text, as suggested by three commenters.[71] Similarly, the Commission believes that the information identified by the commenter who suggested that the final rules be expanded by requiring, among other things, information regarding pricing, liquidity, risk management, and certain decision-making processes also is generally contemplated by one of the requirements of new Rule 19b–4(o).[72] Moreover, to the extent that information suggested to be included in the final rules by commenters is not addressed in other provisions (including, for example, information on certain hedging relationships between security-based swaps and information on decisions not to accept a security-based swap for clearing) or omitted from a Security-Based Swap Submission, the Commission notes that it can require the production of additional information from clearing agencies pursuant to Rule 19b–4(o)(6) (to the extent that the information is requested in connection with an actual Security-Based Swap Submission) or in all cases pursuant to the Commission's general supervisory authority to the extent that it believes such information will be relevant to its consideration of the Security-Based Swap Submission or otherwise.

Nevertheless, and as described in the Proposing Release, the Commission believes that while the content of each Security-Based Swap Submission will depend on the specific product referenced therein and the particular set of circumstances related to the clearing arrangement, many common types of information likely will be responsive to a large number of these types of submissions. For example, with respect to Rule 19b–4(o)(3)(ii)(A), a statement describing the existence of outstanding notional exposures, trading liquidity and adequate pricing data could address pricing sources, models and procedures demonstrating an ability to obtain price data to measure credit exposures in a timely and accurate manner, as well as measures of historical market liquidity and trading activity, and expected market liquidity and trading activity if the security-based swap is required to be cleared (including information on the sources of such measures). With respect to Rule 19b–4(o)(3)(ii)(B), a statement describing the availability of a rule framework could include a discussion of the rules, policies or procedures applicable to the clearing of the relevant security-based swap. Additionally, a discussion of credit support infrastructure could include the methods to address and communicate requests for, and posting of, collateral. With respect to Rule 19b–4(o)(3)(ii)(C), a discussion of systemic risk could include a statement on the clearing agency's risk management procedures including, among other things, the measurement and monitoring of credit exposures, initial and variation margin methodology, methodologies for stress testing and back testing, settlement procedures and default management procedures. With respect to Rule 19b–4(o)(3)(ii)(D), a discussion of fees and charges could address any volume incentive programs that may apply or impact the fees and charges. With respect to Rule 19b–4(o)(3)(ii)(E), a discussion of legal certainty in the event of an insolvency could address segregation of accounts and all other customer protection measures under insolvency.

In addition, the Commission continues to believe that when describing the security-based swap (or group, category, type or class of security-based swaps) referenced in the Security-Based Swap Submission, the clearing agency could discuss the relevant product specifications, including any standardized legal documentation, generally accepted contract terms,[73] standard practices for managing and communicating any life cycle events associated with the security-based swap and related adjustments,[74] and the manner in which the information contained in the confirmation of the security-based swap trade is transmitted. Further, the clearing agency also could discuss its financial and operational capacity to provide clearing services to all customers potentially subject to the clearing requirements as applicable to the particular security-based swap. Finally, the clearing agency could include an analysis of the effect of a clearing requirement on the market for the group, category, type, or class of security-based swaps, both domestically and globally, including the potential effect on market liquidity, trading activity, use of security-based swaps by direct and indirect market participants and any potential market disruption or benefits. This analysis could include whether the members of the clearing agency are operationally and financially capable of absorbing clearing business (including indirect access market participants) that may result from a determination that the security-based swap (or group, category, type or class of security-based swaps) is required to be cleared.[75]

[71] *See supra* notes 65 to 68 and accompanying text.

[72] *See supra* notes 69 to 70 and accompanying text. For example, Better Markets suggested that the Commission require clearing agencies to submit certain information on price indices used for pricing the security-based swap and information on liquidity over the life of the security-based swap. The Commission believes that this information generally falls within the scope of new Rule 19b–4(o)(3)(ii)(A), which requires the clearing agency to provide information about the existence of significant outstanding notional exposures, trading liquidity and adequate pricing data. In addition, Better Markets suggested that the Commission require clearing agencies to submit certain information regarding the clearing agency's risk management procedures which the Commission believes is already contemplated by new Rule19b–4(o)(3)(ii)(B) and (C), which require the clearing agency to provide information about the availability of a rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded as well as the effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the clearing agency available to clear the contract. With respect to the information suggested by Better Markets regarding certain decision-making processes used by the clearing agency when it makes a Security-Based Swap Submission, the Commission believes that much of this information is contemplated by new Rule 19b–4(o)(3)(i), which requires clearing agencies to explain how the submission is consistent with Section 17A of the Exchange Act.

[73] For example, for some security-based swaps, industry standard documentation would include the applicable ISDA Master Agreement and any related asset-class-specific definitions.

[74] The Commission included a definition of ''life cycle event'' in proposed Regulation SBSR. *See Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information,* Securities Exchange Act Release No. 63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010).

[75] In addition to the information required to be submitted to the Commission pursuant to new Rule

Continued

The Commission believes that basing the information submission requirements in new Rule 19b–4(o)(3)(ii) on the five statutory factors set forth in Exchange Act Section 3C(b)(4)(B), and supplementing these requirements by providing the above examples of information that the Commission believes could be responsive, is an appropriate approach to implementing the statute because it retains the flexibility provided for in the Proposing Release to allow clearing agencies to address the statutory factors based on the facts and circumstances of a particular submission without requiring specific data points that could be overly prescriptive at the outset. At the same time, the Commission recognizes that a requirement that does not provide enough detail could result in an inefficient use of clearing agency and Commission resources if Security-Based Swap Submissions contain a large amount of unnecessary or irrelevant information. To that extent, the Commission encourages clearing agencies to discuss, at least initially, prospective Security-Based Swap Submissions with Commission staff to help determine what materials would be responsive to the requirements of new Rule 19b–4(o)(3)(ii) and Exchange Act Section 3C(b)(4)(B) in the context of a particular submission.

c. Substance of Security-Based Swap Submissions: Open Access

Exchange Act Section 3C also requires that the rules of a clearing agency that clears security-based swaps subject to the clearing requirement provide for open access.[76] In the course of reviewing a Security-Based Swap Submission, the Commission may assess whether a clearing agency's rules provide for open access, particularly with respect to the relevant Security-Based Swap Submission. Accordingly, new Rule 19b–4(o)(3)(ii), which is being adopted as proposed, requires that a Security-Based Swap Submission include a statement regarding how the clearing agency's rules:

(i) Prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency; and

(ii) Provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility.

One commenter requested that the Commission delete the requirement that a clearing agency submit information responsive to the factors related to open access in its Security-Based Swap Submission on the basis that requiring this information is ''broad and burdensome'' and outside of the authority granted to the Commission by the Dodd-Frank Act.[77] While the Commission recognizes that the factors related to open access are not included in the five qualitative and quantitative factors that the Commission is required to consider when reviewing a Security-Based Swap Submission, the Commission notes that Exchange Act Section 3C(a)(2) provides the authority for including this requirement in new Rule 19b–4(o)(3)(ii) in that it requires that the rules of a clearing agency that clears security-based swaps subject to the clearing requirement be in compliance with the two open access provisions.[78] By requiring that compliance with the open access requirements be assessed each time a clearing agency files a Security-Based Swap Submission, the clearing agency will be required to demonstrate that it continues to satisfy these ongoing conditions prior to listing a new security-based swap (or group, category, type, or class of security-based swap) for clearing. Because clearing in a particular security-based swap is limited to a small number of clearing agencies, it is critical that access to the clearing agency be open and available to market participants having due regard for risk management considerations.[79] Further, the Commission believes that requiring clearing agencies to address the two open access requirements in a Security-Based Swap Submission generally would not require a clearing agency to conduct a completely novel analysis or to consider factors with which it is unfamiliar as clearing agencies are already required to address open access issues as part of their compliance with certain requirements contained in Section 17A of the Exchange Act.[80] Accordingly, the rules the Commission is adopting today, which are unchanged from what was proposed, require that clearing agencies address in their Security-Based Swap Submission how their rules meet such open access requirements.

d. Timing of Security-Based Swap Submissions

Pursuant to Exchange Act Section 3C(b)(3), the Commission is required to make its determination of whether a security-based swap described in a clearing agency's Security-Based Swap Submission is required to be cleared not later than 90 days after receiving such Security-Based Swap Submission.[81] The statute further provides that this 90-day determination period may be extended with the consent of the clearing agency making such Security-Based Swap Submission.[82] In addition, the statute requires the Commission to make available to the public any Security-

19b–4(o)(3), and any information identified in this release as an example of information that clearing agencies may wish to provide in their submissions, the Commission may also require additional information as necessary to assess any of the factors it determines to be appropriate in order to make a determination of whether the clearing requirement applies. *See infra* section II.A.1.g (discussing new Rule 19b–4(o)(6)).

[76] *See* 15 U.S.C. 78c–3(a)(2) (''OPEN ACCESS.—The rules of a clearing agency described in paragraph (1) shall—(A) prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency; and (B) provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility.'').

[77] *See* CME Letter at 3.

[78] *See* 15 U.S.C. 78c–3(a)(2) (as added by Section 763(a) of the Dodd-Frank Act).

[79] The Commission has previously recognized that certain conflicts of interest at clearing agencies or among their members could restrict open access to the clearing agency. *See Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC,* Securities Exchange Act Release No. 63107 (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010) (noting that ''[a] consequence of increased use of central clearing services, however, is that participants that control or influence a security-based swap clearing agency may gain a competitive advantage in the security-based swaps market by restricting access to the clearing agency. If that occurred, financial institutions and marketplaces that do not have access to central clearing would have limited ability to trade in or list security-based swaps.''). The Commission also recognized, however, that clearing agencies may legitimately impose minimum participation standards that could affect open access. *See id* (''The provisions in Section 17A recognize that a clearing agency may discriminate among persons in the admission to, or the use of, the clearing agency, by requiring that participants meet certain financial, operational, and other fitness standards. However, Section 17A also requires that sanctioned discriminations must not be unfair.'').

[80] *See* 15 U.S.C. 78q–1(b)(3)(F) (requiring that the rules of a clearing agency, among other things, not be designed ''to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency'').

[81] 15 U.S.C. 78c–3(b)(3) (as added by Section 763(a) of the Dodd-Frank Act). Further, pursuant to new Rule 19b–4(o)(2), if any information submitted to the Commission by a clearing agency on Form 19b–4 were not complete or otherwise in compliance with Rule 19b–4 and Form 19b–4, such information would not be considered a Security-Based Swap Submission and the Commission would be required to inform the clearing agency within twenty-one business days of such submission.

[82] 15 U.S.C. 78c–3(b)(3) (as added by Section 763(a) of the Dodd-Frank Act).

Based Swap Submission it receives and to ''provide at least a 30-day public comment period regarding its determination whether the clearing requirement shall apply to the submission.'' [83]

Because the Commission's obligation to provide for notice and public comment of Security-Based Swap Submissions is set forth in detail in Exchange Act Section 3C, it was not necessary for the Commission to adopt rules regarding these procedures. However, the Commission believes that it is important to provide guidance on how it intends to implement these statutory requirements in practice. Specifically, the Commission believes that the statutory requirement to ''provide at least a 30-day public comment'' was intended, at least in part, to enable the public to have an opportunity to comment on the Security-Based Swap Submission and to provide information for the Commission to consider as part of making its determination whether the clearing requirement should apply to the submission. Accordingly, the Commission will indicate in each notice that it publishes of a Security-Based Swap Submission that public comment will be accepted during the period specified in the notice (which will in no event be less than 30 days). In addition, the comment period will begin and end within the 90-day determination period (as opposed to beginning after the Commission has made its final determination). The Commission expects to publish notice of the Security-Based Swap Submission in the **Federal Register** and it also intends to publish notice on the Commission's publicly-available Web site at *www.sec.gov*. Such notice would include the solicitation of public comment for the period specified in the notice. This process is consistent with the current process that is in place for proposed rule changes under Exchange Act Section 19(b)(2) and Rule 19b–4.

Although the Commission did not propose rules with respect to the procedure it will follow in publishing Security-Based Swap Submissions for public comment, one commenter requested that the Commission extend the minimum public review period to 45 days.[84] This commenter also recommended that the comment period should not commence until after: (1) The clearing agency has proven the ability to clear the product through testing; (2) the clearing agency has sufficient operational resources and established connectivity to the market using standard protocols; (3) all market standardization issues defining the product, life events, etc. have been resolved; (4) pricing standards and margin calculations have been agreed by the clearing agency's risk committee; and (5) the Commission has all the information it needs and such information has been verified as consistent with data received from security-based swap data repositories, security-based swap dealers and major security-based swap participants.[85] In response to this comment letter, the Commission notes that the comment period specified in the notice will be at least 30 days, as is required under the statute.[86] The Commission believes the statute permits it to specify a comment period that is longer than 30 days, and the Commission will state the length of the comment period in each notice. Generally, however, the Commission believes that a 30-day comment period for Security-Based Swap Submissions strikes an appropriate balance by providing commenters with sufficient time to formulate their ideas while still giving the Commission time to consider all of the comments received and to factor them into the mandatory clearing determination, particularly as the Commission has a statutory obligation to make a clearing determination not later than 90 days after receiving the submission. In response to the comment suggesting that the Commission should delay the commencement of the comment period until the actions outlined by the above commenter are completed, the Commission notes that most of the information identified by the commenter is already required by the five quantitative and qualitative factors set forth in Exchange Act Section 3C(b)(4)(B) and new Rule 19b–4(o)(3)(ii).[87] Moreover, the Commission is concerned that delaying the commencement of the public comment process would delay the Commission's potential receipt of feedback from the public which, in the Commission's experience reviewing proposed rule changes, is often an important source of information for supplementing or challenging the material submitted by the SRO.

In addition, a commenter recommended that the Commission adopt an extended transition period between the date that a determination is made that a security-based swap is required to be cleared and the date clearing becomes mandatory for that product.[88] This commenter also recommended a second transition period from ''when the 'exchange/security-based swap execution facility trading' requirement is determined to when such requirement takes effect.'' [89] Finally, this commenter recommended ''full transparency of clearing agency requirements and performance during such period(s).'' [90] Although the substance of the Commission's mandatory clearing determinations and the timing of implementation of those determinations are not addressed in the rules being adopted today, which focus on the process by which clearing agencies submit filings, the Commission understands the importance of ensuring that clearing agencies and market participants are given an appropriate amount of time and guidance to comply with a clearing mandate. In many cases, the determination of when and how a clearing requirement should be implemented will depend on the particular product that the Commission determines is required to be cleared. The Commission further notes that Exchange Act Section 3C(b)(4)(C) provides that the Commission, in making a mandatory clearing determination, may require such terms and conditions as the Commission determines to be appropriate.[91]

e. Notice to Clearing Agency Members

Exchange Act Section 3C(b)(2)(A) requires that a clearing agency provide notice to its members, in a manner determined by the Commission, of its Security-Based Swap Submissions.[92] To meet this requirement, new Rule 19b–4(o)(5), which is being adopted as proposed, requires clearing agencies to post all Security-Based Swap Submissions, and any amendments thereto, on their Web sites. This public posting must be completed within two business days following the submission to the Commission. The Commission received one comment expressing general support for this requirement.[93]

[83] 15 U.S.C. 78c–3(b)(2)(C)(iii) (as added by Section 763(a) of the Dodd-Frank Act).

[84] *See* ISDA Letter at 11.

[85] *See id.*

[86] *See* 15 U.S.C. 78c–3(b)(2)(C)(iii) (as added by Section 763(a) of the Dodd-Frank Act).

[87] To the extent that a Security-Based Swap Submission does not include the minimum information set forth in new Rule 19b–4(o)(3), such incomplete submission would, pursuant to new Rule 19b–4(o)(2), be deemed not to have been submitted and the Commission would be required to notify that clearing agency of the rejection of the Security-Based Swap Submission within twenty-one business days of the original submission.

[88] *See* ISDA Letter at 10–11.

[89] *See id.*

[90] *See id.* at 11.

[91] *See* 15 U.S.C. 78c–3(b)(4)(C).

[92] *See* 15 U.S.C. 78c–3(b)(2)(A) (as added by Section 763(a) of the Dodd-Frank Act).

[93] *See* AFR Letter at 2.

This Commission believes that a two-business-day timeframe is appropriate because it is consistent with the notice requirement that currently applies to proposed rule changes,[94] and that such timeframe will provide members of the clearing agency and the public with timely notice of the submission. New Rule 19b–4(o)(5) requires a clearing agency to maintain this posting on its Web site until the Commission makes a determination regarding the Security-Based Swap Submission, the clearing agency withdraws the Security-Based Swap Submission or the clearing agency is notified that the Security-Based Swap Submission is not properly filed.[95] These requirements should help ensure that submissions that are being actively considered by the Commission are readily available to the members of the clearing agency and the public and help provide for a more transparent process.

The Commission notes that the current instructions for Form 19b–4 require an SRO to file with the Commission copies of notices issued by the SRO soliciting comment on the proposed rule change and copies of all written comments on the proposed rule change received by the SRO (whether or not comments were solicited) from its members or participants.[96] Any correspondence the SRO receives after it files a proposed rule change, but before the Commission takes final action on the proposed rule change, also is required to be filed with the Commission.[97] The SRO is required to summarize the substance of all such comments received and respond in detail to any significant issues raised in the comments about the proposed rule change.[98] In accordance with the changes the Commission is adopting today, clearing agencies will be subject to these same requirements in connection with Security-Based Swap Submissions. The Commission believes that applying these requirements in the instructions to Form 19b–4 to Security-Based Swap Submissions will provide the Commission with an opportunity to consider the various viewpoints expressed by commenters by making sure relevant comments are included in the Security-Based Swap Submission.

Finally, one commenter requested that the Commission require clearing agencies ''to notify the Commission, as well as the public, of the type of swap being considered at the time it notifies members of the submission or possible submission.'' [99] The Commission appreciates this suggestion, but has ultimately decided not to modify new Rule 19b–4(o)(5) in this manner as the Commission believes that requiring Web site disclosure of the Security-Based Swap Submission within two business days of the submission itself will provide interested persons and the public with sufficient opportunity to provide feedback on the submission before the Commission makes a mandatory clearing determination.

f. Submissions of a Group, Category, Type or Class of Security-Based Swaps

New Rule 19b–4(o)(4), which is being adopted as proposed, requires that clearing agencies submit security-based swaps to the Commission for review by group, category, type, or class to the extent that doing so is practicable and reasonable. Any aggregation will require a clear description in the applicable Security-Based Swap Submission so that market participants and the public know which security-based swaps may be subject to a clearing requirement. The Proposing Release contained a number of requests for comment with respect to how the Commission should apply this rule including, among other things, questions pertaining to how a clearing agency should identify the scope of the group, category, type or class of security-based swaps it plans to clear, the relevant characteristics of security-based swaps that permit aggregation by group, category, type or class, factors that would make aggregation more difficult, and factors that may be specific to a particular clearing agency.

Two commenters requested that the Commission further define the meaning and scope of the terms ''category,'' ''class,'' ''type,'' and ''group'' with respect to security-based swaps.[100] In particular, one of these commenters further suggested using the following characteristics of security-based swaps to define different products: (1) Instrument description; (2) acceptable currencies (and whether the contract is single currency); (3) acceptable indices; (4) types (*e.g.,* total return or price return); (5) maximum residual term; (6) notional amount (minimum to maximum of the relevant currency unit); (7) applicable day count fraction; (8) applicable business day convention; (9) minimum residual term of the trade (*i.e.,* the period from the date of submission of the trade to the date of termination); and (10) applicable calculation periods.[101]

Although the commenter did provide specific suggestions of certain characteristics that could be used to create groups, categories, types or classes of security-based swaps, the Commission did not receive any comment letters responding to its requests for suggestions as to how best to utilize the individual characteristics, which may include among other things the underlying security, tenor, and coupon of the security-based swap, to aggregate security-based swaps into groups, categories, types or classes. In addition, the Commission notes that it has not yet received any Security-Based Swap Submissions and does not have detailed information about how clearing agencies would create groups, categories, types or classes of security-based swaps in determining whether to clear such security-based swaps. For these reasons, the Commission believes that allowing these key terms to evolve over time as an iterative process between the clearing agencies and the Commission is preferable to prematurely hard-coding definitions into the rules without the benefit of experience.

Nevertheless, the Commission continues to believe that requiring multiple security-based swaps in each submission—to the extent that such groupings are practicable and reasonable (*e.g.,* by taking into consideration appropriate risk management issues applicable to the aggregation)—would streamline the submission process for Commission staff and the clearing agencies. This approach would allow more security-based swaps to be reviewed in a timely manner. At the same time, the manner in which the Commission will ultimately determine which security-based swaps are appropriately aggregated into groups, categories, types, or classes likely will depend on the particular facts and circumstances of the products under consideration. This in turn will be informed by how the clearing agency defines the relevant security-based swap (or relevant group,

[94] Commission rules currently require SROs to post on their Web sites a copy of any proposed rule change the SRO filed with the Commission, and any amendments thereto. Such posting is required within two business days after filing the proposed rule change with the Commission. *See* 17 CFR 240.19b–4(l). In adopting this rule, the Commission stated that all market participants, investors and other interested parties should have access to proposed rule changes filed with the Commission, and any amendments, as soon as practicable, and that it did not believe that a two-business-day timeframe would be impractical or unduly burdensome on SROs. *See Final Rules Regarding Proposed Rule Changes of Self-Regulatory Organizations,* Securities Exchange Act Release No. 50486 (Oct. 4, 2004), 69 FR 60287 (Oct. 8, 2004).

[95] Proposed Rule 19b–4(o)(5).

[96] *See* Items 5 and 9 (Exhibit 2) of the General Instructions for Form 19b–4. 17 CFR 240.819.

[97] *See id.*

[98] Item 5 of the General Instructions for Form 19b–4. 17 CFR 240.819.

[99] *See* Better Markets Letter at 8.

[100] *See* Exhibit A to CME Letter and ISDA Letter.

[101] *See* ISDA Letter at 3–4.

category, type, or class of security-based swaps), how the clearing agency manages the product (both operationally and in its rulebook) and the comments received by the Commission during the public comment period.

Prior to the Commission providing further guidance regarding aggregation, clearing agencies may organize their Security-Based Swap Submissions using a reasonable basis that they determine to be appropriate and responsive to the requirements of the Exchange Act. For example, to the extent possible, the groups, categories, types or classes of security-based swaps that are filed with the Commission as a Security-Based Swap Submission could mirror the groups, categories, types or classes that the clearing agency evaluates in determining whether to list such security-based swap for clearing. In addition, clearing agencies could also consider other factors that they deem to be appropriate, including the characteristics identified in the comment letter referred to above.[102] In reaching a determination regarding any aggregation, the Commission also expects to conduct its own analysis, which will take into account, at a minimum, the five qualitative and quantitative factors that the Commission is required to consider pursuant to Exchange Act Section 3C(b)(4)(B) when making a mandatory clearing determination.

g. Other Issues Related to Security-Based Swap Submissions

Proposed Rule 19b–4(o)(6)(i) provided that, in making a mandatory clearing determination, the Commission would take into account the factors addressed in the Security-Based Swap Submission and any additional factors the Commission determines to be appropriate. Proposed Rule 19b–4(o)(6)(i) also required a clearing agency to provide any additional information requested by the Commission as necessary to make a determination. In addition, proposed Rule 19b–4(o)(6)(ii) provided that, in making a determination of whether or not the clearing requirement would apply to the security-based swap (or any group, category, type, or class of security-based swaps) described in the submission, the Commission may require such terms and conditions as the Commission determines to be appropriate in the public interest.[103]

In connection with proposed Rule 19b–4(o)(6), one commenter urged the Commission to remove the language allowing the Commission, in addition to considering the five statutory factors set forth in Exchange Act Section 3C(b)(4)(B), to consider ''any additional factors the Commission determines to be appropriate'' in connection with a mandatory clearing determination. The commenter believes that this language exceeds the Commission's statutory authority and would expose the proposed rules to potential litigation.[104]

The Commission has carefully considered the comments it received in respect of proposed Rule 19b–4(o)(6). While the Commission disagrees with the commenter that the Commission lacks authority to promulgate a rule allowing it to consider ''any additional factors the Commission determines to be appropriate'' in connection with a mandatory clearing determination,[105] the Commission has nonetheless decided not to adopt the language in the final rule. The Commission believes the language is unnecessary because Exchange Act Section 3C already requires that the Commission shall take into account the five factors in Exchange Act Section 3C(b)(4)(B) in making a mandatory clearing determination and new Rule 19b–4(o)(6)(i), as adopted, requires clearing agencies to provide any additional information requested by the Commission as necessary to assess any of the factors it determines to be appropriate in order to make a mandatory clearing determination in connection with a Security-Based Swap Submission. The Commission believes that this rule, as adopted, already empowers it to require the provision of any additional information relevant to making mandatory clearing determinations under Exchange Act Section 3C.

The Commission also has decided not to adopt: (i) The preamble to proposed Rule 19b–4(o)(6), which had stated that upon receipt of a Security-Based Swap Submission, the Commission was required to review the submission and determine whether the relevant security-based swap (or group, category, type or class of security-based swaps) would be required to be cleared and (ii) proposed Rule 19b–4(o)(6)(ii), which had stated that the Commission may include such terms and conditions as it determined to be appropriate in the public interest in connection with making a mandatory clearing determination. In each case, the Commission notes that these provisions simply mirror statutory provisions set forth in Exchange Act 3C.[106] As noted above in connection with the Commission's modifications to proposed Rule 19b(o)(6)(i), promulgating rules to reiterate existing Commission powers and obligations is unnecessary, and the Commission believes that it would be prudent to remove these types of provisions so as to simplify the final rule to focus on the process by which clearing agencies will be required to make Security-Based Swap Submissions with the Commission.

In the Proposing Release, the Commission also requested comment on whether a clearing agency, in connection with each submission or in some circumstances, should be required to include an independent validation of its margin methodology and its ability to maintain sufficient financial resources. In response to this request, one commenter expressed an opinion that independent validations may be helpful in verifying elements of a submission, but that the Commission should use caution in allowing them to become a substitute for the Commission's own judgment. This commenter also urged the Commission to pay careful attention to the question of what constitutes ''independence'' for these purposes.[107] Another commenter noted that a clearing agency should have an ongoing internal process for validating its internal risk models, which process should be independent of the internal models' development, implementation, and operation.[108] As such, this commenter believes that it should be permissible for the review personnel to be employed by the clearing agency, so long as they are not involved in the development, implementation, and operation of the risk models.[109] This

[102] *See id.*

[103] *See* 15 U.S.C. 78c–3(b)(4)(C) (as added by Section 763(a) of the Dodd-Frank Act) and proposed Rule 19b–4(o)(6)(ii).

[104] *See* Better Markets Letter at 8–10.

[105] The Commission does not read Exchange Act Section 3C as restricting its existing authority to obtain information from registered clearing agencies. The Commission notes that Section 23(a) of the Exchange Act allows the Commission to ''make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which [it is] responsible or for the execution of the functions vested in [it] by this title.'' *See* 15 U.S.C. 78w(a)(1).

[106] *See* 15 U.S.C. 78c–3(b)(2)(C)(ii) (as added by Section 763(a) of the Dodd-Frank Act) (requiring the Commission to review each Security-Based Swap Submission and determine whether the security-based swap, or group, category, type, or class of security-based swaps, described in the submission is required to be cleared) and 15 U.S.C. 78c–3(b)(4)(C) (as added by Section 763(a) of the Dodd-Frank Act) (providing that the Commission, in making a mandatory clearing determination, may require such terms and conditions to the requirement as the Commission determines to be appropriate).

[107] *See* AFR Letter at 3.

[108] *See* OCC Letter at 3.

[109] *See id.*

commenter further recommended that the independent validation evaluate ''empirical evidence and documentation supporting the methodologies used, important model assumptions and their limitations, adequacy and robustness of empirical data used in parameter estimation and model calibration, and evidence of a model's strengths and weaknesses.'' [110] After reviewing the comments received, the Commission has determined that it is not necessary to include an express requirement in new Rule 19b–4(o)(3) that a Security-Based Swap Submission refer to an independent validation of the clearing agency's margin methodology and its ability to maintain sufficient financial resources. The Commission believes such requirement is already contemplated by the final rules, particularly new Rule 19b–4(o)(3)(ii)(B). Specifically, in discussing a clearing agency's rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the security-based swap (or group, category, type or class of security-based swaps) under consideration, as required by this provision, it may be appropriate for a Security-Based Swap Submission to refer to any independent validation of the clearing agency's margin methodology or other processes satisfactory to the clearing agency that have assessed the fundamental soundness of all of the assumptions contained in the model as it exists at the time of the submission and that have assessed the appropriateness of the model during a relevant time period.

Finally, one commenter requested that the Commission promulgate rules governing Commission-initiated Reviews.[111] The commenter further stated that these rules should make clear that during a Commission-initiated Review, the Commission will apply standards that are no different than the standards applied to a review of Security-Based Swap Submissions.[112] The Commission notes that the Dodd-Frank Act does not require rulemaking regarding Commission-initiated Reviews. Commission staff are in the process of determining how these reviews will proceed, particularly with respect to sources of and access to the information the Commission will need to conduct Commission-initiated Reviews, and whether any rulemaking related to these reviews is necessary, either now or in the future.

h. Additional Comments

The Commission also received a number of comments that did not directly relate to the process of filing Security-Based Swap Submissions or to any specific provision in new Rule 19b–4(o). In particular, many of these comments related to the clearing of security-based swaps in general and to the rationale underlying the Commission's specific mandatory clearing determinations. While the Commission appreciates receiving the benefit of the public's views on a wide range of issues, the Commission nevertheless reiterates that the rules that are being adopted today are limited solely to the process by which clearing agencies will be required to make Security-Based Swap Submissions with the Commission. Accordingly, the Commission is not modifying the final rules in response to the comments summarized below. However, the Commission continues to consider a number of important issues related to its substantive mandatory clearing determinations, including many of the points raised in these comment letters. To the extent that these issues are raised by a particular Security-Based Swap Submission, the Commission will address them at the appropriate time.

For example, one commenter urged the Commission to exempt certain structured security-based swaps from the mandatory clearing requirement on the basis that such instruments are ''not clearable'' as they are not standardized, their underlying collateral pool cannot be evaluated, they would transfer risk to the clearing entity and clearing would require the posting of collateral.[113] This comment was related to the determinations to be made by the Commission under Exchange Act Section 3C and not to the process for filing Security-Based Swap Submissions with the Commission. Another commenter provided detailed suggestions to the Commission with respect to how it should evaluate information responsive to the five qualitative and quantitative factors set forth in Exchange Act Section 3C(b)(4)(B), and additional considerations regarding: (1) Standardization, (2) exceptions, (3) affiliate (intra-group) transactions, (4) wrong way risk, (5) implementation timing, and (6) moral hazard concerns.[114] Similarly, a commenter advocated that the Commission consider information that is different from what was included in a clearing agency's Security-Based Swap Submission and to draw upon information provided by other members of the Council.[115]

Commenters representing seven foreign headquartered banks requested that the Commission adopt implementing regulations under the Dodd-Frank Act ''that enable and encourage foreign banks engaged in swap dealing activities to book their swaps businesses in a single well-capitalized, highly rated foreign-based banking institution.'' [116] As a follow-up to this request, 12 foreign-headquartered financial institutions provided specific suggestions of a possible framework for achieving this goal and for dealing with other aspects of the potential extraterritorial application of certain parts of Title VII.[117] Similarly, commenters representing three Japanese bank groups requested that the Commission adopt regulations under the Dodd-Frank Act ''with the effect that Japanese banks, including their U.S. branches, are not made subject to the application of Title VII requirements.'' [118]

In addition, one commenter provided the Commission with a copy of a separate comment that it submitted to the Commission in connection with proposed rules regarding the registration and regulation of security-based swap execution facilities (''SB SEFs''), suggesting that one aspect of proposed Rule 19b–4(o) relates to a proposed rule for SB SEFs.[119] Another commenter

[110] *See id.*

[111] *See* Better Markets Letter at 11–12.

[112] *See id.*

[113] *See* comment letter of American Securitization Forum (Feb. 14, 2011).

[114] *See* ISDA Letter at 9–12.

[115] *See* AFR Letter at 4.

[116] *See* comment letter of Barclays Bank PLC, BNP Paribas S.A., Deutsche Bank AG, Royal Bank of Canada, The Royal Bank of Scotland Group plc, Société Générale and UBS AG (Jan. 11, 2011).

[117] *See* comment letter of Barclays Bank PLC, BNP Paribas S.A., Credit Suisse AG, Deutsche Bank AG, HSBC, Nomura Securities International, Inc., Rabobank Nederland, Royal Bank of Canada, The Royal Bank of Scotland Group plc, Société Générale, The Toronto-Dominion Bank and UBS AG (Feb. 17, 2011).

[118] *See* comment letter from the Bank of Tokyo-Mitsubishi UFJ, Ltd., Mizuho Corporate Bank, Ltd., and Sumitomo Mitsui Banking Corporation (May 6, 2011). In the alternative, these commenters requested that the regulations issued pursuant to Title VII: (1) Not apply to transactions between affiliates of a bank group regulated as a bank holding company and (2) not apply to a foreign dealer—particularly one that is subject to comprehensive home country regulation—with respect to requirements that would otherwise apply due to transactions entered into by the foreign dealer with a U.S. based dealer regulated as a swap dealer or security-based swap dealer pursuant to Title VII. Finally, these commenters requested that the effective dates of all adopting regulations under Title VII be deferred until December 31, 2012, which is the deadline for compliance with the G–20 mandate, so as to avoid overlapping and inconsistent regulatory regimes.

[119] *See* comment letter of GFI Group Inc. (''GFI'') (Apr. 4, 2011) and *Registration and Regulation of Security-Based Swap Execution Facilities,* Securities Exchange Act Release No. 34–63825 (Feb.

provided a number of suggestions for expanding access to central clearing of security-based swaps for buy-side participants.[120] Two commenters urged the Commission to clarify explicitly in its rules that security-based swap transactions entered into between affiliates within the same corporate group should not be subject to the mandatory clearing requirement.[121] Finally, two commenters expressed support for the Commission's proposed rules in the context of actions the Commission could take to reduce potential short selling abuses in the securities markets.[122]

As previously noted, all of the comments discussed above pertain to areas that are not governed by Rule 19b–4(o), which is limited entirely to the process by which clearing agencies will be required to make Security-Based Swap Submissions with the Commission and the information that is required to be included in Security-Based Swap Submissions. These comments do not address the process or information requirements in the proposed rules. Although some of the comments relate to future actions that may be taken by the Commission, such as mandatory clearing determinations or future rulemakings, those comments are outside the context of the process rules being adopted today, but the Commission will consider the issues raised in these letters as they pertain to relevant areas outside of this rulemaking.[123]

2. Prevention of Evasion of the Clearing Requirement

New Rule 3Ca–2 is being adopted as proposed. Specifically, the new rule clarifies that the phrase ''submits such security-based swap for clearing to a clearing agency'' found in Exchange Act Section 3C(a)(1)—which establishes the mandatory clearing requirement for security-based swaps—to mean that the security-based swap subject to the clearing requirement must be submitted for central clearing to a clearing agency that functions as a CCP. Exchange Act Section 3C(d)(1) directs the Commission to prescribe rules (and interpretations of rules) the Commission determines to be necessary to prevent evasions of the clearing requirements.[124]

Specifically, the term ''clearing agency'' is defined broadly under the Exchange Act,[125] and clearing agencies may offer a spectrum of clearing services. The Commission has identified the following entities and activities as falling within the definition of clearing agency: (i) Clearing corporations; (ii) securities depositories; and (iii) matching services.[126] As a result, there may be entities that operate as registered clearing agencies for security-based swaps that do not provide central clearing and act as a CCP. The Commission believes that the broad definition of the term ''clearing agency'' could be used by market participants to evade the clearing requirement of Exchange Act Section 3C(a)(1), which states that ''[i]t shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this Act or a clearing agency that is exempt from registration under this Act if the security-based swap is required to be cleared.'' [127] For example, market participants seeking to evade the requirement to clear a security-based swap set forth in Exchange Act Section 3C(a)(1) could, in the absence of new Rule 3Ca–2, attempt to satisfy the clearing requirement by submitting the security-based swap for matching services (rather than for central clearing) to a clearing agency that is either registered with the Commission or exempt from registration under the Exchange Act.

The Commission believes that other types of clearing functions and services offered by clearing agencies would not achieve the goal of central clearing articulated under the Dodd-Frank Act—improving the management of counterparty risk. As previously noted, a CCP guarantees both sides of a trade executed by two counterparties and, accordingly, lowers the counterparty credit risk of each of the original counterparties that are members of the CCP.[128] The Commission believes that new Rule 3Ca–2 will prevent potential evasions of the clearing requirement by requiring market participants to submit security-based swaps to a clearing agency for central clearing as opposed to other clearing functions or services. Accordingly, Rule 3Ca–2 clarifies the reference to ''submits such security-based swap for clearing to a clearing agency'' in Exchange Act Section 3C(a)(1) to mean that the security-based swap must be submitted for central clearing to a clearing agency that functions as a CCP. Upon the effective

2, 2011), 76 FR 10948 (Feb. 28, 2011) (''SB SEF Release''). Specifically, in the SB SEF Release, the Commission proposed Rule 812 to implement Section 3D(d)(3) of the Exchange Act, which would require that an SB SEF permit trading only in security-based swaps that are not readily to susceptible to manipulation. Proposed Rule 812(b) would provide that, prior to permitting the trading of any security-based swap, an SB SEF's swap review committee must have determined, after taking into account all of the terms and conditions of the security-based swap and the markets for the security-based swap and any underlying security or securities, that such swap is not readily susceptible to manipulation. GFI requested that the Commission specify that an SB SEF would be deemed to have satisfied the requirement in proposed Rule 812 with respect to a security-based swap if the Commission has previously required such security-based swap to be cleared. The Commission notes that this comment is unrelated to the process rules being adopted today. However, the Commission notes that it will consider this comment in the context of the SB SEF Release.

[120] *See* comment letter of the Managed Funds Association (Mar. 24, 2011). Specifically, the Managed Funds Association addressed, among other things, issues regarding: (1) Requirements that dealers be prepared to onboard buy-side market participants on the basis of reasonable objective criteria and reasonable commercial terms; (2) the removal of open interest caps at CCPs and the implementation of a ''reasonable cohort of initial products available for clearing'' and a detailed cleared product roll-out schedule; (3) requirements that CCPs that clear buy-side transactions ''have a robust, transparent, and efficient margin mechanism, well defined and understood default waterfalls, efficient and robust trade processing and reporting that can handle block trading and allocations, effective and efficient risk compression, proven segregation of customer funds and pre- and post-default portability of positions, clear legal documentation of give-up agreements and trade confirmations, and appropriate buy-side representation on governance boards;'' and (4) the elimination of regulatory uncertainty.

[121] *See* comment letter of J.P. Morgan (June 3, 2011) and comment letter of the ABA Securities Association, American Council of Life Insurers, Financial Services Roundtable, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association (Sept. 8, 2011).

[122] *See* comment letter of Naphtali M. Hamlet (Jan. 22, 2011) and comment letter of Suzanne H. Shatto (Jan. 21, 2011).

[123] For example, with respect to the international application of mandatory clearing determinations, rather than addressing the international implications of Title VII in a piecemeal approach, the Commission is considering addressing the relevant international issues holistically in a single proposal. Such a proposal would give investors, market participants, foreign regulators, and other interested parties an opportunity to consider the Commission's proposed approach to the application of Title VII to cross-border security-based swap transactions and non-U.S. persons that act in capacities regulated under the Dodd-Frank Act. This approach should generate thoughtful and constructive comments for us to consider regarding the application of Title VII to cross-border transactions.

[124] *See* 15 U.S.C. 78c–3(d)(1) (as added by Section 763(a) of the Dodd-Frank Act) (stating that ''[t]he Commission shall prescribe rules under this section (and issue interpretations of rules prescribed under this section), as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements under this Act.'').

[125] *See supra* note 8 (discussing the definition of ''clearing agency'' pursuant to Exchange Act Section 3(a)(23)).

[126] *See Order Approving the Clearing Agency Registration of Four Depositories and Four Clearing Corporations,* Securities Exchange Act Release No. 20221 (Sept. 23, 1983), 48 FR 45167 (Oct. 3, 1983), and *Confirmation and Affirmation of Securities Trades; Matching,* Securities Exchange Act Release No. 39829 (Apr. 6, 1998), 63 FR 17943 (Apr. 13, 1998).

[127] *See* 15 U.S.C. 78c–3(a)(1) (as added by Section 763(a) of the Dodd-Frank Act).

[128] *See supra* notes 10–11 and accompanying text.

and compliance dates for Rule 3Ca–2, counterparties must submit security-based swaps to a clearing agency for central clearing in order to meet the clearing requirement set forth in Exchange Act Section 3C(a)(1).[129] The Commission believes that submission to a clearing agency for clearing services other than central clearing would not satisfy a mandatory clearing requirement because only a clearing agency that functions as a CCP guarantees performance on the trade and thus mitigates counterparty credit risk between the bilateral parties to the trade.

The Commission received two comments on Rule 3Ca–2, of which one expressed strong support for the rule to be adopted as proposed.[130] The second commenter suggested that the Commission propose rules to address the potential for evasion through ''spurious customization,'' such as situations where parties to a security-based swap intentionally include terms in the relevant contract that have no economic purpose other than to cause the contract to fall outside the scope of the clearing agency's rules.[131] The Commission is adopting Rule 3Ca–2 as proposed, but will continue to monitor the clearing of security-based swaps as the market develops and will consider whether additional action should be taken to implement the anti-evasion provisions of Exchange Act Section 3C, including the suggestion raised by the commenter described above.

B. Stay of the Clearing Requirement and Review by the Commission

New Rule 3Ca–1 establishes a procedure for staying a mandatory clearing requirement and for the Commission's subsequent review of the terms of the relevant security-based swap (or group, category, type or class of security-based swaps) and the clearing arrangement pursuant to Exchange Act Section 3C(c)(1).[132] Pursuant to new Rule 3Ca–1, a counterparty to a security-based swap subject to the clearing requirement wishing to apply for a stay of the clearing requirement is required to submit a written statement to the Commission that includes (i) a request for a stay of the clearing requirement, (ii) the identity of the counterparties to the security-based swap and a contact at the counterparty requesting the stay, (iii) the identity of the clearing agency clearing the security-based swap, (iv) the terms of the security-based swap subject to the clearing requirement and a description of the clearing arrangement and (v) the reasons a stay should be granted and the security-based swap should not be subject to a clearing requirement, specifically addressing the same factors a clearing agency must address in its Security-Based-Swap Submission pursuant to new Rule 19b–4(o)(3).

The Commission believes that such information will assist the Commission in determining whether to grant the stay and, if the stay is granted, in conducting a review during the stay period of the terms of the relevant security-based swap (or group, category, type or class of security-based swaps) and the clearing arrangement. In particular, there is likely to be considerable overlap in the Commission's prior justification and analysis for requiring that a security-based swap be cleared (*i.e.,* the initial mandatory clearing determination) and the factors the Commission would consider when determining whether to subsequently reverse the prior determination. Accordingly, requiring a party seeking a stay to address the same factors that a clearing agency was required to include in the original Security-Based Swap Submission provides the Commission with a logical point from which to begin its analysis. Moreover, because the application for the stay will, pursuant to Exchange Act Section 3C(c)(1), be made by a counterparty to a security-based swap subject to a clearing requirement,[133] the Commission will need basic information on the clearing agency that clears the relevant security-based swap, particularly if the Commission needs to request additional information from the clearing agency in order to make a determination whether to grant the stay or whether to modify the existing clearing requirement. As such, to the extent that the Commission determines that it requires additional information in the possession of the clearing agency (as distinguished from the information it received from the counterparty), new Rule 3Ca–1(d) requires that any clearing agency that has accepted for clearing the security-based swap subject to the stay provide information requested by the Commission in the course of its review during the stay.[134]

New Rule 3Ca–1(e)(1), which is being adopted as proposed, provides that, upon completion of its review,[135] the Commission may determine unconditionally, or subject to such terms and conditions as the Commission determines to be appropriate in the public interest, that the security-based swap (or group, category, type or class of security-based swaps) must be cleared.[136] Alternatively, new Rule 3Ca–1(e)(2), which also is being adopted as proposed, provides that the Commission may determine that the clearing requirement does not apply to the security-based swap (or group, category, type or class of security-based swaps).[137] If the Commission were to make a determination that the clearing requirement does not apply to a security-based swap (or group, category, type or class of security-based swaps), the new rule provides that clearing may continue on a non-mandatory basis.[138]

In order to provide the public with notice of the submission of a counterparty's request for a stay of the clearing requirement, the Commission intends to make each application for a stay available to the public on the Commission's Web site. A stay of the clearing requirement may be applicable to the counterparty requesting the stay or more broadly, to the security-based swap (or any group, category, type or class of security-based swaps) subject to the clearing requirement. The

[129] *See* 15 U.S.C. 78c–3(a)(1).

[130] *See* AFR Letter at 2–3.

[131] *See* OCC Letter at 5–6.

[132] *See* 15 U.S.C. 78c–3(c)(1) (as added by Section 763(a) of the Dodd-Frank Act) (providing that, after making a determination that a security-based swap (or group, category, type or class of security-based swaps) is required to be cleared, the Commission, on application of a counterparty to a security-based swap or on the Commission's own initiative, may stay the clearing requirement until the Commission completes a review of the terms of the security-based swap and the clearing arrangement). In connection with a stay of the clearing requirement and subsequent review of the terms of the security-based swap and the clearing arrangement, the Commission is required to adopt rules for reviewing a clearing agency's clearing of a security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency has accepted for clearing. *See* 15 U.S.C. 78c–3(c)(4) (as added by Section 763(a) of the Dodd-Frank Act).

[133] *See* 15 U.S.C. 78c–3(c)(1) (as added by Section 763(a) of the Dodd-Frank Act) (indicating that a stay could be initiated either pursuant to an application of a counterparty to a security-based swap or on the Commission's own initiative).

[134] Rule 3Ca–1(d) is being adopted substantially as proposed, with the one modification being the deletion of the phrase ''but need not be limited to'' when describing what the Commission's review of a request for a stay should consider. The reasons for this deletion from the proposal and the Commission's explanation as to why it does not substantively affect the rule are discussed at the end of this section. 17 CFR 240.3Ca–1(d).

[135] Exchange Act Section 3C(c)(2) requires the Commission to complete such clearing review not later than 90 days after issuance of the stay, unless the clearing agency that clears the security-based swap agrees to an extension of the time limit. *See* 15 U.S.C. 78c–3(c)(2) (as added by Section 763(a) of the Dodd-Frank Act).

[136] 17 CFR 240.3Ca–1(e)(1). New Rule 3Ca–1(c) provides that a stay of the clearing requirement may be granted with respect to a security-based swap, or the group, category, type, or class of security-based swaps, as determined by the Commission.

[137] 17 CFR 240.3Ca–1(e)(2).

[138] *See id.*

Commission intends to provide notice to the public each time it grants a stay of a mandatory clearing requirement.

The Commission received two comment letters regarding proposed Rule 3Ca–1.[139] One commenter provided examples of circumstances that may warrant a stay of the mandatory clearing requirement.[140] Specifically, this commenter cited situations in which there is an absence of competition, where there is an unresolved clearing member default at the only clearing agency then clearing the relevant product, where the Commission determines to impose a mandatory clearing requirement where no clearing agency has elected to clear the product, or where a product subject to mandatory clearing becomes so illiquid as to threaten the clearing agency's ability to calculate margin or to manage a default.[141] In response to these comments, the Commission notes that the purpose of new Rule 3Ca–1 is, similar to new Rules 19b–4(n) and (o), to establish the process by which certain parties are required to submit information to the Commission. Nevertheless, the Commission appreciates the commenter's views and will consider them to the extent the issues raised by the commenter are implicated in a particular application for a stay.

A second commenter requested that the Commission delete the phrase ''but need not be limited to'' from proposed Rule 3Ca–1(d) when describing what the Commission's review of a request for a stay should consider.[142] The commenter believes that this language exceeds the Commission's statutory authority and that the language in Exchange Act Section 3C permits the Commission only to consider the five qualitative and quantitative factors that the Commission is required to consider when making an initial mandatory clearing determination. The commenter further believes that the purpose of the stay provision is to ''afford the Commission more time to complete its review.'' [143] In response to these comments, the Commission notes that statutory provisions regarding the Commission's ability to grant a stay of the clearing requirement refers expressly to security-based swaps for which the Commission already has made a mandatory clearing determination.[144] The stay provides time for the Commission to re-consider its initial determination or to re-evaluate the determination in light of changed circumstances or new information. The statute does not address specific factors the Commission must consider when making a stay determination. As such, the Commission believes that it may consider any relevant factors (including ones beyond the five qualitative and quantitative factors set forth in Exchange Act Section 3C(b)(4)) when making a determination regarding a potential stay of the clearing requirement without exceeding the statutory authority set forth in Exchange Act Section 3C(c)(3).[145] Nevertheless, the Commission has chosen not to adopt the phrase ''but need not be limited to'' in proposed Rule 3Ca–1(d) so as to simplify the final rule to focus on the process by which information is submitted to the Commission in connection with an application by a counterparty requesting a stay of a mandatory clearing requirement, particularly since the Commission already has the power to consider other factors in making a determination on the request for a stay without the inclusion of this language.[146]

C. Title VIII Notice Filing Requirements for Designated Clearing Agencies

As proposed, the Commission also is amending Rule 19b–4 to add a new paragraph (n) in order to implement the requirement to file Advance Notices in accordance with Title VIII. As discussed in Section I of this release, Section 806(e) requires any financial market utility designated by the Council as systemically important to file 60 days advance notice of changes to its rules, procedures or operations that could materially affect the nature or level of risk presented by the financial market utility.[147] To implement this filing requirement, new Rule 19b–4(n) will require that an Advance Notice be submitted to the Commission electronically on Form 19b–4. In addition, Rule 19b–4(n) will define when a proposed change to a clearing agency's rules, procedures or operations could materially affect the nature or level of risks presented by the designated financial market utility. This definition will determine when an Advance Notice under Section 806(e) must be filed with the Commission. Further, the Commission is adopting, as proposed, corresponding amendments to Form 19b–4 as discussed in more detail in section II.D.

As with Security-Based Swap Submissions filed pursuant to Exchange Act Section 3C, the Commission anticipates that in many cases a proposed change may be required to be filed as an Advance Notice under Section 806(e) and as a proposed rule change under Exchange Act Section 19(b). This is because a proposal that qualifies as a proposed change to a rule, procedure or operation that materially affects the nature or level of risk presented by the designated clearing agency under Section 806(e) may also qualify as a proposed rule change under Exchange Act Section 19(b).[148] As a result, a designated clearing agency may be required to file a proposal as an Advance Notice and as a proposed rule change. Designated clearing agencies, as SROs, will already be required to file proposed rule changes on Form 19b–4 using EFFS.[149] Accordingly, and consistent with the proposal for Security-Based Swap Submissions, the Commission is requiring designated clearing agencies to use the existing filing system, EFFS, and Form 19b–4 for the filing of Advance Notices under Section 806(e). This will allow designated clearing agencies to comply with the advance notice requirement in Section 806(e) using the same system they use for submitting proposed rule changes under Exchange Act Section 19(b) and, as applicable, Security-Based Swap Submissions under Exchange Act

[139] *See* ISDA Letter and Better Markets Letter.

[140] *See* ISDA Letter at 12.

[141] *See id.*

[142] *See* Better Markets Letter at 10–11.

[143] *See id.*

[144] *See* 78c–3(c)(1) (''[*a*]*fter making a determination pursuant to subsection (b)(2),* the Commission, on application of a counterparty to a security-based swap or on its own initiative, may stay the clearing requirement of subsection (a)(1) until the Commission completes a review of the terms of the security-based swap (or the group, category, type, or class of security-based swaps) and the clearing arrangement.'') (emphasis added).

[145] *See supra* note 105 and accompanying text.

[146] *See also supra* section II.A.1.g.

[147] *See* 12 U.S.C. 5465(e)(1)(A) (as added by Title VIII).

[148] For example, if the proposed change described in the Advance Notice requires a change in addition to, or a deletion from, the rules of a designated clearing agency, the action also would require the filing of a proposed rule change under Exchange Act Section 19(b). Section 3(a)(27) of the Exchange Act defines ''rules'' broadly 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).

[149] As discussed below in Section I.F., the processes under Exchange Act Section 19(b) and Section 806(e) may not always overlap. For example, certain changes to the operations of a designated clearing agency may not be required to be filed as a proposed rule change pursuant to Exchange Act Section 19(b), which does not specifically apply to changes in operations. Such changes may, however, trigger a requirement to file an Advance Notice if they would materially affect the nature or level of risks presented by the designated clearing agency. Nevertheless, the two processes are sufficiently similar as to warrant using the same method for filing.

Section 3C. Leveraging the existing filing system, EFFS, for the submission of Advance Notices is intended to utilize efficiently Commission and designated clearing agency resources. The Commission did not receive any comments related to its decision to require Advance Notices to be submitted using EFFS and is adopting this aspect of Rule 19b–4(n)(1), substantially as proposed, with one minor technical modification to account for the need to finalize certain technological changes.

Specifically, the Commission is currently in the process of designing and implementing the system upgrades that are necessary in order for Advance Notices to be filed on EFFS. The Commission expects the system upgrades to EFFS to be completed no later than December 10, 2012. However, the Commission recognizes that there is a possibility that the Council may designate a clearing agency as systemically important before the system upgrades are completed. In such a circumstance, a designated clearing agency would be unable to file the Advance Notice on Form 19b–4 and would need to file the Advance Notice with the Commission by other means. As a result, the Commission is revising proposed Rule 19b–4(n)(1) to provide that Advance Notices filed before December 10, 2012 must be filed with the Commission by submitting the Advance Notice to a dedicated email inbox to be established by the Commission.[150] A designated clearing agency that files an Advance Notice by email must include in the notice the same information that is required to be included for Advance Notices in the General Instructions for Form 19b–4, as such form has been modified by the rules the Commission is adopting today.[151] Advance Notices filed on or after December 10, 2012 on Form 19b–4 would include the same substantive information.

1. Standards for Determining When Advance Notice Is Required

Section 806(e)(1)(A) requires a designated financial market utility to provide 60 days advance notice to its Supervisory Agency of any proposed change to its rules, procedures or operations that could materially affect the nature or level of risks presented by the designated financial market utility.[152] For purposes of this requirement, the phrase ''materially affect the nature or level of risks presented'' is defined in new Rule 19b–4(n)(2)(i) to mean the existence of a ''reasonable possibility that the change could affect the performance of essential clearing and settlement functions or the overall nature or level of risk presented by the designated clearing agency.'' This definition was designed to include all changes that would affect the risk management functions performed by the clearing agency that are related to systemic risk, as well as changes that could affect the clearing agency's ability to continue to perform its core clearance and settlement functions because the Commission believes that such changes could materially affect the nature or level of risk presented by the clearing agency.[153]

In order to help designated clearing agencies determine whether an Advance Notice is required, new Rule 19b–4(n)(2)(ii), which is being adopted as proposed, includes a list of categories of changes to rules, procedures or operations that the Commission believes could materially affect the nature or level of risks presented by a designated clearing agency. The list of such changes includes, but is not limited to, changes that materially affect participant and product eligibility, daily or intraday settlement procedures, default procedures, system safeguards, governance or financial resources of the designated clearing agency. The Commission believes that changes in these areas pertain to core functions of a clearing agency and, as a result, may affect the ability of a designated clearing agency to manage its risks appropriately and to continue to conduct systemically important clearance and settlement services. For example, participant and product eligibility requirements of a designated clearing agency are designed to ensure that the clearing agency's members have sufficient financial resources and operational capacity to meet obligations arising from participation in the clearing agency, and to ensure that the products cleared by the clearing agency are sufficiently liquid and that adequate pricing data is available. In addition, a designated clearing agency's default procedures exist to ensure that, should a default occur, the clearing agency has the financial resources, liquidity and operational abilities to continue to make payments to non-defaulting participants on time. Additional examples of the types of matters that could fall within the categories listed above include changes to the methods for making margin calculations, liquidity arrangements and significant new services of the clearing agency.

Moreover, while a broad interpretation of the materiality threshold is consistent with the underlying principles of the Clearing Supervision Act and desirable to permit a review of all matters that affect the risks presented by clearing agencies, not every change to a designated clearing agency's rules, procedures or operations will be material. Accordingly, new Rule 19b–4(n)(2)(iii), which is being adopted as proposed, includes two broad categories of examples of changes to rules, procedures or operations that the Commission believes would not materially affect the nature or level of risks presented by a designated clearing agency, and therefore would not require the filing of an Advance Notice. The first category includes, but is not limited to, changes to an existing procedure, control, or service that do not modify the rights or obligations of the designated clearing agency or persons using its payment, clearing, or settlement services and that do not adversely affect the safeguarding of securities, collateral, or funds in the custody or control of the designated clearing agency or for which it is responsible. The second category includes, but is not limited to, changes concerned solely with the administration of the designated clearing agency or related to the routine, daily administration, direction and control of employees. The Commission believes that both categories of changes do not pertain to the core functions performed by a clearing agency and, therefore, would not materially affect the nature or level of risk presented by the clearing agency.

The Commission received two comments about the scope of the definition of ''materially affect the nature or level of risks presented,'' as set

[150] The Commission's Office of Information Technology maintains a system, known as the EMail Encryption Solution, that allows persons outside the agency to compose and send encrypted emails to users within the Commission. The guide for external users wishing to utilize the EMail Encryption Solution is available at: *http://wapps.sec.gov/oitintranet/oit_learn/pdf/Smail-external-guide-01-05-2011.pdf.*

[151] The Commission notes that a designated clearing agency must also continue to meet the filing requirements of Rule 19b–4 and Form 19b–4. For example, if the change that requires the designated clearing agency to file an Advance Notice with the Commission is also a proposed rule change under Exchange Act Section 19(b), the designated clearing agency must file the proposed rule change with the Commission on Form 19b–4 using EFFS and separately file the Advance Notice with the Commission by email.

[152] 12 U.S.C. 5465(e)(1)(A) (as added by Title VIII).

[153] Core clearance and settlement functions may include, but are not limited to, the processing, comparison, netting, or guaranteeing of securities transactions as well as any processes or procedures, such as internal risk management controls, that support these functions.

forth in proposed Rule 19b–4(n)(2).[154] One commenter suggested that the proposed definition is too broad and could require unnecessary or impractical submissions of Advance Notices.[155] This commenter argued that the definition would include ''all changes that would affect the risk management functions performed by the clearing agency that are related to systemic risk, as well as changes that could affect the clearing agency's ability to continue to perform its core clearance and settlement functions.'' [156] This commenter also suggested that the Commission distinguish between ''changes that tend to increase systemic risk and those that tend to decrease it.'' [157] This commenter urged the Commission to ''consider limiting the changes for which Advance Notice is required to those changes that are reasonably likely to have a materially adverse effect on the nature or level of risks presented.'' [158]

The same commenter also expressed the view that providing Advance Notice to the Commission of the terms of a line of credit in accordance with Section 806(e), prior to finalizing the financing, would be impractical.[159] This commenter further requested that a renewal of a liquidity facility be excluded from the requirement to file Advance Notices with the Commission.[160] At most, the commenter believes that it would be ''practical and appropriate to require an Advance Notice for a *termination or reduction* of a liquidity arrangement at the *instance of the clearing agency.*'' [161]

A second commenter expressed concern regarding the potential scope and burden of the requirement to submit Advance Notices in general, with a specific emphasis on the Commission's proposed definition of ''materially affect the nature or level of risks presented'' in Rule 19b–4(n)(2).[162] In particular, the commenter argued that the requirement to submit Advance Notices should apply only to ''matters of true importance that require attention by the Commission and comment by the public.'' [163] Accordingly, the commenter urged the Commission to avoid an overly expansive application of the requirement so as not to create undue strain on the designated clearing agency's resources, and to take into account the designated clearing agency's prior experience and judgment in filing proposed rule changes with the Commission pursuant to Exchange Act Section 19(b), the positions taken by the designated clearing agency during its consultations with the Commission regarding a change that could potentially result in an obligation to file an Advance Notice and the role and views of other entities responsible for supervising the designated clearing agency.[164]

After careful consideration of these two commenters' views that the definition of ''materially affect the nature or level of risk presented'' is over broad, the Commission has decided to adopt Rule 19b–4(n)(2), as proposed. As discussed in the Proposing Release, the Commission believes that the proposed definition of ''materially affect the nature or level of risks presented'' provides sufficient guidance to allow designated clearing agencies to know when an Advance Notice under Section 806(e) is required, while also being broad enough to capture all relevant proposed changes as specific circumstances warrant. The Commission does not believe the definition is so broad as to include proposed changes to be made by a designated clearing agency that would not materially affect the nature or level of risk presented by the clearing agency, and the Commission included examples in the rule to provide guidance regarding when a proposed change would or would not be required to be filed with the Commission. Furthermore, the Commission believes that a standard that would require Advance Notices be filed only for ''matters of true importance,'' as suggested by one commenter, would provide less clarity and be more open to interpretation than the definition the Commission is adopting today. As suggested by the same commenter, the Commission does intend to take into account a clearing agency's prior experience and judgment in determining whether a proposed change would materially affect the nature or level of risk presented by the clearing agency. As stated in the Proposing Release, the Commission encourages designated clearing agencies to discuss proposed changes with Commission staff to help determine whether an Advance Notice under Section 806(e) is required to be filed with respect to a proposed change to the clearing agency's rules, procedures or operations.[165]

In response to one commenter's suggestion that Advance Notices be required only when a proposed change would be reasonably likely to have a materially adverse effect on the nature or level of risks presented by a designated clearing agency (as opposed to changes that would decrease risk), the Commission notes that as a practical matter, many changes to the rules, procedures or operations of a designated clearing agency may have both risk-increasing effects in some respects of a designated clearing agency's operations and risk-reducing effects in other respects. For example, a change in the clearing agency's margin calculation methodology could result in increased margin requirements for some members of the clearing agency and decreased margin requirements for other members. For that reason, Section 806(e) establishes the requirement to file Advance Notices with the Commission without distinguishing between changes that could materially increase or decrease the nature or level of risk.

Finally, and in response to a commenter's suggestion that proposed changes relating to a line of credit or the renewal of a liquidity facility be excluded from the Advance Notice requirement on the basis that imposing a 60 day delay in a designated clearing agency's ability to rely on such financing could be impractical and potentially increase risk for the clearing agency, the Commission notes that Section 806(e)(1)(I) permits a designated clearing agency to implement a change in less than 60 days if the Commission notifies the designated clearing agency in writing that it does not object to the proposed change to the designated clearing agency's rules, procedures or operations and authorizes the designated clearing agency to implement the change on an earlier date, subject to any conditions imposed by the Commission.[166] Accordingly, a designated clearing agency that wishes to implement a change in less than 60 days may request that the Commission expedite review of the Advance Notice

[154] *See* OCC Letter at 6–7; and comment letter of The Depository Trust & Clearing Corporation (Oct. 3, 2011) (''DTCC Letter'') at 3–5.

[155] *See* OCC Letter at 6–7.

[156] *See id.*

[157] *See id.*

[158] *See id.*

[159] *See id.*

[160] *See id.*

[161] *See id.*

[162] *See* DTCC Letter at 3–4.

[163] *See id.* The Commission notes that Section 806(e) of the Clearing Supervision Act, which establishes the requirement that a financial market utility submit Advance Notices to its Supervisory Agency, also contemplates review of the Advance Notice by the Board and consultation between the Board and the applicable Supervisory Agency. *See* 12 U.S.C. 5465(e)(3) and (4) (as added by Title VIII).

[164] *See id.*

[165] One commenter agreed with the approach of encouraging designated clearing agencies to consult with staff and commended the Commission's recognition of the need for cooperation and dialogue in this area. *See* OCC Letter at 7.

[166] 12 U.S.C. 5465(e)(1)(I) (as added by Title VIII).

and provide the written notification under Section 806(e)(1)(I).

2. Providing Notice of the Matters Included in an Advance Notice to the Board and Interested Persons

Given the role of clearing agencies in supporting financial markets, the Commission recognizes that members of the public may have an interest in proposed changes to the rules, procedures or operations of systemically important clearing agencies. New Rule 19b–4(n)(1) provides that, upon the filing of any Advance Notice by a designated clearing agency, the Commission would provide for prompt publication thereof in the **Federal Register**, together with the terms of the substance of the proposed change to the rules, procedures or operations of the designated clearing agency and a description of the subjects and issues involved. This requirement is consistent with the existing procedures for proposed rule changes under Exchange Act Section 19(b) and the new procedures for Security-Based Swap Submissions under Exchange Act Section 3C. In addition, new Rule 19b–4(n)(3) requires designated clearing agencies to post Advance Notices and any amendments thereto on their Web sites within two business days of filing the notice or amendments in order to ensure that interested parties have timely and transparent access to the matters discussed therein, particularly in circumstances where a proposed change is not required to be filed under Exchange Act Section 19(b) and, as a result, would not otherwise be published for comment. These two provisions were intended to allow the Commission to give interested persons an opportunity to review and to submit written data, views and arguments concerning the matters referred to in the Advance Notice.[167] The Commission will consider all comments and other information received when determining whether to object to an Advance Notice.

One commenter requested that the Commission modify the public notice provisions contained in new Rule 19b–4(n) in order to permit designated clearing agencies to request confidential treatment with respect to an Advance Notice and any related material (including, in certain circumstances, the fact of the filing itself) where the public disclosure of the notice or any such related material would (i) jeopardize the ability of the designated clearing agency to successfully achieve the objective of the proposed change which is the subject of the Advance Notice or (ii) disclose sensitive non-public information.[168] This commenter noted specifically that because changes requiring the filing of an Advance Notice by their nature affect risk and risk management controls, ''they may intrinsically involve matters of great sensitivity, which are not appropriate for public disclosure.'' [169] Section 806(e) does not require that an Advance Notice be made publicly available. However, the Commission is requiring publication of these notices by rule in order to give interested persons an opportunity to express their views with respect to a proposed change filed under Section 806(e). Although as a general matter the Commission believes that providing for a public comment period will benefit its review of Advance Notices, the Commission also understands the commenter's concern that changes requiring the filing of an Advance Notice could, in some cases intrinsically involve proprietary information regarding a designated clearing agency's risk management, the public disclosure of which could potentially harm the operations of the clearing agency. In such circumstances, the Commission believes that it is appropriate that an Advance Notice be permitted to be non-public. Accordingly, the Commission has added new Rule 19b–4(n)(6) to provide that the provisions of new Rule 19b–4(n) requiring publication of the Advance Notice in the **Federal Register** and the posting of the notice on the designated clearing agency's Web site will not apply to any information contained in an Advance Notice for which the designated clearing agency has requested confidential treatment following the procedures set forth in Rule 24b–2 of the Exchange Act.[170] The Commission emphasizes, however, that new Rule 19b–4(n)(6) applies only to information submitted to the Commission as an Advance Notice under Section 806(e). Specifically, Rule 19b–4(n)(6) does not relieve a designated clearing agency of its obligation to post any information on its Web site in connection with a Security-Based Swap Submission pursuant to Exchange Act Section 3C or a proposed rule change pursuant to Exchange Act Section 19(b), nor does it affect the Commission's publication of either a Security-Based Swap Submission or a proposed rule change in the **Federal Register** pursuant to those statutory provisions.[171]

In addition, new Rule 19b–4(n)(4), which is being adopted as proposed, requires a designated clearing agency to post a notice on its Web site that the proposed change described in an Advance Notice has been permitted to take effect within two business days of such date as determined in accordance with the timeframe set forth in Section 806(e). The purpose of this rule is to provide a means for public notice when a proposed change under Title VIII is permitted to become effective, since the Commission will not affirmatively approve an Advance Notice under Section 806(e). Because Sections 806(e)(1)(G) and (I) provide that a designated clearing agency may implement a proposed change that is the subject of an Advance Notice if the Commission does not object to it, the Commission will not issue a public order granting approval of the relevant change, as it does with proposed rule changes under Exchange Act Section 19(b). Because there will not be a Commission action to indicate when an Advance Notice has been permitted to take effect, the Commission is adopting new Rule 19b–4(n)(4)(i) to require the designated clearing agency to post notice on its Web site. Moreover, new Rule 19b–4(b)(n)(ii), which is being adopted as proposed, requires the designated clearing agency to post notice on its Web site of the time at which the proposed change becomes effective if that date is different from the date on which the proposed change is permitted to become effective. In order to give interested parties timely notice of the change, this notice will be required to be posted within two business days of the effective date. The Commission is allowing two business days for the designated clearing agency

[167] Under the Commission's current practice with respect to Exchange Act Section 19(b), proposed rule changes are generally published with a twenty-one day comment period. The Commission expects that Advance Notices will be published for the same comment period.

[168] *See* DTCC Letter at 7–8.

[169] *See id.*

[170] 17 CFR 240.24b–2.

[171] *See infra* section II.F. Both Exchange Act Sections 3C and 19(b) contain statutory requirements providing for public comment with respect to Security-Based Swap Submissions and proposed rule changes, respectively. *See* 15 U.S.C. 78c–3(b)(3) (as amended by Section 763(a) of the Dodd-Frank Act) (requiring the Commission to make available to the public any Security-Based Swap Submission it receives and to provide at least a 30-day public comment period ''regarding its determination whether the clearing requirement shall apply to the submission'') and 15 U.S.C. 78s(b)(1) (requiring that the Commission, ''upon the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved.''). Although a similar requirement does not exist in Section 806(e), the Commission believes that requiring an opportunity for public input on the changes discussed in an Advance Notice is an important step toward ensuring transparency with respect to proposed changes to the rules, procedures, or operations of designated clearing agencies.

to post such notice because the existing notice requirement in Rule 19b–4(l), which requires SROs to post a proposed rule change filed under Exchange Act Section 19(b) and any amendments thereto on its Web site, is two business days after filing of the proposed rule change, and any amendments thereto, with the Commission.[172] Once the notice of the effectiveness of the proposed change has been posted, the designated clearing agency will be permitted to remove its original posting of the Advance Notice (and any amendments thereto) from its Web site because notice of the change will no longer be necessary after the public is notified that the change has taken effect. Pursuant to new Rule 19b–4(n)(3)(i), which is being adopted as proposed, a designated clearing agency also may remove the Advance Notice from its Web site if it withdrew the notice or if it was notified that such notice was not properly filed. The Commission did not receive any comments related to any of the provisions described above.

Section 806(e)(3) also requires that the Commission provide the Board with a complete copy of any information it receives in connection with the Advance Notice.[173] To satisfy this requirement, new Rule 19b–4(n)(5) requires a designated clearing agency to provide to the Board copies of all materials submitted to the Commission relating to an Advance Notice contemporaneously with such submission to the Commission. Such copies were proposed to be provided to the Board in triplicate and in hard copy format, pursuant to proposed changes to the General Instructions for Form 19b–4. Two commenters suggested that the requirement to provide these copies in hard copy format was inefficient and burdensome and encouraged the Commission to work with the Board to facilitate the submission of filings pursuant to Section 806(e)(3) in electronic format absent a highly compelling reason to do otherwise.[174] In response to this comment, the Commission is amending the General Instructions for Form 19b–4 to make clear that filers may instead provide the copies to the Board in an electronic format permitted by the Board. Along with this change to the General Instructions for Form 19b–4, the Commission is adopting Rule 19b–4(n)(5), as proposed.

3. Timing and Determination of Advance Notices Pursuant to Section 806(e)

Section 806(e)(1)(E) requires that the Commission notify a designated clearing agency of any objection to a proposed change included in an Advance Notice within 60 days of the Commission's receipt of the Advance Notice, unless the Commission requests additional information in consideration of the notice, in which case the 60-day period will recommence on the date such information is received by the Commission.[175] The Commission, may however, pursuant to Section 806(e)(1)(H), extend the review period for an additional 60 days for proposed changes that raise novel or complex issues, subject to the Commission providing the designated clearing agency with prompt written notice of the extension.[176] Finally, Section 806(e)(4) requires that the Commission consult with the Board before taking any action on, or completing its review of, the change referred to in the Advance Notice.[177] The timeframes set forth in Section 806(e) determine when a proposed change to a designated clearing agency's rules, procedures or operations will become effective, and the Commission does not believe additional rulemaking related to these timeframes is necessary at this time.

4. Implementation of Proposed Changes and Emergency Changes Pursuant to Section 806(e)

Section 806(e)(1)(F) provides generally that a designated clearing agency may not implement a proposed change filed as an Advance Notice during the applicable review period,[178] which is typically 60 days from the Commission's receipt of the Advance Notice, but may be longer if the Commission requests additional information or extends the review period in accordance with the statute.[179] Section 806(e), however, provides two mechanisms by which a designated clearing agency could implement a proposed change prior to the expiration of the applicable review period. First, Section 806(e)(1)(I) permits the designated clearing agency to implement a change before the review period expires if the Commission notifies the designated clearing agency in writing that it does not object to the proposed change to the designated clearing agency's rules, procedures or operations and authorizes the designated clearing agency to implement the change on an earlier date, subject to any conditions imposed by the Commission.[180] As noted above, however, before taking any action on, or completing its review of, a change proposed by a designated clearing agency in an Advance Notice, the Commission is required to consult with the Board.[181]

Second, Section 806(e)(2) allows a designated clearing agency to implement a change that would otherwise require providing an Advance Notice to the Commission if the designated clearing agency determines that (i) an emergency exists and (ii) immediate implementation of the change is necessary for the designated clearing agency to continue to provide its services in a safe and sound manner.[182] If a designated clearing agency determines to implement an emergency change, it must provide notice to the Commission as soon as practicable, and in no event later than 24 hours after implementation of the relevant change.[183] Such emergency notice must contain all of the information otherwise required to be in an Advance Notice as well as a description of (i) the nature of the emergency and (ii) the reason the change was necessary in order for the designated clearing agency to continue to provide its services in a safe and sound manner.[184] In reviewing the emergency notice, the Commission may require modification or rescission of the relevant change if it determines that the change is not consistent with the purposes of the Clearing Supervision Act, including all applicable rules, orders, or the risk management

[172] 17 CFR 240.19b–4(l).

[173] 12 U.S.C. 5465(e)(3) (as added by Title VIII). In addition, the Commission is required to provide the Board with any information it issues or submits in connection therewith.

[174] *See* OCC Letter at 7–8 and DTCC Letter at 8.

[175] 12 U.S.C. 5465(e)(1)(E) (as added by Title VIII). The Commission expects that a designated clearing agency would submit a comment letter to the Secretary of the Commission each time that it provides any additional information to the Commission on EFFS in response to a Commission request for information made pursuant to Section 806(e)(1)(D). For purposes of the time periods set forth in Sections 806(e)(1)(E) and (G), the new 60-day period will begin on the date the Commission receives the additional information and the comment letter. Because the Commission will include a copy of this letter in its specific comment file for the Advance Notice, which is available on the Commission's Web site, this approach will provide the means for notifying the public that the information was submitted.

[176] 12 U.S.C. 5465(e)(1)(H) (as added by Title VIII).

[177] 12 U.S.C. 5465(e)(4) (as added by Title VIII).

[178] 12 U.S.C. 5465(e)(1)(F) (as added by Title VIII).

[179] 12 U.S.C. 5465(e)(1)(E) and (H) (as added by Title VIII).

[180] 12 U.S.C. 5465(e)(1)(I) (as added by Title VIII).

[181] 12 U.S.C. 5465(e)(4) (as added by Title VIII).

[182] 12 U.S.C. 5465(e)(2)(A) (as added by Title VIII).

[183] 12 U.S.C. 5465(e)(2)(B) (as added by Title VIII).

[184] 12 U.S.C. 5465(e)(2)(C) (as added by Title VIII).

standards prescribed under Section 805(a) of the Clearing Supervision Act.[185] The Commission did not receive any comments on a designated clearing agency's ability to act on an emergency basis. Designated clearing agencies would be required to provide such emergency notice on Form 19b–4, pursuant to the General Instructions, which are being adopted substantially as proposed.

D. Amendments to Form 19b–4

In conjunction with new Rules 19b–4(n) and (o), the Commission is adopting amendments to Form 19b–4 to reflect the requirements to file Security-Based Swap Submissions and Advance Notices with the Commission. Specifically, the Commission is modifying the cover page of Form 19b–4 to add additional checkboxes so that a clearing agency may indicate that the filing is being submitted as a Security-Based Swap Submission or an Advance Notice (in the case of a designated clearing agency) as well as a proposed rule change under Exchange Act Section 19(b), in each case to the extent applicable. A clearing agency will be able to select more than one filing type, check the appropriate box or boxes to indicate the filing type and submit all related information as a single filing. In other words, in cases where a proposed change must be filed pursuant to all three filing requirements, the clearing agency would be able, after December 10, 2012, to meet all applicable filing requirements by submitting a single Form 19b–4 electronically on the existing filing system, EFFS, to the Commission.

The Commission also is amending the General Instructions for Form 19b–4 regarding the filing requirements for Security-Based Swap Submissions and Advance Notices. The Commission is revising the instructions to include specific information that is required to be filed as part of a Security-Based Swap Submission or an Advance Notice.

With respect to Security-Based Swap Submissions, the amendments to the Form 19b–4 General Instructions will require clearing agencies to include a statement that includes, but is not limited to: (i) How the submission is consistent with Section 17A of the Exchange Act; (ii) information that will assist the Commission in the quantitative and qualitative assessment of the factors specified in Exchange Act Section 3C; and (iii) how the rules of the clearing agency meet the criteria for open access. Additionally, in order to facilitate the Commission's review of a Security-Based Swap Submission, the revised instructions provide examples of the types of information the clearing agency could consider including in its Security-Based Swap Submission in order to respond to the quantitative and qualitative factors specified in Exchange Act Section 3C and the requirements set forth in new Rule 19b–4(o)(3).

With respect to Advance Notices, the Commission is adopting amendments to the General Instructions for Form 19b–4 to require the designated clearing agency to provide a description of the nature of the proposed change and the expected effects on risks to the designated clearing agency, its participants, or the market, along with a description of how the designated clearing agency will manage any identified risks. These instructions also require that a designated clearing agency provide any additional information requested by the Commission necessary to assess the effect the proposed change would have on the nature or level of risks associated with the designated clearing agency's payment, clearing or settlement activities and the sufficiency of any proposed risk management techniques.

The Commission also is adopting a new Exhibit 1A to the General Instructions for the **Federal Register** notice template used by clearing agencies as an exhibit to the Form 19b–4 filing. New Exhibit 1A will be used only by clearing agencies. All other SROs will continue to use the current Exhibit 1 to prepare the **Federal Register** notice for proposed rule changes. The Commission is adopting a separate exhibit for clearing agencies because the rules requiring notice of Security-Based Swap Submissions and Advance Notices to be published in the **Federal Register** will apply only to clearing agencies. Instructions on preparing a **Federal Register** notice for Security-Based Swap Submissions and Advance Notices are unnecessary for all other SROs. In order to avoid any confusion, the Commission is providing clearing agencies with Exhibit 1A to use to prepare a **Federal Register** notice for a proposed rule change, Security-Based Swap Submission, or Advance Notice, or any combination of the three. The amendments to the General Instructions for Form 19b–4 also incorporate the statutory timeframes and other procedural requirements that are contained in Exchange Act Section 3C and Section 806(e).

Moreover, pursuant to existing Rule 19b–4(j), SROs are required to sign Form 19b–4 electronically in connection with filing a proposed rule change and to retain a copy of the signature page in accordance with Rule 17a–1. Under the rules the Commission is adopting today, Rule 19b–4(j) has been modified such that it also would apply to Security-Based Swap Submissions filed in accordance with Exchange Act Section 3C and Advance Notices filed in accordance with Section 806(e).

In addition, the Commission is adopting changes to the General Instructions for Form 19b–4, as proposed, to reflect the new deadlines by which the Commission must publish and act upon proposed rule changes submitted by SROs and the new standards for approval, disapproval or suspension of proposed rule changes pursuant to the amendments to Exchange Act Section 19(b) contained in Section 916 of the Dodd-Frank Act. The Commission is also adopting a number of technical and clarifying amendments to Rule 19b–4 and Form 19b–4 to make the instructions consistent with the new requirements in Section 916 of the Dodd-Frank Act and with current practices of SRO filers.[186]

Section 916 of the Dodd-Frank Act also modified Exchange Act Section 19(b)(3)(A), which permits certain types of proposed rule changes to take effect immediately upon filing with the Commission and without the notice and approval procedures required by Exchange Act Section 19(b)(2), to make clear that any rule establishing or changing a fee, due or other charge imposed by the SRO qualifies for this designation, regardless of whether the fee, due or other charge is applicable only to a member.[187] The Commission

[185] 12 U.S.C. 5465(e)(2)(D) (as added by Title VIII). Pursuant to Section 806(e)(3), the Commission is required to provide the Board concurrently with a complete copy of any notice, request or other information it receives. However, the Commission is proposing that the designated clearing agency file copies of any such notice, requests or other information directly with the Board in order to help meet this requirement.

[186] *See* amendments to the General Instructions for Form 19b–4.

[187] 15 U.S.C. 78s(b)(3)(A). 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 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).

is also adopting modifications to the General Instructions for Form 19b–4 to reflect this clarification.

The Commission did not receive any comments on the proposed amendments to Form 19b–4, and the Commission is adopting these amendments substantially as proposed. Several minor conforming edits and corrections have, however, been made to Form 19b–4 and the General Instructions thereto, as compared to the version that was included in the Proposing Release, to conform to changes made to new Rule 19b–4(o)(3), as described in detail in section II.A.1.b of this release, and to make other necessary clarifications to the form to reflect typographical edits, changes to the form made pursuant to an interim final rule that was adopted after publication of the Proposing Release,[188] and other non-substantive revisions to eliminate or correct potentially vague or confusing language.[189]

E. Amendments to Rule 19b–4 Relating to Section 916 of the Dodd-Frank Act

Under Exchange Act Section 19(b)(2)(E),[190] as added by the Dodd-Frank Act, the Commission is required to send the notice of a proposed rule change filed by an SRO to the **Federal Register** for publication thereof within 15 days of the date on which the SRO's Web site publication is made. The Commission is amending Rule 19b–4(l) to provide that if an SRO does not post a proposed rule change on its Web site on the same day that it files the proposal with the Commission, then the SRO shall inform the Commission of the date on which it posted such proposal on its Web site. The purpose of this change is to advise the Commission of the date the SRO posted the proposed rule change filing to its Web site, as such posting initiates the Commission's requirement to send notice of the proposed rule change to the **Federal Register**. The Commission did not receive any comments on the amendments and is adopting them as proposed.

F. New Requirements Under Exchange Act Section 3C and Section 806(e) and the Existing Filing Requirements in Exchange Act Section 19(b)

As discussed previously, the Commission is adopting amendments to Rule 19b–4 and Form 19b–4 to incorporate two new requirements under the Dodd-Frank Act that are similar to the existing filing requirement for proposed rule changes under Exchange Act Section 19(b). The first is the requirement to file Security-Based Swap Submissions under new Exchange Act Section 3C. The second is the requirement to file Advance Notices under Section 806(e). The Commission anticipates that in many cases a clearing agency may take an action that would trigger more than one of these filing requirements,[191] and the Commission seeks to streamline the filing processes for Exchange Act Section 3C, Section 806(e) and Exchange Act Section 19(b) by proposing that all such filings be made electronically on Form 19b–4.

New Rules 19b–4(n) and (o) and the corresponding amendments to Form 19b–4 are being adopted to avoid duplicative filings and to streamline the process and burden on clearing agencies and the Commission. However, the filing requirements of Exchange Act Section 3C, Section 806(e) and Exchange Act Section 19(b) are distinct from each other and subject to different statutory standards for Commission review. As a result, a clearing agency that files pursuant to more than one of these sections must meet the requirements of the applicable regulatory scheme before the applicable change may become effective.

Accordingly, it is likely that many proposals made by clearing agencies may be filed and require review under more than one of the three Commission review procedures discussed herein. For example, a designated clearing agency may be required to submit an Advance Notice in connection with its Security-Based Swap Submission if the requirement to clear the security-based swap described in the submission would materially affect the nature or level of risks presented by the designated clearing agency. Moreover, if the designated clearing agency did not have existing authority under its rules to clear the relevant security-based swap, such action also would require a proposed rule change filing under Exchange Act Section 19(b).

In other cases, only one of the three Commission-review procedures may apply because the scope of proposals requiring review under each of Section 806(e) and Exchange Act Section 3C is in some ways broader and in other ways narrower in comparison to Exchange Act Section 19(b). There is, for example, the potential that certain changes to the operations of a designated clearing agency may not require the filing of a proposed rule change under Exchange Act Section 19(b) or a Security-Based Swap Submission under Exchange Act Section 3C, but may trigger a requirement to file an Advance Notice under Section 806(e). By contrast, because the notice requirement under Section 806(e) applies only to matters that materially affect the nature or level of risk presented by a designated clearing agency, in some cases a rule change filed under Exchange Act Section 19(b) would not trigger the advance notice requirement under Section 806(e).

When a clearing agency submits a filing for more than one purpose (*i.e.,* proposed rule change, Security-Based Swap Submission and/or Advance Notice), the Commission will endeavor to evaluate such filings in tandem as part of a parallel process. Although the timing for review under each of Exchange Act Section 3C, Section 806(e) and Exchange Act Section 19(b) is

[188] *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).

[189] In addition to the changes described in this section, the Commission has also made a number of minor typographical and clarifying revisions to the form as compared to what was included in the Proposing Release, including: (i) Correcting typographical errors and inserting missing graphics on the face of the form, (ii) correcting typographical errors in the descriptions of the components of the form and inserting missing language in the description of Exhibit 1A, (iii) inserting parentheses to distinguish existing language from new language in Item A of the General Instructions, (iv) inserting language into Item B of the General Instructions to make clear that Advance Notices and Security-Based Swap Submissions are submitted to the Commission pursuant to different statutes, (v) inserting a missing word and closed parenthesis in Item D of the General Instructions, (vi) deleting the word ''also'' in the second sentence in Item 1(a) to make clear that the text of the proposed rule change should be included ''either'' in Exhibit 5 or Exhibit 1 (or Exhibit 1A in the filing of a clearing agency) (vii) revising the title of Exhibit 1A in Item 11 of the General Instructions, (viii) clarifying a defined term in Item 3 of the General Instructions (Note 3), (ix) adding the phrase ''If the proposed rule change is subject to Commission approval'' to the beginning of the sentence in Item 6 to reflect the fact that only certain types of proposed rule changes are subject to Commission approval and (x) modifying Item II of Exhibit 1A to clarify which items of the General Instructions are specifically applicable to the exhibit. Based on the non-substantive nature of these revisions, the Commission finds notice of the revisions is not necessary. *See* 5 U.S.C. 553(b).

[190] 15 U.S.C. 78s(b)(2)(E).

[191] Title VII contains a clause, which provides in pertinent part, that ''[u]nless otherwise provided by its terms, [Subtitle B] does not divest * * * the Securities and Exchange Commission * * * of any authority derived from any other provision of applicable law.'' *See* Section 771 of the Dodd-Frank Act. Similarly, Section 811 of the Dodd-Frank Act provides that ''[u]nless otherwise provided by its terms, this title does not divest any appropriate financial regulator, any Supervisory Agency, or any other Federal or State agency, of any authority derived from any other applicable law, except that any [risk management] standards prescribed by the [Board] under section 805 shall supersede any less stringent requirements established under other authority to the extent of any conflict.'' Accordingly the new requirements under Titles VII and VIII do not supersede the existing requirements under the Exchange Act that would require clearing agencies (which are all SROs) to file a proposed rule change when the matter described in a Security-Based Swap Submission or Advance Notice also meets the criteria for a proposed rule change.

different,[192] all three processes contain some degree of flexibility, and the Commission will attempt to streamline the review processes to avoid any unnecessary delays or duplicative requests for information.

However, each of the three processes will remain distinct from the other processes. Each proposed rule change, Security-Based Swap Submission and Advance Notice will be reviewed and evaluated independently by the Commission in accordance with the applicable statute and regulatory authority. Moreover, the new requirements being adopted today to file Advance Notices with the Commission and to make Security-Based Swap Submissions would not replace the existing Exchange Act Section 19(b) rule filing process, nor will a filing made under Exchange Act Section 3C or Section 806(e) eliminate the need to satisfy the requirements of the other processes to the extent they are applicable. In other words, the Commission review required by Exchange Act Section 3C is different from the review required under Section 806(e), which in turn is different from the review required under Exchange Act Section 19(b).

Section 806(e) requires an analysis of the risk management issues that may impact the clearing agency, its participants, or the market. Exchange Act Section 19(b), by contrast, requires a broader evaluation and an analysis as to whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules thereunder. Finally, Exchange Act Section 3C only applies when a clearing agency plans to accept for clearing a security-based swap (or a group, category, type or class of security-based swaps), and the standard for review is based on a number of specified factors, including but not limited to: (i) How the submission is consistent with Section 17A of the Exchange Act and (ii) the factors specified in Exchange Act Section 3C relating to the security-based swap, the market for the security-based swaps, and the clearing agency.

The Commission believes that these distinct reviews make it possible for a submission made on Form 19b–4 to be acceptable under the standards for review for one of the three purposes but not under the others.[193] For example, in cases where a clearing agency's plan to accept a new security-based swap (or any group, category, type or class of security-based swaps) for clearing requires it to file both a proposed rule change and a Security-Based Swap Submission, once the proposed rule change is approved and effective, the clearing agency may begin clearing the security-based swap on a voluntary basis, subject to any separate determination that may be made related to the Security-Based Swap Submission to require mandatory clearing. Even if a determination is made not to require mandatory clearing, such security-based swap may continue to be cleared on a voluntary basis. In cases where only the requirements of one of Exchange Act Section 19(b), Exchange Act Section 3C or Section 806(e) are implicated, only the applicable process would need to be completed before the proposal could become effective. The Commission discussed its views regarding the distinct processes under Sections 19(b), 3C, and 806(e) in the Proposing Release and did not receive any comments on these views.

G. Effective and Compliance Dates

The effective date for §§ 240.3Ca–1, 240.3Ca–2, and the amendments to § 240.19b–4, is August 13, 2012. Similarly, the compliance date for §§ 240.3Ca–1, 240.3Ca–2, and the amendments to § 240.19b–4, except for § 240.19b–4(o), which is discussed below, is August 13, 2012.

With respect to the compliance date for new Rule 19b–4(o), which sets forth the process for filing Security-Based Swaps, the Commission recognizes that clearing agencies will require time to gather and synthesize the information required to be included in a submission. To accommodate this transition period, the Commission believes that it is appropriate to delay the compliance date for Rule 19b–4(o) to allow clearing agencies to make any changes to their internal procedures to incorporate the statutory factors and to make any related adjustments, particularly as commenters have stated that a significant amount of data would need to be provided in connection with a Security-Based Swap Submission. More broadly, the Commission is cognizant of the general need to provide for the orderly and methodical implementation of mandatory clearing determinations, commencing with the determinations made with respect to pre-enactment security-based swaps.[194] After considering these issues, the Commission has determined that the compliance date for new Rule 19b–4(o) will be the date that is 60 days after the date the Commission issues its first written determination pursuant to Exchange Act Section 3C(b)(2)(C)(ii)[195] determining whether a security-based swap, or group, category, type, or class of security-based swaps, is required to be cleared.

The Commission expects that such first determination will address pre-enactment security-based swaps (*i.e.,* security-based swaps listed for clearing by a clearing agency as of the date of enactment of Exchange Act Section 3C), which, pursuant to Exchange Act Section 3C(b)(2)(B), were deemed to be submitted to the Commission as of such date.[196] Two clearing agencies listed security-based swaps for clearing as of July 21, 2010, and provided an extension to the 90-day review period in Exchange Act Section 3C(b)(3), which otherwise would have commenced on July 21, 2010. However, as with other Security-Based Swap Submissions, the Commission is required by the Exchange Act Section 3C to make a determination with respect to such pre-enactment submissions within the applicable review period. As described above, that section also requires the Commission to make the submission of pre-enactment security-based swaps available to the public and to provide at least a 30-day public comment period regarding its determination whether a clearing requirement should apply to such security-based swaps.[197] Accordingly, the Commission believes that the compliance date is appropriate since there will be a public notice and comment process prior to the first written determination pursuant to Exchange Act Section 3C(b)(2)(C)(ii). The Commission expects to include in

[192] *See* 15 U.S.C. 78s(b)(2) (as amended by Section 916 of the Dodd-Frank Act) (establishing the timeframes under which the Commission must either approve, disapprove or institute proceedings with respect to a proposed rule change following receipt of the filing); 15 U.S.C. 78c–3(b)(3) (as added by Section 763(a) of the Dodd-Frank Act) (stating that the Commission must make its determination on a Security-Based Swap Submission within 90 days after receipt, unless the clearing agency agrees to an extension of this time limitation) and 12 U.S.C. 5465(e)(1)(G) (as added by Title VIII) (explaining that the Commission must notify a designated clearing agency of any objection to a proposed change filed as an Advance Notice under Section 806(e) within 60 days after receiving the notice filing, unless the Commission requests additional information in consideration of the notice, in which case the 60-day period will recommence on the date such information is received by the Commission).

[193] The Commission notes, however, that when a proposal is required to be filed as both a proposed rule change and an Advance Notice, the proposal would not become effective until the statutory provisions applicable to both types of filings are satisfied. For example, a rule proposal may provide for sound risk management practices but also have an anticompetitive aspect that would not satisfy the requirements of the Exchange Act.

[194] *See supra* note 43 and accompanying text.

[195] 15 U.S.C. 78c–3(b)(2)(C)(iii) (as added by Section 763(a) of the Dodd-Frank Act).

[196] *See* 15 U.S.C. 78c–3(b)(2)(B).

[197] *See* 15 U.S.C. 78c–3(b)(2)(C)(i) and (iii).

such notice and written determination references to the impending compliance date and thus clearing agencies will be on notice and will have time to prepare for the filing of their Submissions. Sixty days following the date that the Commission issues that first written determination, clearing agencies will be required to begin filing Security-Based Swap Submissions with the Commission under new Rule 19b–4(o).

In addition, the Commission is currently in the process of designing and implementing the system upgrades that are necessary in order for Advance Notices and Security-Based Swap Submissions to be filed on EFFS. The Commission intends to have the system upgrades to EFFS operational by December 10, 2012. Because of the time required to finalize these upgrades, the final rules provide that Advance Notices and Security-Based Swap Submissions filed prior to December 10, 2012 must be filed with the Commission by submitting the applicable filing to a dedicated email inbox to be established by the Commission. Accordingly, the compliance and effective dates for the amendments to § 249.819 and Form 19b–4 is December 10, 2012.

III. Paperwork Reduction Act

Rule 19b–4, Form 19b–4 and Rule 3Ca–1 contain ''collection of information requirements'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[198] Accordingly, the Commission has submitted the information to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. Specifically, the Commission has submitted revisions to the current collection of information titled ''Rule 19b–4 Filings with Respect to Proposed Rule Changes by Self-Regulatory Organizations'' (OMB Control No. 3235–0045). The Commission also has submitted revisions to the current collection of information titled ''Form 19b–4 under the Securities Exchange Act of 1934'' (OMB Control No. 3235–0045). Finally, the Commission has submitted a new collection of information titled ''Rule 3Ca–1 Stay of Clearing Requirement and Review by the Commission under the Securities Exchange Act of 1934'' to OMB for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. OMB has not yet assigned a control number to the new collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Any information submitted to the Commission will be made publicly available.

In the Proposing Release, the Commission solicited comments on the collection of information requirements.[199] No written comments were received on the estimates in the Proposing Release, although the Commission received informal comments from eight clearing agencies prior to issuing the Proposing Release in order to inform its estimates in that release. For the most part, the Commission is not making any changes to the estimates in the Proposing Release; however, some initial burden estimates have been adjusted, as discussed below, to reflect updated information on such burden estimates.

A. Summary of Collection of Information

1. Amendments to Rule 19b–4 and Form 19b–4

Rule 19b–4 currently requires an SRO seeking Commission approval for a proposed rule change to provide the information stipulated in Form 19b–4. Form 19b–4 currently requires a description of the terms of a proposed rule change, the proposed rule change's impact on various market segments and the relationship between the proposed rule change and the SRO's existing rules. Form 19b–4 also requires an accurate statement of the authority and statutory basis for, and purpose of, the proposed rule change, the proposal's impact on competition and a summary of any written comments received by the SRO from SRO members. An SRO also is required to submit Form 19b–4 to the Commission electronically, post a proposed rule change on its Web site within two business days of its filing, and to post and maintain a current and complete set of its rules on its Web site.

The Commission is amending Rule 19b–4 to require two new collections of information on Form 19b–4 related to new filing requirements applicable to clearing agencies under the Dodd-Frank Act. The amendments will not otherwise change the collection of information requirements currently in Rule 19b–4 and Form 19b–4. These new reporting requirements are in addition to the information currently required by Rule 19b–4 and Form 19b–4.

New Rules 19b–4(n) and (o) will require clearing agencies to file information with the Commission under Section 806(e) and Exchange Act Section 3C, respectively, on Form 19b–4. Clearing agencies that are required to file a Security-Based Swap Submission or an Advance Notice prior to December 3, 2012 will file such notice with the Commission by email. Exchange Act Section 3C requires clearing agencies to submit for a Commission determination of whether mandatory clearing applies, any security-based swap (or any group, category, type or class of security-based swaps) that the clearing agency plans to accept for clearing and to provide notice to its members of such submission. Section 806(e) requires that a clearing agency designated as systemically important by the Council file with the Commission advance notice of proposed changes to its rules, procedures or operations that could materially affect the nature or level of risk presented by the designated clearing agency.

The Commission anticipates that in many cases, a clearing agency will be required to file a proposal under Exchange Act Section 3C or Section 806(e) when it is already required to file a proposed rule change under Exchange Act Section 19(b). Accordingly, clearing agencies will be able to submit on the same Form 19b–4, proposals required to be filed with the Commission under Exchange Act Section 3C or Section 806(e) that they are already required to submit under Exchange Act Section 19(b). In some cases, however, a clearing agency will be required to file a proposal under Exchange Act Section 3C or Section 806(e) and not under Exchange Act Section 19(b), for example where a proposal materially affects the nature or level of risks presented by the clearing agency but does not change the rules of the clearing agency.

In addition, Exchange Act Section 3C and Section 806(e) each require information to be provided as part of the filing that is in addition to the information required to be filed with a proposed rule change under Exchange Act Section 19(b). A clearing agency will be required to include as part of a Security-Based Swap Submission a statement that includes, but is not limited to: (i) How the submission is consistent with Exchange Act Section 17A; (ii) information that will assist the Commission in the quantitative and qualitative assessment of the factors specified in Exchange Act Section 3C; and (iii) how the rules of the clearing agency meet the criteria for open access.

Section 806(e) provides that the Advance Notice include a description of the nature of the proposed change and the expected effects on risks to the designated clearing agency, its participants, or the market and it must provide a description of how the designated clearing agency will manage any identified risks. A designated

[198] 44 U.S.C. 3501 *et seq.*

[199] *See* Proposing Release, *supra* note 24.

clearing agency also will be required to provide any additional information requested by the Commission as necessary to assess the effect the proposed change would have on the nature or level of risks associated with the designated clearing agency's payment, clearing or settlement activities and the sufficiency of any proposed risk management techniques.

The amendments to Rule 19b–4 also will require a clearing agency to post certain information on its Web site, and require an SRO that does not post a proposed rule change on its Web site on the same day that it files the proposal with the Commission to inform the Commission of the date on which it posted such proposal on its Web site.[200] Security-Based Swap Submissions and Advance Notices, and any amendments thereto, will be required to be posted on the clearing agency's Web site within two business days of filing the information with the Commission. Except for any filing or information for which a clearing agency has submitted a proper confidential treatment request, the information generally shall remain posted on the clearing agency's Web site until: (i) In the case of a Security-Based Swap Submission, the Commission makes a mandatory clearing determination, (ii) in the case of an Advance Notice, the date the clearing agency posts a notice of effectiveness in accordance with new Rule 19b–4(n)(4)(ii), or (iii) in the case of either type of filing, the date the clearing agency withdraws the filing or is notified by the Commission that it was not properly filed. A clearing agency also will be required to post notice on its Web site of the effectiveness of any change to its rules, procedures or operations referred to in an Advance Notice within two business days of the effective date determined in accordance with Section 806(e).

2. Stay of Clearing Requirement

New Rule 3Ca–1 provides that the Commission, on application of a counterparty to a security-based swap (or group, category, type, or class of security-based swaps), or on the Commission's own initiative, may stay the clearing requirement until the Commission completes a review of the terms of the security-based swap and the clearing of the security-based swap that the clearing agency has accepted for clearing. A counterparty to a security-based swap that applies for a stay of the clearing requirement for a security-based swap (or group, category, type, or class of security-based swaps) will be required to submit to the Commission the information set forth in new Rule 3Ca–1(b).[201]

Any clearing agency that has accepted for clearing a security-based swap (or group, category, type, or class of security-based swaps) that is subject to the stay of the clearing requirement will be required to provide information requested by the Commission as it determines to be necessary and appropriate to assess any of the factors in the course of the Commission's review.

B. Use of Information

1. Amendments to Rule 19b–4 and Form 19b–4

The information currently required under Rule 19b–4 and reported on Form 19b–4 is used by the Commission to review proposed rule changes filed by SROs pursuant to Exchange Act Section 19(b)(1) [202] and to provide notice of the proposals to the general public. The Commission relies upon the information received in SRO filings, as well as public comments regarding the information, in reviewing and reaching decisions about whether to approve a proposed rule change.

The information to be provided by clearing agencies pursuant to the amendments to Rule 19b–4 and Form 19b–4 will be used by the Commission to evaluate Security-Based Swap Submissions and Advance Notices. The Commission will use the information filed on Form 19b–4 related to Security-Based Swap Submissions to determine whether the security-based swap (or any group, category, type or class of security-based swaps) described in the Security-Based Swap Submission will be required to be cleared pursuant to Exchange Act Section 3C(a)(1).

The Commission will use the information on Form 19b–4 related to Advance Notices filed under Section 806(e) to determine the effect on the nature or level of risks that would be presented by a designated clearing agency based on a proposed change to its rules, procedures or operations, and the expected effects on risk to the designated clearing agency, its participants and the market and to determine whether the Commission should make an objection to the proposed change. In addition, the information on the form will be provided to the Board because the Commission is required to provide copies of all Advance Notices and any additional information provided by the designated clearing agency relating to the Advance Notice to the Board and to consult with the Board before taking any action on or completing its review of the Advance Notice.[203] In some instances, the Commission also may use the information on the form to determine whether to allow a proposed change to take effect in less than 60 days following the receipt of the Advance Notice and to determine whether a change made on an emergency basis is warranted or whether it should be modified or rescinded.

The information to be filed on Form 19b–4 relating to Exchange Act Section 3C and Section 806(e) also will be used by participants of the clearing agency, market participants, other clearing agencies, or the general public to comment on the proposal, as the Commission requires that a clearing agency post the information on its Web site. In addition, pursuant to Exchange Act Section 3C, a clearing agency will be required to provide its members with notice of the Security-Based Swap Submission. As with proposed rule changes under Exchange Act Section 19(b), the Commission will solicit comment from interested parties on proposals filed under Exchange Act Section 3C and Section 806(e). Interested parties could use the information to comment on the proposed change and to provide feedback on the development of the clearing agency's service offerings and the rules, procedures and operations of the clearing agency.

The information collected by the Commission with respect to the date on which the SRO posted a proposed rule change on its Web site (if such posting date is not the same as the filing date) will be used to inform the Commission of the date by which the Commission must send the SRO notice to the **Federal Register** for publication.

2. Stay of Clearing Requirement

The information provided as required by new Rule 3Ca–1 will be used by the Commission to determine whether to grant the stay of the clearing requirement sought by a counterparty and to review whether the clearing requirement will continue to apply to the security-based swap (or group, category, type, or class of security-based swaps) referenced in the request for a stay.

[200] Rule 19b–4(l).

[201] *See Supra* section II.B.

[202] 15 U.S.C. 78s(b)(1).

[203] 12 U.S.C. 5465(e)(3) and (4) (as added by Title VIII).

C. Respondents

1. Amendments to Rule 19b–4 and Form 19b–4

Prior to the enactment of the Dodd-Frank Act, 25 SROs were making filings with the Commission subject to the collection of information under Rule 19b–4 and Form 19b–4. In fiscal year 2011, these SRO respondents filed 1,606 proposed rule changes subject to the current collection of information, of which 1,180 proposed rule changes ultimately became effective.[204]

Although Rule 19b–4 and Form 19b–4 apply to all SROs, the new collection of information requirements in the new rules will apply to clearing agencies and, in the case of the amendments pursuant to Section 916 of the Dodd-Frank Act, to all SROs (*i.e.,* more than the number of estimated clearing agencies below). The amendments relating to Exchange Act Section 3C will apply to the clearing agencies that currently clear security-based swaps or that the Commission estimates may do so in the future. The obligation to centrally clear security-based swap transactions is a new requirement under Title VII, and three clearing agencies that had previously operated under temporary conditional exemptions under Section 36 of the Exchange Act are now registered security-based swap clearing agencies.[205] These three clearing agencies currently clear or plan to clear[206] security-based swaps and there could conceivably be a few more in the foreseeable future.[207] In the Proposing Release, the Commission noted that four clearing agencies were at that time authorized to clear security-based swaps pursuant to the temporary conditional exemptions and estimated that four to six clearing agencies could in the future clear security-based swaps and be subject to the information collection requirements in the rules relating to Exchange Act Section 3C. The Commission used the higher estimate (six) for the PRA analysis in the Proposing Release and the Commission believes that such estimate is still appropriate given the potential for additional clearing agencies to clear security-based swaps in the future.

The amendments to Rule 19b–4 and Form 19b–4 relating to the requirement to file Advance Notices with the Commission pursuant to Section 806(e) will only apply to clearing agencies that are registered with the Commission, designated by the Council as systemically important, and for which the Commission is the Supervisory Agency. There are currently nine clearing agencies registered with the Commission; this includes four clearing agencies that were registered with the Commission to clear securities transactions prior to the effectiveness of the Dodd-Frank Act, two clearing agencies that currently do not clear any securities transactions, and three clearing agencies that were deemed registered under Section 17A(l) after the effective date of Title VII of the Dodd-Frank Act and that are currently clearing or that plan to clear security-based swaps.[208] In addition, and as noted above and in the Proposing Release, a few additional security-based swap clearing agencies could conceivably register with the Commission in the foreseeable future. Accordingly, the number of security-based swap clearing agencies used in the PRA analysis has been increased beyond the ones that currently exist to a total of six in order to account for such future clearing agencies. For purposes of the PRA analysis, the Commission estimates that the four securities clearing agencies that are currently clearing non-security-based swap securities and the six estimated clearing agencies that either currently clear or may clear security-based swaps in the future would be subject to the applicable collection of information requirements.

2. Stay of Clearing Requirement

The Commission estimates that six security-based swap clearing would potentially be subject to the collection of information under new Rule 3Ca–1 in connection with any counterparty requesting a stay of clearing requirement.

D. Total Annual Reporting and Recordkeeping Burden

1. Background

The amendments to Rule 19b–4 and Form 19b–4 are designed to facilitate the processes for providing the Commission with Security-Based Swap Submissions and Advance Notices and to make these processes efficient by utilizing the existing infrastructure for proposed rule changes, thereby conserving both clearing agency and Commission resources. As amended, Form 19b–4 enables clearing agencies to submit Security-Based Swap Submissions and Advance Notices electronically with the Commission. The amendments to Rule 19b–4 also will require a clearing agency to post on its Web site any Security-Based Swap Submissions, Advance Notices, and any amendments thereto, within two business days of the date on which they are submitted to the Commission. A further amendment to Rule 19b–4 will require an SRO that files a proposed rule change with the Commission to inform the Commission of the date on which it posted such proposal on its Web site if the posting did not occur on the same day that the SRO filed the proposal with the Commission. Finally, new Rule 3Ca–1 specifies the process for a security-based swap counterparty to apply to the Commission for a stay of the clearing requirement.

[204] Filings of proposed rule changes are available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.* To avoid duplication, the total figure does not include certain pre-filings made with the Commission pursuant to Rule 19b–4(f)(6), which allows an SRO to designate certain proposed rule changes as effective upon filing if, among other things, the SRO provides written notice of its intent to file, along with a brief description and proposed rule text (a ''pre-filing''), to the Commission at least five business days prior to an actual filing.

[205] Chicago Mercantile Exchange Inc., ICE Clear Credit LLC (formerly ICE Trust US LLC), and ICE Clear Europe Limited are registered with the Commission to clear security-based swaps. The Commission previously authorized five entities to clear credit default swaps, which are security-based swaps. *See CDS clearing by ICE Clear Europe Limited,* Securities Exchange Act Release Nos. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009) and 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010); *CDS clearing by Eurex Clearing AG,* Securities Exchange Act Release Nos. 60373 (July 23, 2009), 74 FR 37740 (July 29, 2009) and 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010); *CDS clearing by Chicago Mercantile Exchange Inc.,* Securities Exchange Act Release Nos. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009) and 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010); *CDS clearing by ICE Clear Credit LLC (formerly ICE Trust US LLC),* Securities Exchange Act Release Nos. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009) and 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010); *Temporary CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.* Securities Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009). Eurex Clearing AG, LIFFE A&M, and LCH.Clearnet Ltd. are not currently registered with the Commission to clear security-based swaps.

[206] By referring to a clearing agency that plans to clear security-based swaps, the Commission means a clearing agency that is permitted to do so under its rules but that has not yet begun clearing security-based swaps.

[207] Based on the significant level of capital and other financial resources necessary for the formation of a clearing agency, the Commission does not expect there to be a large number of clearing agencies that seek to clear security-based swaps.

[208] Of the four clearing agencies that were authorized to clear security-based swaps at the time the Proposing Release was issued, one was not deemed registered with the Commission under Section 17A(l) of the Exchange Act after the temporary exemptions expired. Accordingly, the Commission has adjusted its estimate of clearing agencies that currently clear or plan to clear security-based swaps. However, the Commission recognizes that this clearing agency, as well as others, may seek to clear security-based swaps in the future and the Commission has maintained the earlier estimate of six clearing agencies for purposes of the PRA analysis.

2. Rule 19b–4 and Form 19b–4

a. Introduction

As noted in the Proposing Release, the Commission conducted a survey and received informal comments from the staff of eight clearing agencies that will be subject to the new requirements in the amendments to Rule 19b–4 and Form 19b–4. These comments were received prior to the publication of the Proposing Release and the Commission did not receive any additional comments from clearing agencies or any other parties on these estimates after the Proposing Release was published. Clearing agencies indicated they would have to train personnel and develop policies and procedures in order to implement the new filing requirements under Rule 19b–4 and Form 19b–4 in connection with Security-Based Swap Submissions and Advance Notices. In addition, clearing agencies indicated they would have to submit additional information to the Commission on Form 19b–4 in order to meet the requirements for filing Security-Based Swap Submissions or Advance Notices, either as separate filings or as part of filings also submitted as proposed rule changes under Exchange Act Section 19(b).

The clearing agencies emphasized that the estimated burdens would depend in large part on the rules ultimately adopted by the Commission to define and determine how frequently Security-Based Swap Submissions and Advance Notices will be required to be filed and the nature and extent of information that will be required with each filing. In addition, the clearing agencies stated that the burden per filing could vary widely, depending on the complexity of each individual filing. For example, some clearing agency proposals may require more information or analysis to be submitted as part of the filing. The clearing agencies also stated that the annual burden also could vary widely from year to year depending on the number of new proposals the clearing agency makes in a particular year. The Commission noted in the Proposing Release that the estimates provided in that release were preliminary and could change after clearing agencies had the opportunity to review and closely evaluate the rules. However, the Commission did not receive any comments on these estimates, from clearing agencies or from other parties and, as a result, has not adjusted these estimates. The estimates of the burden per filing also varied among clearing agencies, which may reflect the different internal processes, training programs, and review procedures for new projects currently in place at the different clearing agencies. In addition, prior to the effective date of the Dodd-Frank Act some clearing agencies were registered with the Commission (''pre-Dodd-Frank Act clearing agencies'') while others were not. Pre-Dodd-Frank Act clearing agencies had been filing proposed rule changes under Exchange Act Section 19(b) prior to the effective date of the Dodd-Frank Act and have more familiarity with the collection of information requirements related to Rule 19b–4 and Form 19b–4, while the newly registered [209] clearing agencies may not be as familiar with these requirements and may incur a greater burden in connection with using EFFS and training personnel.

The Commission used the more conservative numbers estimated by the clearing agencies for its estimates for the PRA. The Commission believed the more conservative estimate was appropriate because the estimates of the burden per filing varied among clearing agencies and could vary among the filings submitted (*i.e.,* some proposals may be more complex and require more time for the clearing agency to prepare a Security-Based Swap Submission or an Advance Notice). In addition, the Commission calculated the burden for the requirements related to Advance Notices assuming that they would apply to ten clearing agencies and the burden for the requirements related to Security-Based Swap Submissions assuming they would apply to six clearing agencies.

Finally, the Commission recognized that there will likely be some substantive and procedural overlap with respect to the processes for preparing and submitting Security-Based Swap Submissions, Advance Notices and proposed rule changes that relate to the same subject matter. For example, in connection with a decision to accept for clearing a new type of security-based swap that was not previously permitted under the clearing agency's rules, a clearing agency could be required to make a filing as a Security-Based Swap Submission, an Advance Notice and a proposed rule change. In this case, because these submissions all relate to the same underlying proposal, the amount of time required to prepare a single Form 19b–4 for all three purposes is likely to be less than the aggregate amount of time ordinarily required to prepare and submit three separate filings. Nevertheless, in the Proposing Release the Commission calculated the PRA burden for each process individually without accounting for any reduction due to the anticipated overlap in order to assure that the Commission did not underestimate the burdens. Additionally, the estimates in the Proposing Release were derived from discussions between the Commission's staff and staff of the clearing agencies, as described above. A detailed description of the estimated burdens related to Rule 19b–4 and Form 19b–4 is set forth in the sections below. The Commission did not receive any comments on the PRA estimates published in the Proposing Release and, other than a minor adjustment to reflect a change in status for recently registered clearing agencies, the burden estimates for the rules have not changed.

b. Internal Policies and Procedures

At the time it issued the Proposing Release, the Commission believed that the six estimated clearing agencies that were either going to be deemed registered to clear security-based swaps pursuant to Section 17A(l) of the Exchange Act or that could on their own initiative seek to be regulated by the Commission in the future in order to clear security-based swaps could incur some one-time costs associated with training their personnel about the procedures for submitting Security-Based Swap Submissions, Advance Notices, and/or proposed rule changes in electronic format through EFFS. Based on staff discussions with the clearing agencies prior to issuing the Proposing Release, the Commission estimated that each newly-registered clearing agency would spend approximately 20 hours training all staff members who will use EFFS to submit Security-Based Swap Submissions, Advance Notices and/or proposed rule changes electronically. Accordingly, the Commission estimated that the total one-time burden of training staff members of newly-registered clearing agencies to use EFFS will be 120 hours (six respondent clearing agencies × 20 hours). After the Proposing Release was issued, three of these clearing agencies were deemed registered with the Commission pursuant to Section 17A(l) and began being required to file proposed rule changes with the Commission on EFFS. However, these clearing agencies will still need to train staff members on filing Advance Notices and Security-Based Swap Submissions. Accordingly, the Commission does not believe it necessary to modify the estimate used in the Proposing Release with respect to initial training on EFFS.

[209] Newly-registered clearing agencies refers to clearing agencies registered with the Commission to clear security-based swaps after the effective date of the Dodd-Frank Act (which includes clearing agencies that the Commission has estimated may be registered in the future to clear security-based swaps).

Accordingly, the Commission is using the estimates in the Proposing Release for the rules being adopted today.

In the Proposing Release, the Commission estimated that, after the initial training was completed, each SRO (including pre-Dodd-Frank Act clearing agencies) would spend approximately 10 hours annually training new compliance staff members and updating the training of existing compliance staff members to use EFFS. The Commission believed that only a minimal amount of EFFS training would be submission-specific and that training a person to submit either a proposed rule change, Security-Based Swap Submission or Advance Notice would generally be sufficient to allow such person to make one or more of the other types of submissions. The Commission did not receive any comments on these estimates in the Proposing Release and is using them for the rules as they are being adopted today, resulting in a total annual burden of 350 hours ((six respondent clearing agencies × 10 hours) + (29 respondent SROs that are not clearing agencies × 10 hours)).

Based on staff discussions with the clearing agencies prior to issuing the Proposing Release, the Commission estimated in the Proposing Release that there would be a one-time paperwork burden of 130 hours for each newly-registered clearing agency to draft and implement internal policies and procedures relating to using EFFS to submit Security-Based Swap Submissions, Advance Notices and proposed rule changes with the Commission, for a total of 780 hours (130 hours × six newly-registered clearing agencies). In addition, and based on conversations with staff from the clearing agencies prior to issuing the Proposing Release, the Commission estimated that there would be a one-time paperwork burden of 30 hours for each pre-Dodd-Frank Act clearing agency to draft and implement modifications to existing internal policies and procedures for using EFFS in order to update them for submitting Security-Based Swap Submissions and/or Advance Notices with the Commission for a total of 120 hours (30 hours × four pre-Dodd-Frank Act clearing agencies). The Commission believes, based on its experience with clearing agencies, that such internal policies and procedures will be drafted and updated by the in-house counsel at the clearing agencies. The Commission did not receive any comments on the burden estimates in the Proposing Release and is using these estimates for the rules the Commission is adopting today.

c. Proposed Rule Changes

An SRO rule change proposal generally is filed with the Commission after an SRO's staff has obtained approval of its board of directors. The time required to complete a filing varies significantly and is difficult to separate from the time an SRO spends in developing internally the proposed rule change. In a PRA analysis conducted in 2004 in connection with amendments to Rule 19b–4 and Form 19b–4 (''2004 PRA''), the Commission 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.[210] The Commission stated in the Proposing Release that it preliminarily believed that these estimates remained valid based on its experience with the filings currently received from SROs and relied on these figures to prepare the analysis in the Proposing Release.[211]

In fiscal year 2011, 25 SRO respondents filed 1,606 rule change proposals subject to the current collection of information. Of this total, and based on the Commission's experience in reviewing SRO filings and past estimates for Rule 19b–4 and Form 19b–4, the Commission estimates that 80 proposed rule changes could be characterized as novel or complex and 1,526 proposed rule changes could be characterized as average. The Commission estimates that the total annual reporting burden for filing proposed rule changes with the Commission under the amendments to Rule 19b–4 and Form 19b–4 will be 87,086 hours (((1,526/25) × 35 [212] average rule change proposals × 34 hours) + ((80/25) × 35 complex rule change proposals × 129 hours)). Thus, on average, the reporting burden for filing proposed rule changes is 38.74 hours (87,086 hours/(2,136 average rule change proposals + 112 complex rule change proposals)). The Commission made similar estimates in the Proposing Release, only using 2009 fiscal year numbers, and did not receive any comments on those estimates. Accordingly, the Commission believes the modified estimates with 2011 fiscal year numbers are appropriate and, accordingly, these estimates have been used for the rules being adopted today.

d. Security-Based Swap Submissions

The Commission stated in the Proposing Release that the time required by clearing agencies to prepare, review and submit Security-Based Swap Submissions to comply with new Rule 19b–4(o) likely would vary significantly based on the unique characteristics of each Security-Based Swap Submission and the submitting clearing agency. The Commission estimated based on previous discussions with staff from clearing agencies that the amount of time that a clearing agency would require to internally prepare, review and submit a Security-Based Swap Submission would be 140 hours. The Commission also estimated that each clearing agency would submit 20 Security-Based Swap Submissions annually based on previous discussions with staff from the clearing agencies. The Commission did not receive any comments on these estimated burdens in the Proposing Release. The Commission is modifying Rule 19b–4(o)(2) from the proposal to provide that clearing agencies that file a Security-Based Swap Submission before December 3, 2012 shall file such submission with the Commission by email. However, the Commission does not believe the requirement to submit Security-Based Swap Submissions electronically by email instead of on EFFS for a limited period of time would change the estimated amount of time for clearing agencies to prepare, review, and file these submissions since the information to be provided in the filing remains the same and the filing method would still be electronic. Accordingly, the Commission estimates that the total annual reporting burden for clearing agencies submitting Security-Based Swap Submissions electronically with the Commission under the amendments to Rule 19b–4 and Form 19b–4 will be 16,800 hours (20 Security-Based Swap Submissions × 140 hours × six respondent clearing agencies).

The Commission also estimated in the Proposing Release that a clearing agency would require 60 hours of outside legal work to assist in the process preparing, reviewing and submitting a Security-Based Swap Submission, based on previous discussions with staff from the

[210] *See* Securities Exchange Act Release No. 50486 (Oct. 4, 2004), 69 FR 60287 (Oct. 8, 2004), *supra* note 94.

[211] In 2011, the Commission submitted to OMB a request for approval of an extension of the existing collection of information provided for in Rule 19b–4 and Form 19b–4 (''2011 PRA''). *Submissions for OMB review; comment requests,* 76 FR 22740 (Apr. 22, 2011) and 76 FR 37161 (June 24, 2011). The 2011 PRA used the 2004 PRA estimates to determine the amount of time required to complete proposed rule change filings. Consistent with the 2011 PRA, the Commission has used the figures contained in the 2011 PRA analysis in calculating the PRA estimates in this final rule.

[212] This figure includes the 32 SROs registered with the Commission as of June 15, 2012 plus the additional clearing agencies that the Commission has estimated could potentially register in the future to clear security-based swaps.

clearing agencies. Assuming an hourly cost of $354 for an outside attorney,[213] the Commission estimated that the total annual cost in the aggregate for the six respondent clearing agencies to meet these requirements would be $2,548,800 (60 hours × $354 per hour for an outside attorney × 20 Security-Based Swap Submissions × six respondent clearing agencies). The Commission did not receive any comments on these estimated burdens in the Proposing Release and is using the estimates for the rules as adopted.

e. Advance Notices

In the Proposing Release, the Commission estimated that the amount of time that designated clearing agency representatives will require to internally prepare, review and electronically file each Advance Notice with the Commission to comply with Rule 19b–4(n)(1) would be 90 hours. This estimate in the Proposing Release was based on the staff's previous discussions with the clearing agencies. The Commission did not receive any comments on this estimate. The Commission is modifying Rule 19b–4(n)(1) from the proposal to provide that designated clearing agencies that file an Advance Notice before December 3, 2012 shall file such notice with the Commission by email. However, the Commission does not believe the requirement to submit Advance Notices by email for a limited period of time would change the estimated amount of time for clearing agencies to prepare, review, and electronically file the notices since the material required to be provided in the filing remains the same and the method for submitting the filing remains electronic. The Commission also estimated in the Proposing Release that two hours should be added to the time required to prepare each Advance Notice to comply with the requirement contained in new Rule 19b–4(n)(5) to provide to the Board copies of all materials submitted to the Commission relating to an Advance Notice contemporaneously with such submission to the Commission. The Commission estimated in the Proposing Release based on previous conversations with staff from clearing agencies that each designated clearing agency would submit 35 Advance Notices to the Commission annually. The Commission did not receive any comments on these estimated burdens in the Proposing Release and is using the estimates for the rules being adopted today. Accordingly, the Commission estimates that the total annual reporting burden on designated clearing agencies submitting Advance Notices electronically with the Commission pursuant to new Rule 19b–4(n) and Form 19b–4 will be 32,200 hours (35 Advance Notices × 92 hours × ten respondent clearing agencies).

In the Proposing Release, the Commission also estimated that a designated clearing agency would require 40 hours of outside legal work to assist in the process preparing, reviewing and submitting an Advance Notice with the Commission based on previous discussions with staff from the clearing agencies. Assuming an hourly cost of $354 for an outside attorney,[214] the total annual cost in the aggregate for ten respondent clearing agencies to meet these requirements would be $4,956,000 (40 hours × $354 per hour for an outside attorney × 35 Advance Notices × ten respondent clearing agencies). The Commission did not receive any comments on these estimates and is using them for the rule as adopted.

f. Summary

The Commission estimates that the total annual reporting burden for clearing agencies to internally prepare, file and submit Security-Based Swap Submissions, proposed rule changes and Advance Notices electronically with the Commission under the Rule 19b–4 and Form 19b–4 will be 136,086 hours (16,800 hours for Security-Based Swap Submissions + 32,200 hours for Advance Notices + 87,086 hours for proposed rule changes). The Commission also estimates that the total annual cost in the aggregate for the respondent clearing agencies to engage outside counsel to assist in the process of preparing, filing and submitting Security-Based Swap Submissions and Advance Notices electronically with the Commission under the new Rules 19b–4(n) and (o) and Form 19b–4 will be $7,504,800 ($2,548,800 for Security-Based Swap Submissions + $4,956,000 for Advance Notices).

3. Posting of Security-Based Swap Submissions, Advance Notices and Proposed Rule Changes on Clearing Agency Web Sites

In the Proposing Release, the Commission stated that it believes clearing agencies that were to be deemed registered under Section 17A(l) or that may be regulated by the Commission in the future to clear security-based swaps could incur some one-time costs associated with posting Security-Based Swap Submissions, Advance Notices and proposed rule changes on their Web sites. The Commission estimated that each newly-registered clearing agency would spend approximately 15 hours creating or updating its existing Web site in order to provide the capability to post these submissions online resulting in a total one-time burden of 90 hours (six respondent clearing agencies × 15 hours). Three of those clearing agencies were deemed registered under Section 17A(l) in July 2012 and were required to begin posting proposed rule changes on their Web sites pursuant to existing Rule 19b–4(l).[215] Because new Rules 19b–4(o)(5) and (n)(3) will require Security-Based Swap Submissions and Advance Notices to be posted on a clearing agencies' Web sites in the same manner as is required for proposed rule changes, the Commission does not believe these three clearing agencies would incur any additional costs to create or update their Web sites to post Security-Based Swap Submissions or Advance Notices pursuant to the new rules. Accordingly, the Commission is modifying the number of respondent clearing agencies to include only the three clearing agencies it estimates may be regulated by the Commission in the future in order to clear security-based swaps. The Commission did not receive any comments on the estimated burden in the Proposing Release regarding the number of hours to create or update a Web site and is using this estimated hours burden for the rules as adopted. The revised estimate is a one-time total burden of 45 hours (three respondent clearing agencies × 15 hours).

With respect to annual burdens, the Commission estimated in the Proposing Release that four hours would be required by a clearing agency to post a Security-Based Swap Submission on its Web site to comply with Rule 19b–4(o)(5). This figure was based on the current estimate for the requirement that SROs post proposed rule changes on their Web sites under Rule 19b–4(l) given the similarities between the two requirements.[216] The Commission estimated that the total annual reporting burden for clearing agencies to post Security-Based Swap Submissions on their Web sites would be 480 hours (20

[213] The hourly rate used for an attorney was from SIFMA's Management & Professional Earnings in the Securities Industry 2010, modified by the Commission's staff to account for an 1800 hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[214] *See id.*

[215] 17 CFR 240.19b–4(l).

[216] *See* Securities and Exchange Commission, Submission for OMB Review, Comment Request, 76 FR 37161 (June 24, 2011). The Supporting Statement containing the detailed estimates for Rule 19b–4 and Form 19b–4 is available at: *http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201104-3235-013.*

Security-Based Swap Submissions × four hours × six respondent clearing agencies). The Commission did not receive any comments on these estimates in the Proposing Release and is using them for the rules as adopted.

The Commission also estimated in the Proposing Release that four hours would be required by a designated clearing agency to post an Advance Notice on its Web site to comply with Rule 19b–4(n)(3). This figure was based on the current estimate for the requirement that SROs post proposed rule changes on their Web sites under Rule 19b–4(l) given the similarities between the two requirements.[217] The Commission estimated that the total annual reporting burden for designated clearing agencies to post Advance Notices on their Web sites would be 1,400 hours (35 Advance Notices × four hours × 10 respondent clearing agencies). The Commission did not receive any comments on these estimates in the Proposing Release and is using them for the rules as adopted.

The Commission estimated in the Proposing Release that four hours would be required for a designated clearing agency to comply with proposed Rule 19b–4(n)(4) and post notice on its Web site of any change to its rules, procedures or operations referred to in an Advance Notice once it has been permitted to take effect. This figure was based on the current estimate for the requirement that SROs post proposed rule changes on their Web sites under Rule 19b–4(l) given the similarities between the two requirements.[218] The Commission therefore estimated that the total annual reporting burden for designated clearing agencies to post notice on their Web sites of any changes to their rules, procedures or operations referred to in Advance Notices will be 1,400 hours (35 Advance Notices × four hours × 10 respondent clearing agencies). The Commission did not receive any comments on these estimates in the Proposing Release and is using them for the rules as adopted.

The Commission has previously provided PRA estimates with respect to the requirement in Rule 19b–4(l) that all SROs post proposed rule changes and amendments to proposed rule changes on their Web sites. The Commission does not believe the rules being adopted today will change those estimated hour burdens because those rules do not affect the current requirement that SROs post proposed rule changes on their Web sites. However, the Commission is increasing the number of respondent SROs given the increased number of clearing agencies that have been deemed registered under Section 17A(l) or that may seek to clear security-based swaps in the future. Clearing agencies registered with the Commission are SROs and are required to comply with the requirements in Rule 19b–4, including the requirement in Rule 19b–4(l) that they post proposed rule changes and amendments to proposed rule changes on their Web sites and to make any related updates. The Commission's previous PRA estimates are that SROs take four hours to post proposed rule change proposals under Exchange Act Section 19(b) and amendments on their Web sites and four hours to update the posted SRO rules on their Web sites once the proposed rules become effective.[219] There were 1,606 proposed rule changes filed with the Commission by 25 SROs in fiscal year 2011. Of these, 1,180 were approved or non-abrogated.[220] The Commission has used these numbers to estimate the total annual reporting burden for its estimate of the increased number of SROs that will post proposed rule change proposals on their Web sites and to update their posted rules on their Web sites. Specifically, the Commission divided the total number of filings received in 2011 by the 25 SROs submitting filings that year and multiplied it by the new total of 35 SROs. The new total annual reporting burden will be 15,602 hours ((1,180/25) × 35 SRO respondents) approved rules × four hours) + ((1,606/25) × 35 SRO respondents) rule change proposals × four hours)).

In summary, the Commission estimates that the total annual reporting burden for all clearing agencies to post submitted Security-Based Swap Submissions, Advance Notices, notices of changes to rules, procedures or operations referred to in Advance Notices once they take effect and proposed rule changes on their Web sites under Rule 19b–4 and Form 19b–4 will be 18,882 hours (480 hours for Security-Based Swap Submissions + 1,400 hours for Advance Notices + 1,400 hours for posting notices of changes to rules, procedures or operations referred to in Advance Notices + 15,602 hours for proposed rule changes).

4. Amendment To Conform to Section 916 of the Dodd-Frank Act

The Commission estimated in the Proposing Release that the requirement that an SRO inform the Commission of the date on which it posted a proposed rule change on its Web site (if the posting did not occur on the same day that the SRO filed the proposal with the Commission) would impose only a minimal burden, if any, on an SRO. The Commission stated in the Proposing Release that it believes that SROs currently post their proposed rule changes on their Web site on the same day on which they file them with the Commission. Further, the Commission believes that it is in the interest of an SRO to continue to do so, since prompt Web site posting triggers the requirement on the Commission to publish notice of the proposal. The new notice requirement would only be applicable in a situation where the SRO is unable to post its proposed rule change on the same day that it files it with the Commission, which the Commission expects would be an unlikely occurrence. However, because the deadline applicable to Commission publication is tied to SRO Web site posting, and the Commission has no means of ascertaining when Web site posting was made other than by receiving that information from the SRO itself, the Commission is imposing this requirement to capture necessary information to allow it to comply with Exchange Act Section 19(b), as amended by Section 916 of the Dodd-Frank Act.

Based on the Commission's experience receiving and reviewing proposed rule changes filed by SROs, the Commission estimated in the Proposing Release that SROs will fail to post proposed rule changes on their Web sites on the same day as the filing was made with the Commission in 1% of all cases, or 16 times each year. Further, the Commission estimated that each SRO will spend approximately one hour preparing and submitting notice to the Commission of the date on which it posted the proposed rule change on its Web site, resulting in a total annual burden of 16 hours.

Thus, the Commission estimated that the total annual reporting burden under Rule 19b–4 and Form 19b–4 will be 156,049 hours in the initial year and 155,334 hours thereafter.[221]

[217] *See id.*

[218] *See id.*

[219] *See id.*

[220] Previously, the Commission was able to ''abrogate'' an immediately effective proposed rule change filing filed under Section 19(b)(3)(a) of the Exchange Act, and require an SRO to re-file the proposal for consideration, notice, and public comment pursuant to Section 19(b)(2) of the Exchange Act. The Dodd-Frank Act eliminated the concept of ''abrogation.'' Instead, an immediately effective proposed rule change filing may be temporarily suspended, in which case the Commission would be required to institute proceedings to determine whether to disapprove the proposed rule change.

[221] In the initial year, the paperwork burden is calculated as follows: 120 hours (one-time paperwork burden to train newly-registered clearing

Continued

Additionally, the Commission estimated that the total annual reporting burden under new Rule 3Ca–1 will be 540 hours. The Commission did not receive any comments on these estimates in the Proposing Release and is using them for the rules as adopted.

5. New Rule 3Ca–1

Prior to issuing the Proposing Release, Commission staff contacted eight clearing agencies, including four that likely would clear security-based swaps, and would therefore be subject to a stay of the clearing requirement and related review under new Rule 3Ca–1. The Commission used these discussions to estimate the collection of information for this rule in the Proposing Release. Those estimates are discussed below; however, the clearing agencies emphasized that the estimated burdens would depend in large part on the number of stays requested annually and the scope of the information requested by the Commission in the course of the related review.

Pursuant to Exchange Act Section 3C(c)(1), the Commission on its own initiative or on the application of a counterparty may stay a clearing requirement made pursuant to Exchange Act Section 3C(a)(1) until it completes a review of the terms of the security-based swap and the clearing arrangement. The Commission is unable to estimate accurately the number of times it may stay a clearing requirement pursuant to Exchange Act Section 3C(c)(1) because it has not yet made any mandatory clearing determinations and it does not know what counterparties may object to a determination or when they would make an application for a stay. However, the Commission recognizes that there will likely be some applications for stays from clearing requirements made pursuant to a Commission determination and, for purposes of the Proposing Release, the Commission estimated there would be five applications for stays of a clearing requirement per clearing agency per year. This figure would represent one quarter of the estimated number of Security-Based Swap Submissions from each clearing agency per year, for a total of 30 applications for stays per year (5 stay applications × 6 respondent clearing agencies). The Commission did not receive any comments on this estimate in the Proposing Release and is using the same estimate for the rules as adopted.

Based on the Commission staff's discussions with the clearing agencies, the Commission estimated in the Proposing Release that a clearing agency would spend approximately 18 hours to retrieve, review, and submit the information associated with the stay of the clearing requirement. The Commission also estimated that each clearing agency would be required to provide information requested by the Commission in the course of its reviews of five requests for a stay of the clearing requirement, resulting in a total annual reporting burden of 540 hours (five stay applications × 18 hours to retrieve, review, and submit the information × six respondent clearing agencies). Further, the Commission also estimated that a clearing agency would require seven hours of outside legal work to retrieve, review, and submit the information associated with the stay of the clearing requirement. These figures were based on the Commission staff's discussions with the clearing agencies prior to issuing the Proposing Release. Assuming an hourly cost of $354 for an outside attorney,[222] the total estimated annual cost in the aggregate for the six respondent clearing agencies to meet these requirements was $74,340 (seven hours × $354 per hour for an outside attorney × five stay of clearing applications × six respondents). The Commission did not receive any comments on these estimates in the Proposing Release and is using them for the rules as adopted.

Finally, the Commission estimated in the Proposing Release that 100 hours would be required by a counterparty to a security-based swap to prepare and submit an application requesting a stay of the clearing requirement. The Commission drew a comparison between the amount of time it would take for a clearing agency to prepare a Security-Based Swap Submission and the amount of time it would take a counterparty to prepare an application of a stay of a clearing requirement, given that each filing would likely address similar issues related to the clearing of the particular security-based swap. This 100 hours estimated for the application is less than the 140 hours the Commission estimates it would take for a clearing agency to prepare a full Security-Based Swap Submission because an application for a stay would take less time to prepare than a new submission, due to the fact that some of the information addressed in the application for a stay will have already been provided with the Security-Based Swap Submission when it was published for notice and comment. As discussed above, the Commission estimated in the Proposing Release that counterparties to security-based swaps transactions would submit 30 applications requesting stays of the clearing requirement. Assuming an hourly cost of $354 for an outside attorney,[223] the total annual cost in the aggregate for the respondent counterparties to meet these requirements would be $1,062,000 (100 hours × $354 per hour for an outside attorney × 30 stay of clearing applications). The Commission did not receive any comments on these estimates in the Proposing Release and is using them for the rules as adopted.

E. Retention Period of Recordkeeping Requirements

Clearing agencies will be required to retain records of the collection of information (the manually signed signature page of the Form 19b–4, a file available to interested persons for public inspection and copying, of all Security-Based Swap Submissions, Advance Notices and proposed rule changes made pursuant to Rule 19b–4) and all correspondence and other

agency staff members to use EFFS) + 780 hours (one-time paperwork burden for each newly-registered clearing agency to draft and implement policies and procedures relating to using EFFS to submit proposed rule changes, Security-Based Swap Submissions and Advance Notices) + 120 hours (one-time paperwork burden for each pre-Dodd-Frank Act clearing agency to draft and implement policies and procedures relating to using EFFS to submit Security-Based Swap Submissions and/or Advance Notices) + 45 hours (one-time paperwork burden for each newly-registered clearing agency to create or update their existing Web sites in order to provide the capability to post proposed rule changes, Security-Based Swap Submissions and Advance Notices online) + 136,086 hours (the total annual reporting burden for all SROs to prepare, review and submit Security-Based Swap Submissions, proposed rule changes and Advance Notices with the Commission) + 18,882 hours (the total annual burden for all SROs to post Security-Based Swap Submissions, Advance Notices, notices of changes to rules, procedures or operations referred to in Advance Notices and proposed rule changes (including updates to the posted SRO rules) on their Web sites + 16 hours for SROs to notify the Commission of the date on which it posted a proposed rule change on its Web site = 156,049 hours. After the initial year, the paperwork burden is calculated as follows: 136,086 hours (the total annual reporting burden for all SROs to prepare, review and submit Security-Based Swap Submissions, proposed rule changes and Advance Notices with the Commission) + 18,882 hours (the total annual burden for all SROs to post Security-Based Swap Submissions, Advance Notices, notices of changes to rules, procedures or operations referred to in Advance Notices and proposed rule changes on their Web sites) + 350 hours (the total annual burden of training new staff members and updating the training of existing staff members to use EFFS) + 16 hours for SROs to notify the Commission of the date on which it posted a proposed rule change on its Web site = 155,334 hours.

[222] The hourly rate for an outside attorney is from SIFMA's *Management & Professional Earnings in the Securities Industry 2010,* modified by the Commission's staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[223] *See id.*

communications reduced to writing (including comment letters) to and from such SROs concerning any Security-Based Swap Submissions, Advance Notices and proposed rule changes, for a period of not less than five years, the first two years in an easily accessible place, according to the current recordkeeping requirements set forth in Exchange Act Rule 17a–1.[224]

The Commission believes that maintaining the physical signature pages, Security-Based Swap Submissions, Advance Notices, proposed rule changes and all related correspondence and other communications would enable interested parties, including the Commission, to access a record of a particular Security-Based Swap Submission, Advance Notice or proposed rule change that was made. The Commission notes that the retention of the physical signature page is an existing maintenance requirement for SROs.[225]

F. Collection of Information is Mandatory

Any collection of information pursuant to Rule 19b–4 and Form 19b–4 to require electronic submission of Security-Based Swap Submissions, Advance Notices and proposed rule changes with the Commission is a mandatory collection of information. Any collection of information pursuant to Rule 19b–4 to require Web site posting by clearing agencies of their Security-Based Swap Submissions, Advance Notices and proposed rule changes also is a mandatory collection of information. Any collection of information pursuant to new Rule 3Ca–1 in connection with the application for the stay of the clearing requirement is a mandatory collection of information. Any collection of information pursuant to Rule 19b–4 to require an SRO to inform the Commission of the date on which it posted a proposed rule change on its Web site (if such date is not the same day that it filed the proposal with the Commission) also is a mandatory collection of information.

G. Responses to Collection of Information Will Not Be Kept Confidential

The collection of information pursuant to Rule 19b–4, Form 19b–4 and new Rule 3Ca–1 will not be kept confidential.[226] The posting of Security-Based Swap Submissions, Advance Notices and proposed rule changes would be publicly available on the SRO's Web site.

IV. Economic Analysis

The rules that the Commission is adopting today are largely concerned with implementing certain processes for clearing agencies and security-based swap counterparties to submit filings to the Commission. These include Security-Based Swap Submissions, Advance Notices, and requests for a stay of an existing mandatory clearing requirement. The economic analysis set forth below focuses on the economic considerations related to those processes. The analysis does not seek to address the full range of considerations that may result from the Commission's future actions, such as determinations based on the information submitted in specific filings. The Commission believes instead that these considerations are more appropriately addressed at the time such future determinations are made as each filing may raise unique issues that are unrelated to the submission process. The Commission, however, recognizes that the process rules are being adopted in the larger context of substantive reforms to the financial system pertaining to the clearing of securities. The Commission is mindful of the potential economic consequences of this larger substantive effort in considering the more limited economic consequences of these final procedural rules. In particular, the Commission is cognizant of the potential impact future determinations made with respect to mandatory clearing could have on clearing practices, given that central clearing of security-based swaps is a relatively recent development and much of the current security-based swaps market is cleared on a bilateral basis.

In recognition of the larger context within which the final rules are being adopted, this analysis begins with a review of the Dodd-Frank Act's new clearing requirements, current clearing practices, and views on the new clearing requirements, including the broader economic considerations that those requirements, practices, and views may suggest. This discussion then proceeds with an analysis of each procedure established by the final rules—in particular, Security-Based Swap Submissions, stays related to the review of mandatory clearing determinations, and Advance Notices—and the specific economic considerations associated with each procedure.

A. Background

1. Dodd-Frank Act Requirements for Clearing Security-Based Swaps

As described above, the Dodd-Frank Act was enacted to, among other things, mitigate systemic risk and promote the financial stability of the U.S. by improving accountability and transparency in the financial system and by providing for enhanced regulation and oversight of institutions designated as systemically important.[227] Specifically, Title VII of the Dodd-Frank Act amended the Exchange Act to require that transactions in security-based swaps must be cleared through a clearing agency that is registered with the Commission (or exempt from registration) if they are of a type that the Commission determines must be cleared, unless an exemption from mandatory clearing applies.[228] As one means of accomplishing this objective, the Dodd-Frank Act seeks to ensure that, wherever possible and appropriate, derivatives contracts formerly traded exclusively in the OTC market be centrally cleared.[229] Central clearing mitigates counterparty credit risk among dealers and other institutions by shifting that risk from individual counterparties to CCPs, thereby helping protect counterparties from each other's potential failures. Central clearing also requires that mark-to-market pricing and margin requirements be applied in a consistent manner.[230] CCPs generally use liquid margin collateral to manage the risk of a CCP member's failure, and rely on the accuracy of their margin calculations and their access to that liquid collateral to protect against sudden movements in market prices. A CCP that stands between counterparties

[224] SROs may also destroy or otherwise dispose of such records at the end of five years according to Rule 17a–6 of the Act. 17 CFR 240.17a–6.

[225] Rule 19b–4(j) currently requires SROs to sign Form 19b–4 electronically in connection with filing a proposed rule change and to retain a copy of the signature page in accordance with Rule 17a–1. Under the adopted rules, Rule 19b–4(j) would be modified such that it would apply also to Security-Based Swap Submissions and Advance Notices.

[226] While there is a general requirement that information be made publicly available, SROs may request confidential treatment of certain information in accordance with the provisions of the Freedom of Information Act. 5 U.S.C. 552.

[227] *See supra* part I. *See also* Pub. L. 111–203, Preamble.

[228] *See* 15 U.S.C. 78c–3(a)(1) (as added by Section 763(a) of the Dodd-Frank Act).

[229] *See supra* note 5 and accompanying text.

[230] *See* Christopher Culp, *OTC-Cleared Derivative: Benefits, Costs, and Implications of the "Dodd-Frank Wall Street Reform and Consumer Protection Act,* (Journal of Applied Finance No. 2, 2010), available at: *http://www.rmcsinc.com/articles/OTCCleared.pdf.*

for OTC derivatives is generally perceived to decrease systemic risk.[231]

Exchange Act Section 3C(b), which was added pursuant to Title VII of the Dodd-Frank Act, requires the Commission to adopt rules for a clearing agency's submission of security-based swaps (or any group, category, type or class of security-based swaps) that a clearing agency plans to accept for clearing and to determine the manner of notice the clearing agency must provide to its members of such Security-Based Swap Submission.[232]

2. Current Clearing Practices in the Security-Based Swap Market

Prior to the enactment of the Dodd-Frank Act, there was no provision in the Exchange Act or any other laws in the U.S. for the mandatory clearing of OTC derivatives. Although initiatives related to central clearing had been considered before 2008, certain events of September 2008 brought a new focus on CDS as a source of systemic risk and contributed to a more general recognition that CCPs could play a role in helping to manage bilateral counterparty credit risk in OTC CDS.[233] The failure of large financial institutions highlighted the concern that bilateral swap agreements can be a source of systemic risk by, among other things, increasing the likelihood that financial distress in one dealer will contribute to the financial distress in others—a risk that can be mitigated when transactions are cleared by a creditworthy central counterparty that becomes the seller to every clearing member buyer and the buyer to every clearing member seller.[234]

In November 2008, the Commission, in consultation and coordination with the Board and the CFTC, took steps to help facilitate the prompt development of CCPs for OTC derivatives.[235] Specifically, the Commission authorized the clearing of OTC security-based swaps by permitting certain clearing agencies to clear CDS on a temporary conditional basis.[236] As the Commission and other regulatory agencies monitored the activities of those clearing agencies, a significant volume of interdealer OTC CDS transactions and a smaller volume of dealer to non-dealer OTC CDS transactions were centrally cleared on a voluntary basis.[237] As discussed in greater detail below, the level of voluntary clearing in swaps and security-based swaps has steadily increased since that time. Although the volume of interdealer CDS cleared to date is quite large,[238] many security-based swap transactions are still ineligible for central clearing, and many transactions in security-based swaps eligible for clearing at a CCP continue to settle bilaterally.

Voluntary clearing of security-based swaps in the U.S. is currently limited to CDS products. Central clearing of security-based swaps began in March 2009 for index CDS products, in December 2009 for single-name corporate CDS products, and in November 2011 for single-name sovereign CDS products. At present, there is no central clearing in the U.S. for security based swaps that are not CDS products, such as those based on equity securities. The level of clearing activity appears to have steadily increased as more products have become eligible to be cleared. One illustration of this apparent trend is Figure 1 below, which shows the gross notional volumes of cleared transactions reported by ICE Clear Credit for U.S. CDS index and U.S. single-name corporate CDS products[239] compared to the *total* gross notional volumes of (a) all transactions for reference entities or indexes, as applicable, that are accepted for clearing in the corresponding calendar year (cleared and uncleared), and (b) the total market, that is, all transactions in all reference underlyings of the same category (single name or index), whether accepted for clearing or not by ICE Clear Credit, in each case calculated based on price-forming, gold record transactions submitted to the Depository Trust and Clearing Corporation's Trade Information Warehouse (''DTCC–TIW'').[240]

[231] *See, e.g.,* Darrell Duffie and Haoxiang Zhu, *Does a Central Clearing Counterparty Reduce Counterparty Risk?,* (Stanford University, Working Paper, 2010), available at: *http://www.stanford.edu/~duffie/DuffieZhu.pdf;* Nout Wellink, *Mitigating system risk in OTC derivatives markets,* (Banque de France, Financial Stability Review, No. 14—Derivatives—Financial innovation and stability, July 2010), available at: *http://www.banque-france.fr/fileadmin/user_upload/banque_de_france/publications/Revue_de_la_stabilite_financiere/etude15_rsf_1007.pdf;* and Manmohan Singh, *Collateral, Netting and System Risk in the OTC Derivatives Market,''* (International Monetary Fund, Working Paper, 2009), available at: *http://www.imf.org/external/pubs/ft/wp/2010/wp1099.pdf.*

[232] *See* 15 U.S.C. 78c–3(b)(2)(A) and (5) (as added by Section 763(a) of the Dodd-Frank Act).

[233] *See, e.g.,* Testimony of Erik Sirri, Director of the Division of Trading and Markets, Securities and Exchange Commission, before the U.S. House of Representatives, Committee on Agriculture, (Nov. 20, 2008) (''In light of the problems involving AIG, Lehman, Fannie, Freddie, and others, attention has focused on the systemic risks posed by CDS * * * A [CCP] for CDS could be an important step in reducing the counterparty risks inherent in the CDS market, and thereby help mitigate potential systemic impacts.''), available at: *http://www.sec.gov/news/testimony/2008/ts112008ers.htm.* The President's Working Group on Financial Markets made the central clearing of OTC derivatives a top policy objective in 2008. *See* Policy Objectives for the OTC Derivatives Market (Nov. 14, 2008), available at: *http://www.treasury.gov/resource-center/fin-mkts/Documents/policyobjectives.pdf; see also* Policy Statement on Financial Market Developments (Mar. 13, 2008), available at: *http://www.treasury.gov/resource-center/fin-mkts/Documents/pwgpolicystatemktturmoil_03122008.pdf;* and Progress Update (Oct. 2008), available at: *http://www.treasury.gov/resource-center/fin-mkts/Documents/q4progress%20update.pdf.*

[234] *See supra* notes 10–11 and accompanying text.

[235] On November 14, 2008, the Commission executed a Memorandum of Understanding with the Board and CFTC that established a framework for consultation and information sharing on issues related to central counterparties for the OTC derivatives market. *See http://www.sec.gov/news/press/2008/2008-269.htm.*

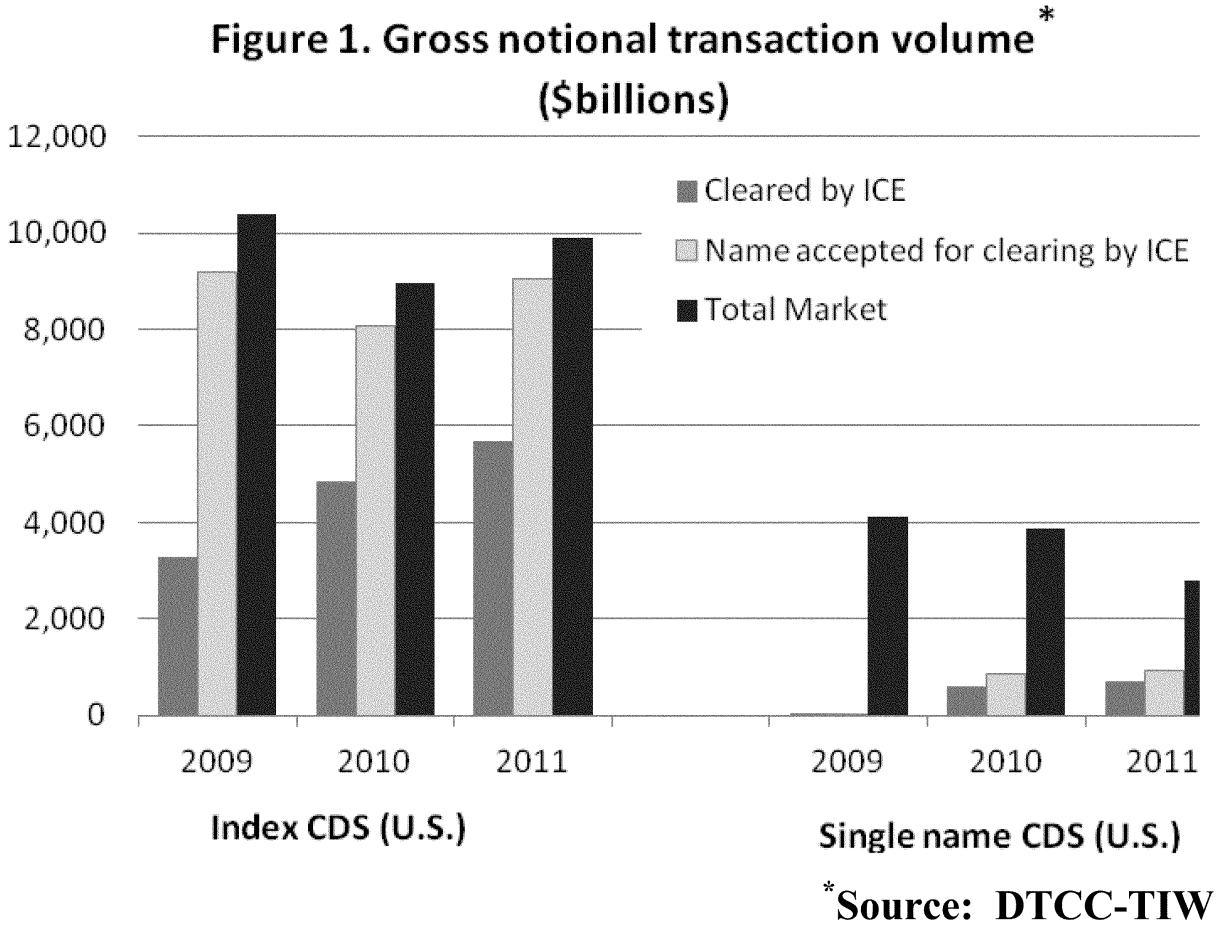
[236] The Commission authorized five entities to clear credit default swaps. *See supra* note 205.

[237] Voluntary CCP clearing grew out of a series of meetings beginning in September 2005 hosted by the Federal Reserve Bank of New York with major market participants and their domestic and international supervisors for the purpose of discussing problems in the processing of credit default swaps, and related risk management and control issues. *See http://www.ny.frb.org/newsevents/news/markets/2005/an050915.html.* In June 2008 the attendees agreed to an agenda for improvement in the derivatives market infrastructure that included ''developing a central counterparty for credit default swaps that, with a robust risk management regime, can help reduce systemic risk.'' *See http://www.ny.frb.org/newsevents/news/markets/2008/ma080609.html; see also https://www.theice.com/marketdata/reports/ReportCenter.shtml.*

[238] As of March 31, 2012, ICE Clear Credit had cleared approximately $15.4 trillion notional amount of CDS contracts based on indices of securities, approximately $1.4 trillion notional amount of CDS contracts based on individual reference entities or securities and $151 billion notional amount of CDS contracts based on sovereigns. As of March 31, 2012, ICE Clear Europe had cleared approximately €7.7 trillion notional amount of CDS contracts based on indices of securities and approximately €1.2 trillion notional amount of CDS contracts based on individual reference entities or securities.

[239] These amounts are based on information reported by ICE Clear Credit on its public Web site and are based on ''price forming transactions.'' *See infra* note 240. This includes the clearing of trades entered into on the same day as the trade was executed as well as the clearing of trades entered into in prior periods that were not previously cleared. These amounts do not include trades that result from the compression of trades previously submitted for clearing. *See https://www.theice.com/marketdata/reports/ReportCenter.shtml#report/26.* ICE Clear Credit describes portfolio compression as a process that ''reduces the overall notional size and number of outstanding contracts in credit derivative portfolios without changing the overall risk profile or present value of the portfolios. This is achieved by terminating existing trades and replacing them with a smaller number of new replacement trades that carry the same risk profile and cashflows as the initial portfolio, but require a smaller amount of regulatory capital to be held against the positions.'' *See https://www.theice.com/post_trade_processing.jhtml.* The CME Group also clears CDS index products and has reported clearing $144 billion in gross notional volumes of transactions since inception, with $21 billion in open interest as of the end of 2011. *See http://www.cmegroup.com/trading/cds/.* These volumes are small relative to total market activity and are not included in Figure 1.

[240] ''Price-forming transactions'' include all new trades and assignments, increases, and terminations of previously executed trades. Trades terminated or



*Source: DTCC-TIW

Figure 1 shows that U.S.-based index CDS products comprise a greater proportion of the CDS market than U.S. single-name corporate CDS products and account for the bulk of current clearing activity in U.S. CDS transactions. The proportion of transactions in names accepted for clearing that are ultimately cleared also appears to be higher in U.S.-based index CDS products than in U.S. corporate single-name CDS products. In calendar years 2010 and 2011, Figure 1 indicates that 90% of the total gross notional volume of transactions in index names was accepted for clearing as of the end of each calendar year and that cleared index transactions correspond to more than 50% of the total gross notional volume of index trades during the same period. By contrast, the figure suggests that the proportion of transactions in accepted names in U.S. single-name corporate CDS was only 33% during 2011, with cleared transactions during the same year totaling only 25% of the total trades during the same period.

Table 1, below, provides more detail of the data summarized in Figure 1. The Table reports the proportion of gross notional market activity in names accepted for clearing and the proportion of gross notional market activity that was cleared. Because a security-based swap may have been accepted for clearing only late in the calendar year, two measures of transactions that were ''accepted for clearing'' are provided, which differ by when the applicable reference underlying became accepted for clearing. The first measure, and the measure included in Figure 1, includes all transaction volume in names accepted for clearing at any time during the calendar year, whether or not a trade was accepted for clearing at the time of its execution.[241] This measure represents an upper bound for the potential level of clearing—*i.e.,* the level that could have been achieved if all trades in products accepted for clearing had in fact been submitted for clearing and there were no additional constraints on clearing eligibility such as those described above (*e.g.,* a counterparty is not a member of a CCP that accepts the product in question for clearing). The second measure includes only transaction volume in names accepted for clearing at the time of trade execution.[242] This measure accounts for the fact that although transactions executed in names prior to the name being accepted for clearing can be cleared later in the same calendar year through ''backloading,'' names accepted for clearing towards the end of the year allow less time for this to occur. Comparing these two measures within a year and across years measures (a) the

entered into in connection with a compression exercise and expiration of a contract at maturity are not considered price-forming and therefore excluded. Transactions reported to the DTCC–TIW used for this analysis considers all global activity, including transactions wholly between foreign counterparties.

[241] This calculation was performed by staff in the Division of Risk, Strategy, and Financial Innovation by totaling the sum of price forming transactions reported to DTCC in the calendar year for Index and single-name corporate CDS products that match the list of names accepted for clearing at ICE Clear Credit during the same period. *See https://www.theice.com/publicdocs/clear_credit/ICE_Clear_Credit_Clearing_Eligible_Products.xls*

[242] This calculation was performed by staff in the Division of Risk, Strategy, and Financial Innovation by totaling the sum of price forming transactions reported to DTCC in the calendar year for Index and single-name corporate CDS products that match the list of names accepted for clearing at ICE Clear Credit, including only those transactions executed following the accepted for clearing date reported by ICE Clear Credit.

increase in percentage from 2009 to 2011 in the volume of new trades in names that have ''accepted for clearing'' status, and (b) the increase in percentage in the volume of new transactions that are actually being cleared.

TABLE 1—CLEARED TRADES AND ACCEPTED TRADES AS A PERCENTAGE OF GROSS NOTIONAL TRANSACTION VOLUME

	U.S. Index CDS			U.S. Single name CDS		
	2009	2010	2011	2009	2010	2011
Gross notional volume ($ billions)	10,400	8,900	9,900	4,100	3,900	2,800
Percent of gross notional in names accepted for clearing						
—at calendar year end	88%	90%	91%	1%	23%	33%
—at time of trade execution	55%	87%	91%	0%	16%	29%
Cleared transactions: % of gross notional	32%	54%	57%	0%	16%	25%

One important limitation of the calendar year snapshots is that the volumes of cleared transactions reported by ICE Clear Credit likely overstate the percentages of total market activity that are cleared in a particular calendar year because many of the trades submitted for clearing to ICE Clear Credit are bilateral transactions entered into in a prior calendar year before ICE Clear Credit began clearing the particular security-based swap. Such transactions were submitted for clearing retroactively—through a process referred to as ''backloading''—causing the termination of the original trade and the creation of two new trades with ICE Clear Credit, both of which are reported to DTCC–TIW by ICE Clear Credit as cleared transactions, but only one of which is reported for the purpose of calculating the clearing volume reported in Figure 1. Until April 2011, all newly cleared security-based swaps were submitted for clearing in this manner because same-day clearing was not available. Since April 2011, clearing members have been able to submit new trades in security-based swaps for clearing on the same day the counterparties enter into the trade. With same-day clearing, the trade is first submitted to the CCP for clearing, and the CCP then reports it to the DTCC–TIW as a single transaction. However, some backloading will likely continue to occur as long as CCPs continue to expand the roster of security-based swaps that they accept for clearing, making more past trades eligible for backloading.

Although the volume of cleared CDS transactions appears to have steadily increased over time, there is still a large proportion of transactions in security-based swaps that are accepted for clearing by a CCP but that are nevertheless not actually cleared, particularly with respect to U.S. Index CDS. Currently, only eligible trades where both parties request the CCP to clear the transaction will be cleared. Eligible trades include only those where both counterparties are members of the clearing agency and the trade has ''accepted for clearing'' status at that agency. Because clearing is currently done on a voluntary basis, if both parties do not request the CCP to clear the transactions, then the transaction is not cleared. There may be a number of reasons why one counterparty to a security-based swap transaction may choose not to clear that transaction. For example, some counterparties may so choose because they want to avoid any additional transaction costs or transparency associated with clearing at a CCP. Other counterparties may wish to clear a transaction in a name accepted for clearing by a CCP but may not be eligible for membership in the CCP or may not have a correspondent clearing arrangement in place with a member of the CCP. To these counterparties, clearing is not available for trades that are otherwise eligible to be cleared when executed by other counterparties. It is also possible for counterparties to transact in a currency other than U.S. dollars in a name that is accepted for clearing; use of a currency other than U.S. dollars makes the trade not eligible to be cleared. Finally, because prior to April 2011 clearing was performed exclusively on a backloading basis, some trades have not been cleared because they may have been subject to portfolio compression or otherwise terminated prior to the option to submit the trade for clearing becoming available.

3. Views on Clearing Requirements for Security-Based Swaps

Taken together, while the Commission is mindful of the limitations discussed above, these data suggest that clearing of security-based swaps has been increasing, but significant segments of the security-based swap market remain uncleared, even where a CCP is available to clear the product in question on a voluntary basis. Due in part to this data, the Commission recognizes that mandatory clearing determinations made pursuant to Exchange Act Section 3C(a)(1) could alter current clearing practices at the time such determinations are made. One potential consequence of determinations that require mandatory clearing for certain security-based swaps could be a higher level of clearing for such security-based swaps than would take place under a voluntary system. Where the amount of clearing taking place under a voluntary system is significantly different from the level of clearing that would take place if trading in a product were mandatory and where such difference marks a shift in existing market clearing practices, the mandatory clearing determination could potentially have a material economic impact.

New Rule 19b–4(o) and the corresponding amendments to Form 19b–4 focus largely on the process for how a clearing agency is required to make Security-Based Swap Submissions. Interested parties, including a number of academics, have expressed their views on the potential impact of the underlying clearing determinations that will be made by the Commission in response to Security-Based Swap Submissions or pursuant to the Commission's own initiative. While these parties generally agree that a well-managed CCP would help to mitigate counterparty credit risk in the security-based swaps markets, their views vary on how effective a clearing requirement would be in controlling risk to the financial system. For example, some believe that central clearing is a core feature of the Dodd-Frank Act and is intended to mitigate systemic risk. According to this view, there should be as much central clearing of security-based swaps as possible to fulfill the purpose of the Dodd-Frank Act.[243]

[243] *See, e.g.,* Swaps and Derivatives Market Association, ''Lessening Systemic Risk: Removing Final Hurdles to Clearing OTC Derivatives'', (available at: *http://media.ft.com/cms/fe51a538-78d7-11df-a312-00144feabdc0.pdf*) (''[m]andating the clearing of all standardized OTC derivatives

Others contend that concentrating the risk of numerous bilateral counterparties in a single CCP (or a small number of CCPs) could introduce risks and incentives that may not otherwise exist. For example, they believe that risk sharing through a central counterparty may encourage excessive risk taking if the costs of imprudent decisions by one clearing member are borne by other clearing members, and generally would not be more effective in mitigating systemic risk than bilateral clearing arrangements between individual firms.[244] Moreover, at least one party believes this moral hazard problem could be exacerbated to the extent that CCPs are viewed as too important to fail and subject to bailout remedies that benefit all CCP members.[245]

Some market participants, furthermore, are concerned that requiring central clearing of security based swaps may entail unnecessary costs. One commenter stated that an ''inappropriate imposition of mandatory clearing requirements could also adversely affect liquidity in the relevant security-based swap(s) and similarly deter use of otherwise optimal risk management products.''[246] In this commenter's view, ''[w]hile sound, centralized clearing affords clear benefits, it should be noted that centralized clearing also entails increased operational and collateral costs.''[247] According to this commenter, these additional costs underscore the importance of the Commission ''strik[ing] an appropriate balance in evaluating the relevant statutory standards applicable to a mandatory clearing determination, and weigh[ing] the relevant factors and market impacts with great care.''[248]

4. Overview of Statutory Requirements

Exchange Act Section 3C(b) requires the Commission to adopt rules for a clearing agency's submission of security-based swaps (or any group, category, type or class of security-based swaps) that a clearing agency plans to accept for clearing and to determine the manner of notice the clearing agency must provide to its members of such Security-Based Swap Submission.[249] In addition, Section 806(e)(1)(B) of the Clearing Supervision Act requires each Supervisory Agency to adopt rules, in consultation with the Board, that define and describe when a designated financial market utility is required to file an Advance Notice with its Supervisory Agency.[250] To satisfy these requirements, the Commission is today adopting new Rules 19b–4(n) and (o) and making corresponding amendments to Form 19b–4. In addition, Exchange Act Section 3C(c)(4) requires the Commission to adopt rules, pursuant to its authority to stay a mandatory clearing requirement, for reviewing a clearing agency's clearing of a security-based swap (or any group, category, type or class of security-based swaps) that the clearing agency has accepted for clearing.[251] Today the Commission is adopting new Rule 3Ca–1 to comply with this requirement. In addition, Exchange Act Section 3C(d)(1), which is the basis on which the Commission is adopting new Rule 3Ca–2, directs the Commission to prescribe rules (and interpretations of rules) the Commission determines to be necessary to prevent evasions of the clearing requirements.[252] Finally, Section 916 of the Dodd-Frank Act amended Exchange Act Section 19(b) the Dodd-Frank Act to provide for new deadlines by which the Commission must publish and act upon a proposed rule change submitted by an SRO.[253] Accordingly, the Commission is adopting amendments to Rule 19b–4 and Form 19b–4 to implement conform the rule and form to these new requirements.

B. Analysis of Final Procedural Rules

The Commission is sensitive to the economic effects of all of the rules it is adopting today, including the costs and benefits of those rules. Some of these costs and benefits stem from statutory mandates, while others are affected by the discretion the Commission exercises in implementing the mandates. The Commission requested comment on all aspects of the costs and benefits of the proposal, including any effect the proposed rules may have on efficiency, competition, and capital formation.

The first procedure the Commission is adopting implements the requirement of Exchange Act Section 3C(b) to promulgate rules for a clearing agency's Security-Based Swap Submissions and to determine the manner of notice the clearing agency must provide to its members of such Security-Based Swap Submission.[254] The Commission also is adopting two additional process-related rules related to the mandatory clearing of security-based swaps that are contemplated by the Dodd-Frank Act. Specifically, pursuant to Exchange Act Section 3C(c)(1), new Rule 3Ca–1 establishes a procedure for staying a mandatory clearing requirement and for the Commission's subsequent review of the terms of the security-based swap and the clearing arrangement. Separately, new Rule 3Ca–2, adopted pursuant to the anti-evasion authority granted to the Commission by Exchange Act Section 3C(d)(1), clarifies that the phrase ''submits such security-based swap for clearing to a clearing agency'' found in Exchange Act Section 3C(a)(1)—which establishes the mandatory clearing requirement for security-based swaps—means that the security-based swap subject to the clearing requirement must be submitted for central clearing to a clearing agency that functions as a CCP.

In adopting these rules, the Commission considered the procedural rules recently adopted by the CFTC pursuant to the mandatory clearing requirement in new Section 2(h) of the Commodity Exchange Act, as added by Section 723(a)(3) of the Dodd-Frank Act.[255] The procedural rules adopted by the CFTC included, among other things, a rule for the submission of swaps by a DCO to the CFTC for a mandatory

without exemptions would lead to broad adoption of CCPs, thus reducing systemic risk.'').

[244] *See, e.g.,* Craig Pirrong, *Mutualization of Default Risk, Fungibility, and Moral Hazard: The Economics of Default Risk Sharing in Cleared and Bilateral Markets,* available at: *http://business.nd.edu/uploadedFiles/Academic_Centers/Study_of_Financial_Regulation/pdf_and_documents/clearing_moral_hazard_1.pdf* (University of Houston, Working Paper, 2010) (''[c]learing of OTC derivatives has been touted as an essential component of reforms designed to prevent a repeat of the financial crisis. A back-to-basics analysis of the economics of clearing suggests that such claims are overstated, and that traditional OTC mechanisms may be more efficient for some instruments and some counterparties.''). *See also Derivatives Clearinghouses: Opportunities and Challenges: Hearing Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on Securities, Insurance, and Investment,* 112th Cong. (2011) (statement of Chester Spatt) (''it is unclear whether the extent of use of clearinghouses will ultimately lead to a reduction in systemic risk in the event of a future crisis.'').

[245] *See* Pirrong, *supra* note 244.

[246] ISDA Letter at 2–3.

[247] *See id.* Although the comment was submitted in response to the proposed process rule, the substance of the comments focused on the statutory requirements of Exchange Act Section 3C, including the Commission's review of security-based swaps in order to determine whether the Commission should impose a mandatory clearing requirement (either pursuant to a Commission-initiated Review or a Security-Based Swap Submission).

[248] *See id.*

[249] *See* 15 U.S.C. 78c–3(b)(2)(A) and (5) (as added by Section 763(a) of the Dodd-Frank Act).

[250] *See* 12 U.S.C. 5465(e)(1)(B) (as added by Title VIII).

[251] *See* 15 U.S.C. 78c–3(c)(4) (as added by Section 763(a) of the Dodd-Frank Act).

[252] *See* 15 U.S.C. 78c–3(d)(1) (as added by Section 763(a) of the Dodd-Frank Act).

[253] *See* 15 U.S.C. 78s(b) (as amended by Section 916 of the Dodd-Frank Act).

[254] *See* 15 U.S.C. 78c–3(b)(2)(A) and (5) (as added by Section 763(a) of the Dodd-Frank Act).

[255] *See* Section 2(h) of the CEA, 7 U.S.C. 2(h) (as added by Section 723(a) of the Dodd-Frank Act).

clearing determination.[256] Given the similarity between the clearing requirements for swaps and security-based swaps under the CEA and the Exchange Act, respectively, the Commission carefully reviewed the rules adopted by the CFTC in formulating the rules the Commission is adopting today. Specifically, the Commission considered the information required by the CFTC for swap submissions filed by DCOs in new Regulation 39.5.[257] The Commission believes that these information requirements are substantially similar to the information the Commission is requiring in its rules, or that it may request in connection with a Security-Based Swap Submission. Similar to the rules the Commission is adopting today, Regulation 39.5(b) requires that a DCO submit information relating to the five factors the CFTC must consider in making a mandatory clearing determination.[258] Additionally, Regulation 39.5(b) requires that DCOs submit detailed information relating to the swap and the risk management practices of the DCO.[259] The Commission did not add such additional information requirements in the text of the rules being adopted today in order to retain the ability to evaluate the information needed on a case-by-case basis; however, the Commission specifically provided for the ability to request such additional information in connection with each Security-Based Swap Submission and, as previously indicated, the Commission may require production of such information to the extent it believes such information is relevant to the mandatory clearing determination.

The rules the Commission is adopting also implement certain process-related provisions of the Clearing Supervision Act. Among other things, Section 806(e) of the Clearing Supervision Act requires any financial market utility designated by the Council as systemically important to file 60 days advance notice of changes to its rules, procedures or operations that could materially affect the nature or level of risk presented by the financial market utility. Specifically, the Commission is adopting new Rule 19b–4(n) and corresponding amendments to Form 19b–4 to set forth the process by which a designated clearing agency (for which the Commission is the Supervisory Agency) must file Advance Notices with the Commission.

Finally, the Commission is adopting technical, conforming and clarifying amendments to Rule 19b–4 and Form 19b–4 to conform the rule and form with new deadlines and approval, disapproval and temporary suspension standards with respect to proposed rule changes filed under Exchange Act Section 19(b), as modified by Section 916 of the Dodd-Frank Act.

The principal benefit of the final rules is that they will facilitate the operation of certain substantive regulations contemplated by the Dodd-Frank Act. Specifically, as described above, the Dodd-Frank Act establishes a number of reforms related to the substantive regulation of securities clearing including, for example, with respect to the mandatory clearing of security-based swaps and enhanced oversight of systemically important financial market utilities. While the final rules do not themselves implement these substantive reforms, they do establish certain processes that clearing agencies and security-based swap counterparties must follow in order for the broader substantive regulations to proceed.

For example, Exchange Act Sections 3C(b)(2)(A) and (b)(5) require the Commission to adopt rules for a clearing agency's submission of security-based swaps (or any group, category, type or class of security-based swaps) that a clearing agency plans to accept for clearing and to determine the manner of notice the clearing agency must provide to its members of such Security-Based Swap Submission.[260] The Commission is then required to make a determination, pursuant to Exchange Act Section 3C(b)(2)(C)(ii), whether the security-based swap described in the submission is required to be cleared (*i.e.,* subject to mandatory clearing). New Rule 19b–4(o) and the corresponding amendments to Form 19b–4, while not addressing the underlying mandatory clearing determinations, will facilitate such determinations by providing registered clearing agencies with, among other things, information as to what must be included in a Security-Based Swap Submission and a mechanism for transmitting the submission to the Commission. The rules also specify how and when a clearing agency is required to provide notice of a Security-Based Swap Submission to its members and the public.

Similarly, Section 806(e) of the Clearing Supervision Act requires the Commission, in consultation with the Board, to adopt rules that define and describe when a designated clearing agency is required to file with the Commission notice of any change to its rules, procedures or operations that could materially affect the nature or level of risk presented by the clearing agency.[261] Upon receiving an Advance Notice, the Commission is required, subject to certain exceptions, to (i) consult with the Board before taking any action on, or completing its review of, the change referred to in the Advance Notice[262] and (ii) notify the designated clearing agency of any objection to a proposed change described in the notice within 60 days of receipt.[263] Although new Rule 19b–4(n) and the corresponding amendments to Form 19b–4 do not address how the Commission will ultimately determine whether to object to a particular change, the final rules will facilitate such determinations by helping designated clearing agencies determine when they must file Advance Notices and what information must be included therein. The final rules also provide a method of submission for Advance Notices that should already be familiar to clearing agencies and establish certain requirements related to how the clearing agency must make the Advance Notice available to the public.

Finally, Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine 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.[264] In addition, Section 23(a)(2) of the Exchange Act[265] requires the Commission, when adopting rules and regulations under the Exchange Act, to consider the impact such new rule would have on competition. Section 23(a)(2) of the Exchange Act also 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.

Because these rules focus on the process by which clearing agencies

[256] *See* 76 FR 44464 (Jul. 26, 2011).

[257] *See* 17 CFR 39.5(b). Regulation 39.5(b) sets out the process for DCOs to follow when submitting a swap, or a group, category, type or class of swaps to the CFTC, including what information a DCO must include in the submission to assist the CFTC in its review.

[258] *See* 17 CFR 39.5(b)(3)(ii)(A)–(E).

[259] *See* 17 CFR 39.5(b)(3)(iii)–(ix).

[260] *See* 15 U.S.C. 78c–3(b)(2)(A) and (5) (as added by Section 763(a) of the Dodd-Frank Act).

[261] *See* 12 U.S.C. 5465(e)(1)(B) (as added by Title VIII).

[262] *See* 12 U.S.C. 5465(e)(4) (as added by Title VIII).

[263] *See* 12 U.S.C. 5465(e)(1)(E).

[264] 15 U.S.C. 78c(f).

[265] 15 U.S.C. 78w(a)(2).

make Security-Based Swap Submissions, the Commission believes that the rules being adopted today will have a minimal, if any, impact on efficiency, competition, and capital formation. Although in some cases process rules themselves can have a significant impact on efficiency, competition, and capital formation, in this context, the rules are intended to simply facilitate implementation of the larger statutory regime regarding mandatory clearing. The Commission believes the rules are being implemented in a cost-efficient way consistent with the statute (*e.g.,* leveraging existing infrastructure and procedures familiar to clearing agencies), but the rules themselves should have a minimal impact on efficiency, competition, and capital formation. The Commission nevertheless recognizes that its subsequent mandatory clearing determinations, which will be based on the particular facts and circumstances of each individual Security-Based Swap Submission, could potentially have an impact on efficiency, competition, and capital formation in the security-based swap market.

1. Analysis of Final Rules Related to Security-Based Swap Submissions

Exchange Act Section 3C requires each clearing agency that plans to accept a security-based swap for clearing to file a Security-Based Swap Submission with the Commission for a determination by the Commission of whether a security-based swap (or any group, category, type or class of security-based swaps) referenced in the submission is required to be cleared.[266] Accordingly, the Commission is adopting new Rule 19b–4(o) and corresponding amendments to Form 19b–4 for the purpose of ensuring that the Commission receives the information necessary to conduct its review of Security-Based Swap Submissions received from clearing agencies. In particular, the new rule requires clearing agencies to provide information about the factors the Commission is required to consider under Exchange Act Section 3C(b)(4)(B). These factors include consideration of the effect on competition as well as the size of the market, trading liquidity, and pricing data, as well as the availability of a rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the security-based swap (or group, category, type or class of security-based swaps) under consideration.[267] In addition, the factors in Exchange Act Section 3C(b)(4)(B) require the Commission to consider the effect of a mandatory clearing determination on the mitigation of systemic risk, taking into account the size of the market for the security-based swap and the resources of the clearing agency available to clear the security-based swap, as well as the effect on competition and the effect of an insolvency event on customer and security-based swap counterparty positions, funds, and property.[268] Furthermore, in taking into account the size of the market, competition, and the mitigation of systemic risk, the factors in Section 3C(b)(4)(B) require the Commission to consider the effect of a mandatory clearing determination on the market, whether market participants trading in the particular security-based swap could all meet a mandatory clearing requirement or if the costs of such a requirement would competitively disadvantage some participants, and whether the clearing agency has the operational and risk management systems in place to effectively mitigate systemic risk.

The Commission will conduct each review in accordance with Exchange Act Section 3C(b)(4),[269] with determinations made on a case-by-case basis in connection with the unique facts and circumstances of each submission. The Commission will consider the factors in Exchange Act Section 3C(b)(4)(B) at the time the Commission conducts a review, drawing on the information provided by the relevant clearing agency in accordance with new Rule 19b–4(o).

In the Proposing Release, the Commission identified potential costs and benefits resulting from Rule 19b–4(o) and the related amendments to Form 19b–4, as proposed, and requested comment on all aspects of the cost-benefit analysis, including the identification and assessment of any costs and benefits that were not discussed in the analysis. Although the Commission did not receive any comments on the specific cost-benefit analysis contained in the Proposing Release, some commenters raised concerns about the overall scope of some of the proposed rules. In particular, one commenter suggested that new Rule 19b–4(o)(3), which sets forth the information that a clearing agency will be required to include in a Security-Based Swap Submission, is broad and burdensome, not authorized by the Dodd-Frank Act, and would ultimately ''undermine the purposes of Dodd-Frank'' by ''eliminat[ing] the possibility of a simple, speedy decision on whether a swap transaction can be cleared by a clearing agency.'' [270]

The Commission does not agree with the assertion that the requirements of Rule 19b–4(o)(3) would delay the approval of a request by a clearing agency to list a new security-based swap for clearing. As previously noted, the rules related to Security-Based Swap Submissions apply solely to the process by which the Commission will make a determination, pursuant to Exchange Act Section 3C(b)(2)(C)(ii), whether the security-based swap described in the submission is required to be cleared (*i.e.,* subject to mandatory clearing). Nothing in the rules the Commission is adopting today related to Security-Based Swap Submissions would prevent a registered clearing agency from voluntarily clearing a security-based swap prior to such determination so long as it does so in accordance with its rules. Thus, the Commission does not believe that Rule 19b–4(o)(3), which simply sets forth the information required to be contained in a Security-Based Swap Submission, would affect the current state of affairs with respect to a clearing agency's ability to clear a security-based swap transaction, nor does the Commission believe that this rule would undermine the goals of the Dodd-Frank Act as they pertain to the voluntary clearing of security-based swaps.

At the same time, the Commission recognizes the concern expressed by commenters that Rule 19b–4(o)(3) could potentially require a clearing agency to submit a large amount of information in connection with a Security-Based Swap Submission. Accordingly, the Commission has sought to narrowly tailor the rule to the specific requirements of the Exchange Act. The list of information required pursuant to new Rule 19b–4(o)(3)(ii) incorporates the identical qualitative and quantitative factors that the Commission is required to consider pursuant to Exchange Act Section 3C(b)(4)(B) when determining whether a security-based swap (or group, category, type or class of security-based swaps) will be subject

[266] *See* 15 U.S.C. 78c–3(b)(2) (as added by Section 763(a) of the Dodd-Frank Act).

[267] 15 U.S.C. 78c–3(4)(B)(i) and (ii) (as added by Section 763(a) of the Dodd-Frank Act).

[268] 15 U.S.C. 78c–3(4)(B)(iii), (iv), and (v) (as added by Section 763(a) of the Dodd-Frank Act).

[269] *See* 15 U.S.C. 78c–3(b)(4) (as added by Section 763(a) of the Dodd-Frank Act).

[270] *See* CME Letter at 3. Similarly, The Options Clearing Corporation noted that Rule 19b–4(o)(3) identifies a ''a potentially very large amount of data'' to be provided in a Security-Based Swap Submission and urged Commission staff exercise judgment and flexibility in determining the scope of information required in connection with a submission. *See* OCC Letter at 3–4.

to the mandatory clearing requirement.[271] In addition, the information required pursuant to new Rule 19b–4(o)(3)(i) (discussing how the Security-Based Swap Submission is consistent with Section 17A of the Exchange Act) and new Rules 19b–4(o)(3)(iii)–(iv) (describing how the clearing agency's rules for open access are applicable to the security-based swap described in the Security-Based Swap Submission) also track statutory requirements contained in Exchange Act Section 3C.[272] The Commission therefore believes that it has crafted new Rule 19b–4(o)(3) to allow it to obtain the information necessary to complete its statutory obligation to make the required determination, without imposing undue additional information requirements on clearing agencies. As described in greater detail below, the Commission also believes that the available alternatives to the approach being adopted would have been less cost-efficient because of the concentration of relevant information in the clearing agencies and would not represent the best option for appropriately implementing the statutory mandate.

However, the Commission is mindful that the new procedure set forth by Rule 19b–4(o) will result in costs for clearing agencies, even if that procedure were to achieve optimal efficiency. As in the Proposing Release, this analysis looks first to the hourly burdens contained in the PRA analysis in Section IV (which hourly figures have been updated from the estimates provided in the Proposing Release) multiplied by the estimated hourly cost. With respect to the amendments to Rule 19b–4 and Form 19b–4 that require a clearing agency to file Security-Based Swap Submissions with the Commission using EFFS and existing Form 19b–4, the Commission believes that clearing agencies affected by the new rules will likely incur certain one-time and ongoing costs associated with making these filings, which are primarily related to preparing internal policies and procedures with respect to the new filing requirements and training personnel to prepare security-based swap submission and file them on EFFS. The hourly estimates are discussed in detail in the PRA analysis, although the Commission recognizes that certain of these costs may differ in amount depending on whether the clearing agency is already clearing security-based swaps or will be new to the market and regulatory structure. The Commission has used the hourly estimates in the PRA analysis to estimate the total recurring annual and ongoing costs for the six clearing agencies the Commission has determined may be required to meet the requirements in the rules relating to Security-Based Swap Submissions. The Commission estimates the annual costs will be $8,113,090 in the aggregate and that the one-time costs will be $319,080 in the aggregate.[273]

In addition, the Commission recognizes that registered clearing agencies may incur some additional costs associated with filing Security-Based Swap Submissions that are not readily quantifiable. For example, in cases where a clearing agency's rules already permit it to clear a security-based swap that is not listed for clearing, the clearing agency's subsequent decision to list such security-based swap for clearing would result in the requirement to make a Security-Based Swap Submission despite the fact that the clearing agency may have previously filed a proposed rule change with respect to the same security-based swap. As a result, clearing agencies put in this position could incur additional costs by being required to make a greater number of filings than they do currently under Exchange Act Section 19(b). In addition, the Commission notes that Security-Based Swap Submissions filed before December 10, 2012, will not be filed on Form 19b–4 in order to allow time for the Commission to make the necessary system upgrades to EFFS. Accordingly, a clearing agency that files a Security-Based Swap Submission prior to December 10, 2012, that is also an Advance Notice or proposed rule change (or both) will be required to submit two separate filings with the Commission. However, the Commission believes that the requirement to file the Security-Based Swap Submission by email, as well as the temporary nature of the requirement, will impose relatively little additional burden on clearing agencies, which can use their existing email systems to make such filings.

While the Commission recognizes the importance of considering these costs, and appreciates that some costs may be unavoidable in establishing a new procedure, the Commission believes that new Rule 19b–4(o) is cost-efficient and appropriately implements the provisions identified by Congress as requiring Commission rulemaking. Specifically, while implementing the submission and notice requirements in Exchange Act Section 3C, the Commission anticipates that the rule will minimize unnecessary costs to filers by utilizing a format that clearing agencies should be familiar with and, as they become registered clearing agencies, will be otherwise required to use for all of their proposed rule changes under existing Commission rules.

In addition, the Commission also believes that new Rule 19b–4(o) is cost-efficient and an implementation of the statutory mandate because, as previously noted, a clearing agency would ordinarily consider most, if not all, of the factors set forth in the Exchange Act Section 3C(b)(4) and new Rule 19b–4(o)(3) as part of its internal decision-making process, particularly at the time when it was determining whether to list the relevant security-based swaps for clearing (and knowing that such listing could result in the Commission determining that the security-based swap may be required to be cleared).[274] Accordingly, although the Commission recognizes that clearing agencies may incur costs associated with locating, processing and preparing information required to be included in a Security-Based Swap Submission, the Commission believes that clearing agencies are the most appropriate source for accurate and updated information regarding a security-based swap that it accepts (or plans to accept) for clearing. The Commission is aware of no other source for the scope and nature of the information contemplated by Exchange Act Section 3C.

In the alternative, as suggested by a commenter,[275] if the Commission were limited to compiling the necessary information using already available material as well as information obtained by the Commission in connection with its supervision of clearing agencies,

[271] *See* 15 U.S.C. 78c–3(b)(4)(B)(i)–(v) (as added by Section 763(a) of the Dodd-Frank Act) (emphasis added).

[272] *See* 15 U.S.C. 78c–3(b)(4)(A) (as added by Section 763(a) of the Dodd-Frank Act) (regarding compliance with Section 17A of the Exchange Act) and 15 U.S.C. 78c–3(a)(2) (as added by Section 763(a) of the Dodd-Frank Act) (setting forth the standards for evaluating whether the rules of a clearing agency provide for open access).

[273] These figures consist of the total hourly burdens identified in sections III.D.2.b and d, multiplied by the costs per hour attributed to different specialists. Specifically, $320 is attributed per hour for in-house compliance attorneys, $354 per hour for outside attorneys, $259 per hour for a senior systems analyst, and $225 per hour for a Webmaster. These hourly rates were based on the corresponding figures set forth in SIFMA's *Management & Professional Earnings in the Securities Industry 2010,* modified by the Commission's staff to account for an 1800 hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[274] *See supra* section II.A.1.b.

[275] *See supra* notes 59 to 61 and accompanying text.

there is risk that such material would be incomplete and/or inaccurate and therefore not well-suited to allowing the Commission to make a reasonably informed mandatory clearing determination. Under such circumstances, the Commission may also be required to make potentially costly and time-consuming *ad hoc* information requests to clearing agencies. Requiring a clearing agency to provide necessary information with its submission will help ensure that the information used by the Commission to evaluate the security-based swap for mandatory clearing is correct and complete in the first instance, reducing the likelihood that further information requests will be required and the associated costs for clearing agencies incurred.

Moreover, as described above, new Rule 19b–4(o) limits the information required to be provided to the Commission while, at the same time, allowing the Commission to meet its statutory requirements under specific categories established by the Dodd-Frank Act. The Commission, in seeking the most cost-efficient solution for the new procedure that also appropriately implements the statutory mandate, chose not to include additional information requests in the rule at this time because the Commission believes that the factors identified in the statute are capable of supporting a reasonable determination with respect to a Security-Based Swap Submission. Nevertheless, the Commission recognizes that a clearing agency may still require additional clarification or guidance with respect to what information must be included in a Security-Based Swap Submission. In that regard, Commission staff is in regular contact with each clearing agency and expects to be able to provide such clarification or guidance as necessary or appropriate based on the relevant facts and circumstances.

Finally, although the Commission is still in the process of determining how best to aggregate security-based swaps into groups, categories, types or classes, requiring that Security-Based Swap Submissions aggregate security-based swaps in this manner, to the extent reasonable and practicable to do so, as provided for in new Rule 19b–4(o)(4), could eventually lead to further cost efficiencies by reducing the number of filings required to be made with the Commission, and subsequently reducing the number of submissions that must be processed and reviewed by Commission staff.

Separately, with respect to notice, the Commission believes that new Rule 19b–4(5) appropriately implements the statutory mandate and creates a cost-efficient method of providing notice to members of the clearing agency, as well as other interested persons, such as counterparties to security-based swaps, of a Security-Based Swap Submission by requiring posting of the submission on the clearing agency's Web site within two business days of filing with the Commission. The Commission anticipates that this notice will provide the clearing agency members and other interested persons with the opportunity to comment on the submission with the potential for providing new information about the suitability of the security-based swap for mandatory clearing.

2. Analysis of Final Rules Related to the Process for Staying a Clearing Requirement While the Clearing of the Security-Based Swap Is Reviewed

Under Exchange Act Section 3C(c)(1), after making a determination that a security-based swap (or group, category, type or class of security-based swaps) is required to be cleared, the Commission, on application of a counterparty to a security-based swap or on the Commission's own initiative, may stay the clearing requirement until the Commission completes a review of the terms of the security-based swap and the clearing arrangement.[276] In connection with a stay of the clearing requirement, the Commission is required to adopt rules for reviewing a clearing agency's clearing of a security-based swap (or any group, category, type or class of security-based swaps) that the clearing agency has accepted for clearing.

Pursuant to new Rule 3Ca–1, a counterparty to a security-based swap subject to the clearing requirement who applies for a stay of the clearing requirement will be required to submit a written statement to the Commission that includes: A request for a stay of the clearing requirement; the identity of the counterparties to the security-based swap and a contact at the counterparty requesting the stay; the identity of the clearing agency clearing the security-based swap; the terms of the security-based swap subject to the clearing requirement and a description of the clearing arrangement; and the reasons why a stay should be granted and why the security-based swap should not be subject to a clearing requirement, specifically addressing the same factors a clearing agency must address in its Security-Based-Swap Submission pursuant to Rule 19b–4(o).[277] In the Proposing Release, the Commission identified potential costs and benefits resulting from Rule 3Ca–1 as proposed and requested comment on all aspects of the cost-benefit analysis, including the identification and assessment of any costs and benefits that were not discussed in the analysis. The Commission did not receive any responses to this request.

The Commission is mindful of the costs associated with the final procedure for the application for a stay. As in the Proposing Release, this analysis looks first to the hourly burdens contained in the PRA analysis in Section IV (which hourly figures have been updated from the estimates provided in the Proposing Release) multiplied by the estimated hourly cost. As previously noted, the Commission is unable to estimate accurately the number of stay applications that it will receive pursuant to new Rule 3Ca–1 and Section 3C(c)(1) because the Commission has not yet made any mandatory clearing determinations, does not know which counterparties may object to a determination, and has no information as to when counterparties would make an application for a stay. Accordingly, the Commission has no reasonable basis for estimating the number of applications. In addition, the mere fact that a counterparty files an request for a stay does not automatically create an obligation on the relevant clearing agency to respond to the application. Rather, new Rule 3Ca–1(d) provides that any clearing agency that has accepted for clearing a security-based swap that is subject to the stay shall provide information requested by the Commission necessary to assess any of the factors it determines to be appropriate in the course of its review. The Commission therefore cannot estimate with precision the quantified costs associated with the new rule regarding procedures for a stay, and no additional information was made available during the pendency of this rule that would aid such an estimate.

Nonetheless, the Commission recognizes that there will likely be applications for stays and, for purposes of the Proposing Release, the Commission estimated, by way of illustrating the potential costs of such applications, that there would be 30 applications for stays of a clearing requirement from counterparties each year based on the estimates of section III.D.4. of the PRA analysis. Further, the Proposing Release relied on the

[276] *See* 15 U.S.C. 78c–3(c)(1) (as added by Section 763(a) of the Dodd-Frank Act).

[277] Rule 3Ca–1(b).

assumption that the Commission would request additional information from the relevant clearing agency after receiving a request for a stay from a counterparty.

Based on the figures and assumptions described above, the Commission estimates, as it did in the Proposing Release, that counterparties would incur $1,062,000 in total aggregate costs to prepare and submit applications requesting a stay of a clearing requirement and that clearing agencies will incur $247,140 in total aggregate costs to compile and provide any information requested by the Commission.[278]

While for the reasons described above, the Commission has no basis to believe that this estimate is an inapt illustration of the potential costs associated with stays, the Commission notes that another indicator of the potential burden may be the ''per stay'' cost implied by these aggregate figures—namely, approximately $35,400 per counterparty per stay and approximately $8,238 per clearing agency per stay. These estimates of course also assume that there is an application (when in fact there may be none in cases where the Commission exercises its authority under Exchange Act Section 3C(c)(1) to grant a stay on its own initiative) and that it requires a clearing agency to respond (when in fact it may not be required to respond in cases where the Commission does not require the production of additional information pursuant to new Rule 3Ca–1(d)).

After considering these illustrative costs, the Commission believes that new Rule 3Ca–1 appropriately implements the provisions identified by Congress as requiring Commission rulemaking and is cost-efficient for the parties that will most likely be affected by the rule. In particular, the Commission believes that the information required of the counterparty and, if applicable, the clearing agency, is information that is most likely to be in the possession of the relevant party, and that alternative mechanisms for obtaining that information would be comparatively more costly for the parties involved. For example, similar to the analysis conducted with respect to Security-Based Swap Submissions, one alternative would have been to require that the Commission rely on information within its possession to make a determination with respect to the application for a stay. However, with respect to the counterparty, the Commission is all but certain not to have the full information required to understand the application—the counterparty alone will likely have its reasons as to why the stay should be granted and why the security-based swap should not be subject to a clearing requirement. Similarly, a clearing agency will only be required to submit information in connection with this process in response to a request by the Commission in order to facilitate the Commission's review of the application for a stay and, if the stay is granted, the applicable clearing requirement. Under these circumstances, it is likely that such requests will include information that is unique to the clearing agency and not independently available to the Commission.

3. Analysis of Final Rule Related to Preventing Evasion of the Clearing Requirement

As described above, new Rule 3Ca–2 clarifies that the phrase ''submits such security-based swap for clearing to a clearing agency'' found in Exchange Act Section 3C(a)(1) and is intended to prevent potential evasions of the clearing requirement by requiring market participants to submit security-based swaps to a clearing agency for central clearing as opposed to other clearing functions or services. The Commission does not believe that the Rule 3Ca–2 would impose any additional costs or burdens on clearing agencies or counterparties to security-based swaps because the rule simply clarifies that security-based swaps must be cleared at a central counterparty, rather than at an entity that meets the technical definition of a clearing agency under the Exchange Act for another reason. This clarification is consistent with the purpose of Section 3C(a)(1), which is to require that security-based swaps are centrally cleared.

4. Analysis of Final Rules Related to Advance Notices

As previously noted, the Clearing Supervision Act, which was enacted into law pursuant to Title VIII of the Dodd-Frank Act, provides for enhanced regulation of financial market utilities, such as clearing agencies, that manage or operate a multilateral system for the purpose of transferring, clearing or settling payments, securities or other financial transactions among financial institutions or between financial institutions and the financial market utility. Among other things, Section 806(e) of the Clearing Supervision Act requires any financial market utility designated by the Council as systemically important to provide ''60 days in advance notice to its Supervisory Agency of any proposed change to its rules, procedures or operations that could, as defined in rules of each Supervisory Agency, materially affect the nature or level of risks presented by the designated financial market utility.''[279] In addition, Congress mandated that each Supervisory Agency, including the Commission, adopt rules, in consultation with the Board, that define and describe when a designated financial market utility is required to file an Advance Notice with its Supervisory Agency.[280] Accordingly, new Rule 19b–4(n) was intended to define and describe when Advance Notices are required to be filed by designated clearing agencies and to set forth the process for filing such notices with the Commission.

In the Proposing Release, the Commission identified potential costs and benefits resulting from Rule 19b–4(n) and the related amendments to Form 19b–4 as proposed, and requested comment on all aspects of the cost-benefit analysis, including the identification and assessment of any costs and benefits that were not discussed in the analysis. Although the Commission did not receive any comments on the specific cost-benefit analysis contained in the Proposing Release, some commenters suggested that proposed 19b–4(n)(2), which defines the phrase ''materially affect the nature or level of risks presented'' for purposes of determining when a designated clearing agency will be required to submit an Advance Notice with the Commission, was overly broad and burdensome.[281] Specifically, these commenters generally argued that the definition would result in a requirement to submit Advance Notices to the Commission regarding matters that were risk-reducing, impractical, and potentially of lesser importance to the designated clearing agency and its regulators, which could potentially place an unnecessary strain on the existing resources of the clearing agency.[282]

While the Commission recognizes that new Rule 19b–4(n)(2), which is being

[278] This figure consists of the total hourly burden identified in section III.D.4, multiplied by $320 for each hour attributed to in-house compliance attorneys and $354 per hour for outside attorneys. This hourly cost is based on SIFMA's *Management & Professional Earnings in the Securities Industry 2010,* modified by the Commission's staff to account for an 1800 hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[279] *See* 12 U.S.C. 5465(e)(1)(A) (as added by Title VIII).

[280] *See* 12 U.S.C. 5465(e)(1)(B) (as added by Title VIII).

[281] *See supra* notes 154 to 162 and accompanying text.

[282] *See id.*

adopted as proposed, will impose certain costs and burdens on designated clearing agencies (which costs and burdens are discussed in greater detail below), the Commission believes that the rule is cost-efficient method and represents an appropriate method for implementing the statutory mandate. Specifically, Section 806(e) requires all financial market utilities to file Advance Notices with their Supervisory Agencies whenever the change referred to in the notice materially affects the nature or level of risks presented by the designated financial market utility.[283] While the Commission recognizes that a more narrowly tailored definition of the phrase ''materially affect the nature or level of risks presented'' could potentially result in designated clearing agencies being required to file fewer Advance Notices, new Rule 19b–4(n)(2) was drafted to follow closely the statutory language set forth in Section 806(e)(1)(A). As such, the Commission believes that the definition set forth in the new rule strikes an appropriate balance between the objectives of the Dodd-Frank Act and the potential costs and burdens on financial market utilities in that it does not expand on the language included in the statute, either by including specific types of changes not contemplated in Section 806(e) or by excluding changes that were not expressly identified by Congress. Furthermore, the Commission has previously encouraged designated clearing agencies to discuss proposed changes with Commission staff to help determine whether an Advance Notice under Section 806(e) would need to be filed and continues to encourage clearing agencies to avail themselves of this approach.[284]

However, the Commission is mindful that the new procedure set forth for Advance Notices will result in costs for financial market utilities, even if that procedure were to achieve optimal efficiency. As in the Proposing Release, this analysis looks first to the hourly burdens contained in the PRA analysis in Section IV (which hourly figures have been updated from the estimates provided in the Proposing Release) multiplied by the estimated hourly cost. The Commission estimates the total annual cost related to filing and posting Advance Notices to be $15,890,000 in the aggregate for ten respondent clearing agencies.[285]

In addition, the Commission recognizes that registered clearing agencies may incur some additional costs associated with filing Advance Notices that are not readily quantifiable. For example, some proposed changes may be required to be filed only as Advance Notices under Section 806(e) and not as proposed rule changes under Exchange Act Section 19(b). In these circumstances, clearing agencies will likely incur additional costs by being required to make a greater number of filings than they do currently under Exchange Act Section 19(b), which would result from the application of different standards for triggering a filing under the two statutory provisions. In addition, the Commission notes that Advance Notices filed before December 10, 2012, will not be filed on Form 19b–4 in order to allow time for the Commission to make the necessary system upgrades to EFFS. Accordingly, a designated clearing agency that is required to file a change as both an Advance Notice and a proposed rule change will be required to submit two separate filings with the Commission. However, the Commission believes that the requirement to file the Advance Notice by email, as well as the temporary nature of the requirement, will impose relatively little additional burden on clearing agencies, which can use their existing email systems to make such filings.

While the Commission recognizes the importance of considering these costs, and appreciates that some costs may be unavoidable in establishing a new procedure, the Commission believes that new Rule 19b–4(n) implements the provisions identified by Congress as requiring Commission rulemaking and is cost-efficient for the parties that will most likely be affected by the rule. Specifically, by defining the term ''materially affect the nature or level of risks presented,'' new Rule 19b–4(n)(2) provides designated clearing agencies with an understanding, as required by Congress pursuant to Section 806(e)(1)(B), of when an Advance Notice is required. While the Commission could have taken a more prescriptive approach by specifying which types of groups of changes would or would not trigger the requirement, the Commission believes that interpretative issues would remain and questions whether such alternative would be consistent with the statutory language in Section 806(e)(1)(A).

In addition, because the requirement to file notices under Section 806(e) is similar to the filing requirement for proposed rule changes under Exchange Act Section 19(b), the Commission is requiring that Advance Notices be filed on Form 19b–4 and EFFS. In many cases, it is likely that a proposed change for purposes of Section 806(e) will also be a proposed rule change for purposes of Exchange Act Section 19(b). Although the Commission could have required that Advance Notices be filed on a separate form, the Commission believes that requiring submissions using existing Form 19b–4 and EFFS represents a particularly cost-efficient approach to implementing the statutory mandate to submit Security-Based Swap Submissions, particularly since designated clearing agencies will already be familiar with this method of submission. Further, in situations where a single clearing agency action would trigger more than one of these filing requirements, allowing for each filing to be made pursuant to a single Form 19b–4 submission would improve efficiency in the filing process including, for example, by allowing the clearing agency to refer to and cross-reference information in one part of the submission if the information is relevant to a separate filing that is part of the same submission (so long as the requirements of each applicable rule are individually satisfied and if the clearing agency clearly explains how the information in one filing is applicable to the specific information required to be provided in the other filing).

5. Analysis of Final Rules To Amend Rule 19b–4 To Conform to the Requirements of Section 916 of the Dodd-Frank Act

The Commission has made a number of modifications to Rule 19b–4 and Form 19b–4 to conform to the requirements specified in Exchange Act Section 19(b), as amended by Section 916 of the Dodd Frank Act. These amendments were designed to incorporate changes required by Section 916, which provided for new deadlines by which the Commission must publish and act upon a proposed rule change submitted by all SROs and new standards for the approval, disapproval, and temporary suspension of a proposed rule change. In the Proposing Release, the Commission identified potential costs and benefits resulting from these amendments, as proposed, and requested comment on all aspects of the

[283] *See* 12 U.S.C. 5465(e)(1)(A) (as added by Title VIII).

[284] *See supra* section II.C.1.

[285] This figure consists of the total hourly burdens identified in sections III.D.2.e and III.3, multiplied by the costs per hour attributed to different specialists. Specifically, $320 is attributed per hour for in-house compliance attorneys, $354 per hour for outside attorneys and $225 per hour for a Webmaster. These hourly rates were based on the corresponding figures set forth in SIFMA's *Management & Professional Earnings in the Securities Industry 2010,* modified by the Commission's staff to account for an 1800 hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

cost-benefit analysis, including the identification and assessment of any costs and benefits that were not discussed in the analysis. The Commission did not receive any responses to this request.

The Commission estimates that the requirement that an SRO inform the Commission of the date on which it posted a proposed rule change on its Web site (if the posting did not occur on the same day that the SRO filed the proposal with the Commission) will impose only a minimal burden, if any, on the SRO. As discussed in Section IV.B.4., the Commission believes that SROs currently post their proposed rule changes on their Web site on the same day on which they file them with the Commission. It would be unlikely that an SRO would fail to post its proposed rule change on the same day that it files with the Commission, since prompt Web site posting triggers the requirement on the Commission to publish notice of the proposed rule change.

The Commission also identified certain isolated or unusual circumstances that could result in unforeseen costs associated with the requirement that an SRO, if it does not post a proposed rule change on its Web site on the same day that it files the proposal with the Commission, inform the Commission of the date on which it posted such proposal on its Web site. In conducting an evaluation of the costs of this amendment, as in the Proposing Release, the Commission relies on the hourly burdens contained in the PRA analysis in Section IV (which hourly figures have been updated from the estimates provided in the Proposing Release) multiplied by the estimated hourly cost. In addition, the Commission estimates that SROs will fail to post proposed rule changes on their Web sites on the same day as the filing was made with the Commission in 1% of all cases, or 16 times each year, and that each SRO will spend approximately one hour preparing and submitting notice to the Commission of the date on which it posted the proposed rule change on its Web site, resulting in a total annual burden of 14 hours. Based on these assumptions, the Commission estimates that the total annual cost of this amendment will be $5,120 in the aggregate for all SROs.[286]

V. Regulatory Flexibility Certification

The Regulatory Flexibility Act (''RFA'')[287] requires the Commission, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a)[288] of the Administrative Procedure Act,[289] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all rules it has proposed to determine the impact of such rulemaking on ''small entities.''[290] 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.[291]

A. Self-Regulatory Organizations

New Rule 19b–4(n) and the corresponding amendments to Form 19b–4 will apply to all designated clearing agencies. New Rule 19b–4(o) and the corresponding amendments to Form 19b–4 will apply to all security-based swap clearing agencies. New rules 3Ca–1 and 3Ca–2 also will apply to all security-based swap clearing agencies. All of the remaining amendments to Rule 19b–4 and Form 19b–4, including those made to Rule 19b–4(l) to reflect the revisions to Exchange Act Section 19(b) pursuant to Section 916 of the Dodd-Frank Act, will apply to all SROs. Three entities are currently registered to provide central clearing services for CDS, a class of security-based swaps. The Commission believes, based on its understanding of the market, that likely no more than six security-based swap clearing agencies could be subject to the requirements of new Rule 19b–4(o) and new Rules 3Ca–1 and 3Ca–2. In addition, the Commission believes that approximately ten registered clearing agencies could be designated by the Council as systemically important (and for which the Commission will be the Supervisory Agency) and subject to the requirements of new Rule 19b–4(n), which includes the four securities clearing agencies in existence prior to the enactment of the Dodd-Frank Act and the six estimated clearing agencies that may clear security-based swaps. Finally, there are currently 32 SROs registered with the Commission (including registered clearing agencies). When combined with the additional clearing agencies that could potentially register with the Commission in the future to clear security-based swaps, the Commission believes that approximately 35 SROs will be subject to all of the other technical amendments to Rule 19b–4, including the amendments to Rule 19–4(l).

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.[292] With respect to SROs that are not clearing agencies, the RFA analysis would apply to national securities exchanges, national securities associations and the Municipal Securities Rulemaking Board. Exchange Act Rule 0–10(d) provides that a small entity includes, when used in reference to an exchange, any exchange that: (i) Has been exempted from the reporting requirements of Rule 601 of Regulation NMS[293] and (ii) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[294] 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.[295]

Based on the Commission's existing information about SROs, 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. Additionally, while other clearing agencies may become eligible to operate as central counterparties for

[286] This figure consists of the total hourly burdens identified in section III.D.4, multiplied by $320 per hour for in-house compliance attorneys. This hourly cost is based on SIFMA's *Management & Professional Earnings in the Securities Industry 2010,* modified by the Commission's staff to account for an 1800 hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[287] 5 U.S.C. 601 *et seq.*

[288] 5 U.S.C. 603(a).

[289] 5 U.S.C. 551 *et seq.*

[290] 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 rulemaking, are set forth in Rule 0–10, 17 CFR 240.0–10.

[291] *See* 5 U.S.C. 605(b).

[292] 17 CFR 240.0–10(d).

[293] 17 CFR 242.601.

[294] 17 CFR 240.0–10(e).

[295] 13 CFR 121.201, Sector 52.

security-based swaps, the Commission does not believe that any such entities will be ''small entities'' as defined in Exchange Act Rule 0–10.[296] Furthermore, the Commission believes it is unlikely that clearing agencies acting as central counterparties for security-based swaps would have annual receipts of less than $6.5 million. Accordingly, the Commission believes that any clearing agencies clearing security-based swaps by acting as central counterparties for such transactions will exceed the thresholds for ''small entities'' set forth in Exchange Act Rule 0–10.

B. Security-Based Swap Counterparties

New Rule 3Ca–1 will apply to any counterparty to a security-based swap subject to the clearing requirement that applies for a stay of a mandatory clearing requirement. For the purposes of Commission rulemaking and as applicable to new Rule 3Ca–1, a small entity includes: (i) When used with reference to a clearing agency, a clearing agency that (a) compared, cleared and settled less than $500 million in securities transactions during the preceding fiscal year, (b) 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 (c) is not affiliated with any person (other than a natural person) that is not a small business or small organization;[297] (ii) when used as reference to an ''issuer'' or a ''person,'' other than an investment company, an ''issuer'' or a ''person'' that, on the last day of its most recent fiscal year, had total assets of $5 million or less;[298] or (iii) when used as reference to broker-dealer, a broker-dealer (a) with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act, or, if not required to file such statements, a broker-dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in that time that it has been in business, if shorter) and (b) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[299] 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.[300]

While the Commission is unable to anticipate whether any counterparties to security-based swap transactions that apply for a stay of a mandatory clearing requirement would meet the definition of a ''small entity'' under Exchange Act Rule 0–10, the Commission believes that it is unlikely that the stay application process of new Rule 3Ca–1 will have a significant economic impact upon such an entity. Given that the new stay application process entails the submission of a written statement to the Commission setting forth information about the security-based swap transaction for which the stay is sought, the Commission believes the impact of the application process on a counterparty would be minimal.[301] Furthermore, even if the stay application process were to have a significant economic impact upon such non-clearing agency counterparty, the Commission believes that the number of entities so impacted will be no more than 30.[302] Accordingly, in respect of non-clearing agency counterparties to security-based swap transactions, the Commission believes that new Rule 3Ca–1 will not have a significant economic impact on a substantial number of small entities.

C. Certification

For the reasons stated above, the Commission certifies that the amendments to Rule 19b–4, including new Rules 19b–4(n) and (o) and all corresponding amendments to Form 19b–4, and new Rules 3Ca–1 and 3Ca–2 will not have a significant economic impact on a substantial number of small entities for the purposes of the RFA.

VI. Statutory Authority

Pursuant to the Exchange Act, and particularly Sections 3C, 17A and 19(b) thereof, 15 U.S.C. 78c–3, 78q–1 and 78s(b) and Section 806(e) of the Clearing Supervision Act, 12 U.S.C 5465(e), the Commission is amending Rule 19b–4 and Form 19b–4 and adding Rules 3Ca–1 and 3Ca–2, as set forth below.

List of Subjects in 17 CFR Parts 240 and 249

Brokers, Reporting and recordkeeping requirements, Securities.

Text of the Final 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

■ 1. The general authority citation for part 240 is revised and a sub-authority is added in section number order 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, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78*o,* 78*o*–4, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.;* 18 U.S.C. 1350, 12 U.S.C. 5221(e)(3), and Pub. L. 111–203, § 939A, 124 Stat. 1376, (2010), unless otherwise noted.

* * * * *

Section 240.19b–4 is also issued under 12 U.S.C. 5465(e).

* * * * *

■ 2. Add an undesignated center heading and §§ 240.3Ca–1 and 240.3Ca–2 following § 240.3b–19 to read as follows:

Clearing of Security-Based Swaps

240.3Ca–1 Stay of clearing requirement and review by the Commission.

240.3Ca–2 Submission of security-based swaps for clearing.

* * * * *

[296] *See* 17 CFR 240.0–10(d).

[297] 17 CFR 240.0–10(d).

[298] 17 CFR 240.0–10(a).

[299] 17 CFR 240.0–10(c).

[300] 13 CFR 121.201, Sector 52.

[301] In the economic analysis, the Commission estimated that the 30 counterparties would incur $1,062,000 in total aggregate costs to prepare and submit applications requesting a stay of a clearing requirement, which breaks down to $35,400 per stay. *See supra* note 278 and accompanying text.

[302] As previously noted, the Commission is unable to estimate accurately the number of times it will receive an application for a stay pursuant to Section 3C(c)(1) because it has not yet made any mandatory clearing determinations and it does not know what counterparties may object to a determination or when they would make an application for a stay. However, the Commission recognizes that there will likely be applications for stays and, for purposes of conducting the PRA analysis, the Commission estimated there would be five applications for stays of a clearing requirement per clearing agency per year. This figure represents one quarter of the estimated number of Security-Based Swap Submissions from each clearing agency per year, for a total of 30 applications for stays per year. While the Commission recognizes that a counterparty may submit multiple stay applications, in order to use the most conservative estimate possible, the Commission is assuming that each of the 30 estimated applications will be submitted by different counterparties. *See supra* section III.D.4.

§ 240.3Ca–1 Stay of clearing requirement and review by the Commission.

(a) After making a determination pursuant to a clearing agency's security-based swap submission that a security-based swap, or any group, category, type or class of security-based swaps, is required to be cleared, the Commission, on application of a counterparty to a security-based swap or on the Commission's own initiative, may stay the clearing requirement until the Commission completes a review of the terms of the security-based swap (or group, category, type, or class of security-based swaps) and the clearing of the security-based swap (or group, category, type, or class of security-based swaps) by the clearing agency that has accepted it for clearing.

(b) A counterparty to a security-based swap applying for a stay of the clearing requirement for a security-based swap (or group, category, type, or class of security-based swaps) shall submit a written statement to the Commission that includes:

(1) A request for a stay of the clearing requirement;

(2) The identity of the counterparties to the security-based swap and a contact at the counterparty requesting the stay;

(3) The identity of the clearing agency clearing the security-based swap;

(4) The terms of the security-based swap subject to the clearing requirement and a description of the clearing arrangement; and

(5) Reasons why such stay should be granted and why the security-based swap should not be subject to a clearing requirement, specifically addressing the same factors a clearing agency must address in its security-based-swap submission pursuant to § 240.19b–4(o)(3).

(c) A stay of the clearing requirement may be granted with respect to a security-based swap, or the group, category, type, or class of security-based swaps, as determined by the Commission.

(d) The Commission's review shall include a quantitative and qualitative assessment of the factors specified in § 240.19b–4(o)(3). Any clearing agency that has accepted for clearing a security-based swap, or any group, category, type or class of security-based swaps, that is subject to the stay of the clearing requirement shall provide information requested by the Commission as necessary to assess any of the factors it determines to be appropriate in the course of its review.

(e) Upon completion of its review, the Commission may:

(1) Determine, subject to any terms and conditions that the Commission determines to be appropriate in the public interest, that the security-based swap, or group, category, type, or class of security-based swaps must be cleared; or

(2) Determine that the clearing requirement will not apply to the security-based swap, or group, category, type, or class of security-based swaps, but clearing may continue on a non-mandatory basis.

§ 240.3Ca–2 Submission of security-based swaps for clearing.

Pursuant to section 3C(a)(1) of the Act (15 U.S.C. 78c–3(a)(1)), it shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this Act or a clearing agency that is exempt from registration under the Act if the security-based swap is required to be cleared. The phrase *submits such security-based swap for clearing to a clearing agency* in the clearing requirement of Section 3C(a)(1) of the Act shall mean that the security-based swap will be submitted for central clearing to a clearing agency that functions as a central counterparty.

■ 3. § 240.19b–4 is amended by:

■ a. Removing the phrase ''Preliminary Note:'' in the introductory text;

■ b. Removing paragraph (b);

■ c. Redesignating paragraph (a) as paragraph (b);

■ d. Adding new paragraph (a);

■ e. In paragraph (i), adding the phrase '', notices and submissions'' after ''of all filings'';

■ f. In paragraph (i), adding the words ''notice or submission,'' after the phrase ''any such filing,'';

■ g. In paragraph (i), removing the phrase ''the filing of the proposed rule change.'' and adding in its place ''the filing, notice or submission of the proposed rule change, advance notice or security-based swap submission, as applicable.'';

■ h. In paragraph (j), first sentence, removing the words ''with respect to proposed rule changes'';

■ i. Revising paragraph (l), introductory text;

■ j. Adding paragraph (n); and

■ k. Adding paragraph (o).

The additions and revisions read as follows:

§ 240.19b–4 Filings, notices or submissions with respect to proposed rule changes, advance notices or security-based swap submissions by self-regulatory organizations.

* * * * *

(a) *Definitions.* As used in this section:

(1) The term *advance notice* means a notice required to be made by a designated clearing agency pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act (12 U.S.C. 5465(e));

(2) The term *designated clearing agency* means a clearing agency that is registered with the Commission, and for which the Commission is the Supervisory Agency (as determined in accordance with section 803(8) of the Payment, Clearing and Settlement Supervision Act (12 U.S.C. 5462(8)), that has been designated by the Financial Stability Oversight Council pursuant to section 804 of the Payment, Clearing and Settlement Supervision Act (12 U.S.C. 5463) as systemically important or likely to become systemically important;

(3) The term *Payment, Clearing and Settlement Supervision Act* means Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (124 Stat. 1802, 1803, 1807, 1809, 1811, 1814, 1816, 1818, 1820, 1821; 12 U.S.C. 5461 *et seq.*);

(4) The term *proposed rule change* has the meaning set forth in Section 19(b)(1) of the Act (15 U.S.C. 78s(b)(1));

(5) The term *security-based swap submission* means a submission of identifying information required to be made by a clearing agency pursuant to section 3C(b)(2) of the Act (15 U.S.C. 78c–3(b)(2)) for each security-based swap, or any group, category, type or class of security-based swaps, that such clearing agency plans to accept for clearing;

(6) The term *stated policy, practice, or interpretation* means:

(i) Any material aspect of the operation of the facilities of the self-regulatory organization; or

(ii) Any statement made generally available to the membership of, to all participants in, or to persons having or seeking access (including, in the case of national securities exchanges or registered securities associations, through a member) to facilities of, the self-regulatory organization (''specified persons''), or to a group or category of specified persons, that establishes or changes any standard, limit, or guideline with respect to:

(A) The rights, obligations, or privileges of specified persons or, in the case of national securities exchanges or registered securities associations, persons associated with specified persons; or

(B) The meaning, administration, or enforcement of an existing rule.

* * * * *

(l) The self-regulatory organization shall post each proposed rule change,

and any amendments thereto, on its Web site within two business days after the filing of the proposed rule change, and any amendments thereto, with the Commission. If a self-regulatory organization does not post a proposed rule change on its Web site on the same day that it filed the proposal with the Commission, then the self-regulatory organization shall inform the Commission of the date on which it posted such proposal on its Web site. Such proposed rule change and amendments shall be maintained on the self-regulatory organization's Web site until:

* * * * *

(n)(1)(i) A designated clearing agency shall provide an advance notice to the Commission of any proposed change to its rules, procedures, or operations that could materially affect the nature or level of risks presented by such designated clearing agency. Except as provided in paragraph (n)(1)(ii) of this section, such advance notice shall be submitted to the Commission electronically on Form 19b–4 (referenced in 17 CFR 249.819). The Commission shall, upon the filing of any advance notice, provide for prompt publication thereof.

(ii) Any designated clearing agency that files an advance notice with the Commission prior to December 10, 2012, shall file such advance notice in electronic format to a dedicated email address to be established by the Commission. The contents of an advance notice filed pursuant to this paragraph (n)(1)(ii) shall contain the information required to be included for advance notices in the General Instructions for Form 19b–4 (referenced in 17 CFR 249.819).

(2)(i) For purposes of this paragraph (n), the phrase *materially affect the nature or level of risks presented,* when used to qualify determinations on a change to rules, procedures, or operations at the designated clearing agency, means matters as to which there is a reasonable possibility that the change could affect the performance of essential clearing and settlement functions or the overall nature or level of risk presented by the designated clearing agency.

(ii) Changes to rules, procedures, or operations that could materially affect the nature or level of risks presented by a designated clearing agency may include, but are not limited to, changes that materially affect participant and product eligibility, risk management, daily or intraday settlement procedures, default procedures, system safeguards, governance or financial resources of the designated clearing agency.

(iii) Changes to rules, procedures, or operations that may not materially affect the nature or level of risks presented by a designated clearing agency include, but are not limited to:

(A) Changes to an existing procedure, control, or service that do not modify the rights or obligations of the designated clearing agency or persons using its payment, clearing, or settlement services and that do not adversely affect the safeguarding of securities, collateral, or funds in the custody or control of the designated clearing agency or for which it is responsible; or

(B) Changes concerned solely with the administration of the designated clearing agency or related to the routine, daily administration, direction, and control of employees;

(3) The designated clearing agency shall post the advance notice, and any amendments thereto, on its Web site within two business days after the filing of the advance notice, and any amendments thereto, with the Commission. Such advance notice and amendments shall be maintained on the designated clearing agency's Web site until the earlier of:

(i) The date the designated clearing agency withdraws the advance notice or is notified that the advance notice is not properly filed; or

(ii) The date the designated clearing agency posts a notice of effectiveness as required by paragraph (n)(4)(ii) of this section.

(4)(i) The designated clearing agency shall post a notice on its Web site within two business days of the date that any change to its rules, procedures, or operations referred to in an advance notice has been permitted to take effect as such date is determined in accordance with Section 806(e) of the Payment, Clearing and Settlement Supervision Act (12 U.S.C. 5465).

(ii) The designated clearing agency shall post a notice on its Web site within two business days of the effectiveness of any change to its rules, procedures, or operations referred to in an advance notice.

(5) A designated clearing agency shall provide copies of all materials submitted to the Commission relating to an advance notice with the Board of Governors of the Federal Reserve System contemporaneously with such submission to the Commission.

(6) The publication and Web site posting requirements contained in paragraphs (n)(1), (n)(3), and (n)(4) of this section do not apply to any information contained in an advance notice for which a designated clearing agency has requested confidential treatment following the procedures set forth in § 240.24b–2.

(o)(1) Every clearing agency that is registered with the Commission that plans to accept a security-based swap, or any group, category, type, or class of security-based swaps for clearing shall submit to the Commission a security-based swap submission and provide notice to its members of such security-based swap submission.

(2)(i) Except as provided in paragraph (o)(2)(ii) of this section, a clearing agency shall submit each security-based swap submission to the Commission electronically on Form 19b–4 (referenced in 17 CFR 249.819) with the information required to be submitted for a security-based swap submission, as provided in § 240.19b–4 and Form 19b–4. Any information submitted to the Commission electronically on Form 19b–4 that is not complete or otherwise in compliance with this section and Form 19b–4 shall not be considered a security-based swap submission and the Commission shall so inform the clearing agency within twenty-one business days of the submission on Form 19b–4 (referenced in 17 CFR 249.819).

(ii) Any clearing agency that files a security-based swap submission with the Commission prior to December 10, 2012, shall file such security-based swap submission in electronic format to a dedicated email address to be established by the Commission. The contents of a security-based swap submission filed pursuant to this paragraph (o)(2)(ii) shall contain the information required to be included for security-based swap submissions in the General Instructions for Form 19b–4.

(3) A security-based swap submission submitted by a clearing agency to the Commission shall include a statement that includes, but is not limited to:

(i) How the security-based swap submission is consistent with Section 17A of the Act (15 U.S.C. 78q–1);

(ii) Information that will assist the Commission in the quantitative and qualitative assessment of the factors specified in Section 3C of the Act (15 U.S.C. 78c–3), including, but not limited to:

(A) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data;

(B) The availability of a rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded;

(C) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the clearing agency available to clear the contract;

(D) The effect on competition, including appropriate fees and charges applied to clearing; and

(E) The existence of reasonable legal certainty in the event of the insolvency of the relevant clearing agency or one or more of its clearing members with regard to the treatment of customer and security-based swap counterparty positions, funds, and property;

(iii) A description of how the rules of the clearing agency prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency, as applicable to the security-based swaps described in the security-based swap submission; and

(iv) A description of how the rules of the clearing agency provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility, as applicable to the security-based swaps described in the security-based swap submission.

(4) A clearing agency shall submit security-based swaps to the Commission for review by group, category, type or class of security-based swaps, to the extent reasonable and practicable to do so.

(5) A clearing agency shall post each security-based swap submission, and any amendments thereto, on its Web site within two business days after the submission of the security-based swap submission, and any amendments thereto, with the Commission. Such security-based swap submission and amendments shall be maintained on the clearing agency's Web site until the Commission makes a determination regarding the security-based swap submission or the clearing agency withdraws the security-based swap submission, or is notified that the security-based swap submission is not properly filed.

(6) In connection with any security-based swap submission that is submitted by a clearing agency to the Commission, the clearing agency shall provide any additional information requested by the Commission as necessary to assess any of the factors it determines to be appropriate in order to make the determination of whether the clearing requirement applies.

(7) Notices of orders issued pursuant to Section 3C of the Act (15 U.S.C. 78c–3), regarding security-based swap submissions will be given by prompt publication thereof, together with a statement of written reasons therefor.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 4. The general authority citation for part 249 is revised and a sub-authority is added in section number order to read as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Section 249.819 is also issued under 12 U.S.C. 5465(e).

* * * * *

■ 5. Revise § 249.819 to read as follows:

§ 249.819 Form 19b–4, for electronic filings with respect to proposed rule changes, advance notices and security-based swap submissions by all self-regulatory organizations.

This form shall be used by all self-regulatory organizations, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(26)), to file electronically proposed rule changes with the Commission pursuant to Section 19(b) of the Act (15 U.S.C. 78s(b)) and § 240.19b–4 of this chapter, advance notices with the Commission pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act (12 U.S.C. 5465(e)) and § 240.19b–4 of this chapter and security-based swap submissions with the Commission pursuant to Section 3C(b)(2) of the Act (15 U.S.C. 78c–3(b)(2)) and § 240.19b–4 of this chapter.

■ 6. Form 19b–4 (referenced in § 249.819) is revised to read as follows:

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

BILLING CODE 8011–01–P

OMB APPROVAL OMB	
Number:	3235-0045
Expires:	[ ]
Estimated average burden hours per response	[ ]

Page 1 of [ ]

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. SR - [ ] - [ ]

Amendment No. [ ]

Filing by [Select SRO]

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial ☐ Amendment ☐ Withdrawal ☐

Section 19(b)(2) ☐ Section 19(b)(3)(A) ☐ Section 19(b)(3)(B) ☐

Pilot ☐

Extension of Time Period for Commission Action ☐

Date Expires [ ]

Rule

☐ 19b-4(f)(1) ☐ 19b-4(f)(4)
☐ 19b-4(f)(2) ☐ 19b-4(f)(5)
☐ 19b-4(f)(3) ☐ 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing and Settlement Act of 2010

Section 806(e)(1) ☐ Section 806(e)(2) ☐

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934

Section 3C(b)(2) ☐

Exhibit 2 Sent As Paper Document ☐ Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the action (limit 250 characters).

[ ]

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name [ ] Last Name [ ]
Title [ ]
E-mail [ ]
Telephone [ ] Fax [ ]

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date [ ]
By [ ]
(Name)

[ ]
(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Digitally Sign and Lock Form

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information Add Remove View	The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.
Exhibit 1 - Notice of Proposed Rule Change Add Remove View	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3).
Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies Add Remove View	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3).
Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications Add Remove View Exhibit Sent As Paper Document	Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.
Exhibit 3 - Form, Report, or Questionnaire Add Remove View Exhibit Sent As Paper Document	Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.
Exhibit 4 - Marked Copies Add Remove View	The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.
Exhibit 5 - Proposed Rule Text Add Remove View	The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.
Partial Amendment Add Remove View	If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

BILLING CODE 8011–01–C

General Instructions for Form 19b–4

A. Use of the Form

All self-regulatory organization proposed rule changes (except filings with respect to proposed rule changes by self-regulatory organizations submitted pursuant to Section 19(b)(7) [1]

[1] Because Section 19(b)(7)(C) of the Act states that filings abrogated pursuant to this Section should be re-filed pursuant to paragraph (b)(1) of Section 19

of the Securities Exchange Act of 1934 (''Act'')), security-based swap submissions, and advance notices shall be filed in an electronic format through the Electronic Form 19b–4 Filing System (''EFFS''), a secure Web site operated by the Commission. This form shall be used for filings of proposed rule changes by all self-regulatory organizations pursuant to Section 19(b) of the Act, except filings with respect to proposed rule changes by self-regulatory organizations submitted pursuant to Section 19(b)(7) of the Act. National securities exchanges, registered securities associations, registered clearing agencies, and the Municipal Securities Rulemaking Board are self-regulatory organizations for purposes of this form. This form shall be used for all security-based swap submissions and advance notices filed by registered clearing agencies. A proposed change that is required to be filed with the Commission under more than one of these three processes (a proposed rule change, security-based swap submission, or advance notice) shall be submitted on the same Form 19b–4.

B. Need for Careful Preparation of the Completed Form, Including Exhibits

This form, including the exhibits, is intended to elicit information necessary for the public to provide meaningful comment on the proposed rule change, security-based swap submission, or advance notice and for the Commission to determine whether the proposed rule change, security-based swap submission, or advance notice is consistent with the requirements of the Act and the rules and regulations thereunder or the Payment, Clearing and Settlement Supervision Act and the rules and regulations thereunder, in each case as applicable to the self-regulatory organization and in accordance with the requirements for each type of filing. The self-regulatory organization must provide all the information called for by the form, including the exhibits, and must present the information in a clear and comprehensible manner.

The proposed rule change, security-based swap submission, or advance notice shall be considered filed on the date on which the Commission receives the proposed rule change, security-based swap submission, or advance notice if the filing complies with all requirements of this form. Any filing that does not comply with the requirements of this form may be returned to the self-regulatory organization. Any filing so returned shall for all purposes be deemed not to have been filed with the Commission. See also Rule 0–3 under the Act (17 CFR 240.0–3).

C. Documents Comprising the Completed Form

The completed form filed with the Commission shall consist of the Form 19b–4 Page 1, numbers and captions for all items, responses to all items, and exhibits required in Item 11. In responding to an item, the completed form may omit the text of the item as contained herein if the response is prepared to indicate to the reader the coverage of the item without the reader having to refer to the text of the item or its instructions. Each filing shall be marked on the Form 19b–4 with the initials of the self-regulatory organization, the four-digit year, and the number of the filing for the year (*e.g.,* SRO–YYYY–XX). If the SRO is filing Exhibits 2 or 3 via paper, the exhibits must be filed within 5 calendar days of the electronic submission of all other required documents.

D. Amendments

If information on this form is or becomes inaccurate before the Commission takes action on the proposed rule change or the security-based swap submission, or prior to the expiration of the statutory review period with respect to advance notices (as determined in accordance with Section 806(e) of the Payment, Clearing and Settlement Supervision Act), the self-regulatory organization shall correct any such inaccuracy. Amendments shall be filed as specified in Instruction F.

Amendments to a filing shall include the Form 19b–4 Page 1 marked to number consecutively the amendments, numbers and captions for each amended item, amended response to the item, and required exhibits. The amended response to Item 3 shall explain the purpose of the amendment and, if the amendment changes the purpose of or basis for the proposed rule change, security-based swap submission, or advance notice, the amended response shall also provide a revised purpose and basis statement. Exhibit 1 or Exhibit 1A, as applicable, shall be re-filed if there is a material change from the immediately preceding filing in the language of the proposed rule change or in the information provided relating to the proposed rule change, security-based swap submission, or advance notice.

If the amendment alters the text of an existing rule, the amendment shall include the text of the existing rule, marked in the manner described in Item 1(a) using brackets to indicate words to be deleted from the existing rule and underscoring to indicate words to be added. The purpose of this marking requirement is to maintain a current copy of how the text of the existing rule is being changed.

If the amendment alters the text of the proposed rule change as it appeared in the immediately preceding filing (even if the proposed rule change does not alter the text of an existing rule), the amendment shall include, as Exhibit 4, the entire text of the rule as altered. This full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (*i.e.,* partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

If, after the Form 19b–4 is filed but before the Commission takes final action on it, the self-regulatory organization receives or prepares any correspondence or other communications reduced to writing (including comment letters) to and from such self-regulatory organization concerning the proposed rule change, security-based swap submission, or advance notice, the communications shall be filed as Exhibit 2. If information in the communication makes the filing inaccurate, the filing shall be amended to correct the inaccuracy. If such communications cannot be filed electronically in accordance with Instruction F, the communications shall be filed in accordance with Instruction G.

E. Completion of Action by the Self-Regulatory Organization on the Proposed Rule Change

The Commission will not approve a proposed rule change or make a determination regarding a security-based swap submission or raise no objection to an advance notice before the self-regulatory organization has completed all action required to be taken under its constitution, articles of incorporation, bylaws, rules, or instruments corresponding thereto (excluding action specified in any such

of the Act, SROs are required to file electronically such proposed rule changes in accordance with this form.

instrument with respect to (i) compliance with the procedures of the Act or (ii) the formal filing of amendments pursuant to state law).

F. Signature and Filing of the Completed Form

All proposed rule changes, security-based swap submissions, advance notices, amendments, extensions, and withdrawals of proposed rule changes, security-based swap submissions, and advance notices shall be filed through the EFFS. In order to file Form 19b–4 through EFFS, self-regulatory organizations must request access to the SEC's External Application Server by completing a request for an external account user ID and password. Initial requests will be received by contacting the Trading and Markets Administrator located on our Web site (*http://www.sec.gov*). An email will be sent to the requestor that will provide a link to a secure Web site where basic profile information will be requested.

A duly authorized officer of the self-regulatory organization shall electronically sign the completed Form 19b–4 as indicated on Page 1 of the Form. In addition, a duly authorized officer of the self-regulatory organization shall manually sign one copy of the completed Form 19b–4, and the manually signed signature page shall be maintained pursuant to Section 17 of the Act. A registered clearing agency for which the Commission is not the appropriate regulatory agency also shall file with its appropriate regulatory agency three copies of the form, one of which shall be manually signed, including exhibits. A clearing agency that also is a designated clearing agency shall file with the Board of Governors of the Federal Reserve System (''Federal Reserve'') three copies of any form containing an advance notice, one of which shall be manually signed, including exhibits; provided, however, that this requirement may be satisfied instead by providing the copies to the Federal Reserve in an electronic format as permitted by the Federal Reserve. The Municipal Securities Rulemaking Board also shall file copies of the form, including exhibits, with the Federal Reserve, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.

G. Procedures for Submission of Paper Documents for Exhibits 2 and 3

To the extent that Exhibits 2 and 3 cannot be filed electronically in accordance with Instruction F, four copies of Exhibits 2 and 3 shall be filed with the Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549. Page 1 of the electronic Form 19b–4 shall accompany paper submissions of Exhibits 2 and 3. If the SRO is filing Exhibits 2 and 3 via paper, they must be filed within five calendar days of the electronic filing of all other required documents.

H. Withdrawals of Proposed Rule Changes, Security-Based Swap Submissions or Advance Notices

If a self-regulatory organization determines to withdraw a proposed rule change, security-based swap submission, or advance notice, it must complete Page 1 of the Form 19b–4 and indicate by selecting the appropriate check box to withdraw the filing.

I. Procedures for Granting an Extension of Time for Commission Final Action

After the Commission publishes notice of a proposed rule change or security-based swap submission, if a self-regulatory organization wishes to grant the Commission an extension of the time to take final action as specified in Section 19(b)(2) or Section 3C, the self-regulatory organization shall indicate on the Form 19b–4 Page 1 the granting of said extension as well as the date the extension expires.

Information To Be Included in the Completed Form (''Form 19b–4 Information'')

1. Text of the Proposed Rule Change

(a) Include the text of the proposed rule change, security-based swap submission, or advance notice. Text of the proposed rule change should be included either in Exhibit 5 or Exhibit 1 (or Exhibit 1A in the filing of a clearing agency). Changes in, additions to, or deletions from, any existing rule shall be set forth with brackets used to indicate words to be deleted and underscoring used to indicate words to be added.

If any form, report, or questionnaire is:

(i) proposed to be used in connection with the implementation or operation of the proposed rule change, security-based swap submission, or advance notice, or

(ii) prescribed or referred to in the proposed rule change, security-based swap submission, or advance notice, then the form, report, or questionnaire must be attached to and shall be considered as part of the proposed rule change, security-based swap submission, or advance notice. If completion of the form, report, or questionnaire is voluntary or is required pursuant to an existing rule of the self-regulatory organization, then the form, report, or questionnaire, together with a statement identifying any existing rule that requires completion of the form, report, or questionnaire, shall be attached as Exhibit 3. If the form, report, or questionnaire cannot be filed electronically in accordance with Instruction F, the documents shall be filed in accordance with Instruction G.

(b) If the self-regulatory organization reasonably expects that the proposed rule change, security-based swap submission, or advance notice will have any direct effect, or significant indirect effect, on the application of any other rule of the self-regulatory organization, set forth the designation or title of any such rule and describe the anticipated effect of the proposed rule change, security-based swap submission, or advance notice on the application of such other rule.

(c) Include the file numbers for prior filings with respect to any existing rule specified in response to Item 1(b).

2. Procedures of the Self-Regulatory Organization

Describe action on the proposed rule change, security-based swap submission, or advance notice taken by the members or board of directors or other governing body of the self-regulatory organization. See Instruction E.

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Provide a statement of the purpose of the proposed rule change and its basis under the Act and the rules and regulations thereunder applicable to the self-regulatory organization. With respect to proposed rule changes filed pursuant to Section 19(b)(1) of the Act, except for proposed rule changes that have been abrogated pursuant to Section 19(b)(7)(C) of the Act, the statement should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the self-regulatory organization. With respect to proposed rule changes filed pursuant to Section 19(b)(1) of the Act that have been abrogated pursuant to Section 19(b)(7)(C) of the Act, the statement should be sufficiently detailed and specific to support a finding under Section 19(b)(7)(D) of the Act that the proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public

interest or the protection of investors. At a minimum, the statement should:

(a) Describe the reasons for adopting the proposed rule change, any problems the proposed rule change is intended to address, the manner in which the proposed rule change will operate to resolve those problems, the manner in which the proposed rule change will affect various persons (*e.g.,* brokers, dealers, issuers, and investors), and any significant problems known to the self-regulatory organization that persons affected are likely to have in complying with the proposed rule change; and

(b) Explain why the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the self-regulatory organization. A mere assertion that the proposed rule change is consistent with those requirements is not sufficient. With respect to a proposed rule change filed pursuant to Section 19(b)(1) of the Act that has been abrogated pursuant to Section 19(b)(7)(C) of the Act, explain why the proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest and the protection of investors, in accordance with Section 19(b)(7)(D) of the Act. A mere assertion that the proposed rule change satisfies these requirements is not sufficient. In the case of a registered clearing agency, also explain how the proposed rule change will be implemented consistently with the safeguarding of securities and funds in its custody or control or for which it is responsible. Certain limitations that the Act imposes on self-regulatory organizations are summarized in the notes that follow.

Failure to describe and justify the proposed rule change in the manner described above may result in the Commission not having sufficient information to make an affirmative finding that the proposed rule change is consistent with the Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.

Note 1. *National Securities Exchanges and Registered Securities Associations.* Under Sections 6 and 15A of the Act, rules of a national securities exchange or registered securities association may not permit unfair discrimination between customers, issuers, brokers, or dealers, and may not regulate, by virtue of any authority conferred by the Act, matters not related to the purposes of the Act or the administration of the self-regulatory organization. Rules of a registered securities association may not fix minimum profits or impose any schedule of or fix rates of commissions, allowances, discounts, or other fees to be charged by its members.

Under Section 11A(c)(5) of the Act, a national securities exchange or registered securities association may not limit or condition the participation of any member in any registered clearing agency.

Note 2. *Registered Clearing Agencies.* Under Section 17A of the Act, rules of a registered clearing agency may not permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency, may not regulate, by virtue of any authority conferred by the Act, matters not related to the purposes of Section 17A of the Act or the administration of the clearing agency, and may not impose any schedule of prices, or fix rates or other fees, for services rendered by its participants.

Note 3. *Municipal Securities Rulemaking Board.* Under Section 15B of the Act, rules of the Municipal Securities Rulemaking Board may not permit unfair discrimination between customers, issuers, municipal securities brokers, or municipal securities dealers, may not fix minimum profits, or impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by municipal securities brokers or municipal securities dealers, and may not regulate, by virtue of any authority conferred by the Act, matters not related to the purposes of the Act with respect to municipal securities or the administration of the Municipal Securities Rulemaking Board.

4. Self-Regulatory Organization's Statement on Burden on Competition

State whether the proposed rule change will have an impact on competition and, if so, (i) state whether the proposed rule change will impose any burden on competition or whether it will relieve any burden on, or otherwise promote, competition and (ii) specify the particular categories of persons and kinds of businesses on which any burden will be imposed and the ways in which the proposed rule change will affect them. If the proposed rule change amends an existing rule, state whether that existing rule, as amended by the proposed rule change, will impose any burden on competition. If any impact on competition is not believed to be a significant burden on competition, explain why. Explain why any burden on competition is necessary or appropriate in furtherance of the purposes of the Act. In providing those explanations, set forth and respond in detail to written comments as to any significant impact or burden on competition perceived by any person who has made comments on the proposed rule change to the self-regulatory organization. A mere assertion that the proposed rule change satisfies these requirements is not sufficient. The statement concerning burdens on competition should be sufficiently detailed and specific to support a Commission finding that the proposed rule change does not impose any unnecessary or inappropriate burden on competition. Failure to describe and justify the proposed rule change in the manner described above may result in the Commission not having sufficient information to make an affirmative finding that the proposed rule change is consistent with the Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

If written comments were received (whether or not comments were solicited) from members of or participants in the self-regulatory organization or others, summarize the substance of all such comments received and respond in detail to any significant issues that those comments raised about the proposed rule change. If an issue is summarized and responded to in detail under Item 3 or Item 4, that response need not be duplicated if appropriate cross-reference is made to the place where the response can be found. If comments were not or are not to be solicited, so state.

6. Extension of Time Period for Commission Action

If the proposed rule change is subject to Commission approval, state whether the self-regulatory organization consents to an extension of the time period specified in Section 19(b)(2) or Section 19(b)(7)(D) of the Act and the duration of the extension, if any, to which the self-regulatory organization consents.

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)

(a) If the proposed rule change is to take, or to be put into, effect, pursuant to Section 19(b)(3), state whether the filing is made pursuant to paragraph (A) or (B) thereof.

(b) In the case of paragraph (A) of Section 19(b)(3), designate that the proposed rule change:

(i) Is a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule,

(ii) Establishes or changes a due, fee, or other charge,

(iii) Is concerned solely with the administration of the self-regulatory organization,

(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,

(v) Effects a change in an existing order-entry or trading system of a self-regulatory organization 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

(vi) Effects 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 self-regulatory organization 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. If it is requested that the proposed rule change become operative in less than 30 days, provide a statement explaining why the Commission should shorten this time period.

(c) In the case of paragraph (B) of Section 19(b)(3), set forth the basis upon which the Commission should, in the view of the self-regulatory organization, determine that the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities and funds requires that the proposed rule change should be put into effect summarily by the Commission.

Note. The Commission has the power under Section 19(b)(3)(C) of the Act to summarily 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 procedures of Section 19(b)(2) of the Act. Accordingly, in most cases, a summary order under Section 19(b)(3)(B) shall be effective only until such time as the Commission shall enter an order, pursuant to Section 19(b)(2)(A) of the Act, to approve such proposed rule change or, depending on the circumstances, until such time as the Commission shall institute proceedings to determine whether to disapprove such proposed rule change or, alternatively, such time as the Commission shall, at the conclusion of such proceedings, enter an order, pursuant to Section 19(b)(2)(B), approving or disapproving such proposed rule change.

(d) If accelerated effectiveness pursuant to Section 19(b)(2) or Section 19(b)(7)(D) of the Act is requested, provide a statement explaining why there is good cause for the Commission to accelerate effectiveness.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

State whether the proposed rule change is based on a rule either of another self-regulatory organization or of the Commission, and, if so, identify the rule and explain any differences between the proposed rule change and that rule, as the filing self-regulatory organization understands it. In explaining any such differences, give particular attention to differences between the conduct required to comply with the proposed rule change and that required to comply with the other rule.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

(a) A clearing agency shall submit to the Commission on this Form 19b–4, a security-based swap submission for any security-based swap, or any group, category, type or class of security-based swaps that the clearing agency plans to accept for clearing.

(b) The clearing agency shall include in the security-based swap submission a statement that includes, but is not limited to:

(i) How the security-based swap submission is consistent with Section 17A of the Act (15 U.S.C. 78q–1);

(ii) Information that will assist the Commission in the quantitative and qualitative assessment of the factors specified in Section 3C of the Act (15 U.S.C. 78c–3), including, but not limited to:

(A) The existence of significant outstanding notional exposures, trading liquidity and adequate pricing data;

(B) The availability of a rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded;

(C) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the clearing agency available to clear the contract;

(D) The effect on competition, including appropriate fees and charges applied to clearing; and

(E) The existence of reasonable legal certainty in the event of the insolvency of the relevant clearing agency or one or more of its clearing members with regard to the treatment of customer and security-based swap counterparty positions, funds, and property;

(iii) A description of how the rules of the clearing agency prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency, as applicable to the security-based swaps described in the security-based swap submission; and

(iv) A description of how the rules of the clearing agency provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility, as applicable to the security-based swaps described in the security-based swap submission.

Note. In connection with the factor specified in Item 9(b)(ii)(A) above, the statement describing the existence of outstanding notional exposures, trading liquidity and adequate pricing data could address pricing sources, models and procedures demonstrating an ability to obtain price data to measure credit exposures in a timely and accurate manner, as well as measures of historical market liquidity and trading activity, and expected market liquidity and trading activity if the security-based swap is required to be cleared (including information on the sources of such measures). With respect to the factor specified in Item 9(b)(ii)(B) above, the statement describing the availability of a rule framework could include a discussion of the rules, policies or procedures applicable to the clearing of the relevant security-based swap. Additionally, the discussion of credit support

infrastructure specified in Item 9(b)(ii)(B) above could include the methods to address and communicate requests for, and posting of, collateral. With respect to the factor specified in Item 9(b)(ii)(C) above, the discussion of systemic risk could include a statement on the clearing agency's risk management procedures including, among other things, the measurement and monitoring of credit exposures, initial and variation margin methodology, methodologies for stress testing and back testing, settlement procedures and default management procedures. With respect to the factor specified in Item 9(b)(ii)(D) above, the discussion of fees and charges could address any volume incentive programs that may apply or impact the fees and charges. With respect to the factor specified in Item 9(b)(ii)(E) above, the discussion of legal certainty in the event of an insolvency could address segregation of accounts and all other customer protection measures under insolvency.

In describing the security-based swap (or group, category, type or class of security-based swaps) referenced in the security-based swap submission, the clearing agency could discuss the relevant product specifications, including copies of any standardized legal documentation, generally accepted contract terms, standard practices for managing and communicating any life cycle events associated with the security-based swap and related adjustments, and the manner in which the information contained in the confirmation of the security-based swap trade is transmitted. The clearing agency also could discuss its financial and operational capacity to provide clearing services to all customers potentially subject to the clearing requirements as applicable to the particular security-based swap. Finally, the clearing agency could include an analysis of the effect of a clearing requirement on the market for the group, category, type, or class of security-based swaps, both domestically and globally, including the potential effect on market liquidity, trading activity, use of security-based swaps by direct and indirect market participants and any potential market disruption or benefits. This analysis could include whether the members of the clearing agency are operationally and financially capable of absorbing clearing business (including indirect access market participants) that may result from a determination that the security-based swap (or group, category, type or class of security-based swaps) is required to be cleared.

(c) A clearing agency shall submit security-based swaps to the Commission for review by group, category, type or class of security-based swaps, to the extent reasonable and practicable to do so.

(d) A clearing agency shall file as an amendment to this Form 19b–4 any additional information necessary to assess any of the factors the Commission determines to be appropriate in order to make a determination regarding the clearing requirement.

(e) A security-based swap submission pursuant to Section 3C that also is required to be filed as a proposed rule change under Section 19(b) or an advance notice under Section 806(e) of the Payment, Clearing and Settlement Supervision Act shall not take effect until determinations are obtained under each of the other applicable statutory provisions.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

(a) A designated clearing agency shall provide notice on this Form 19b–4 sixty (60) days in advance of any proposed change to its rules, procedures, or operations that could, as defined in Rule 19b–4, materially affect the nature or level of risks presented by the designated clearing agency.

(b) A designated clearing agency shall include in the advance notice a description of:

(i) The nature of the change and expected effects on risks to the designated clearing agency, its participants, or the market; and

(ii) how the designated clearing agency plans to manage any identified risks.

(c) A designated clearing agency shall file as amendment to this Form 19b–4 any additional information that is required to be filed by the Commission as necessary to assess the effect the proposed change would have on the nature or level of risks associated with the designated clearing agency's payment, clearing, or settlement activities and the sufficiency of any proposed risk management techniques.

(d) A designated clearing agency that implements a proposed change on an emergency basis must file notice with the Commission on Form 19b–4 within 24 hours of implementing the change. In addition to the information required for advance notices, the notice of an emergency change shall include a description of the nature of the emergency and the reason the change was necessary for the designated clearing agency to continue to operate in a safe and sound manner. Any change implemented by a designated clearing agency on an emergency basis also must comply with Section 19(b) and Section 3C of the Act to the extent those sections are applicable.

(e) A proposed change filed pursuant to Section 806(e) that is also required to be filed as a proposed rule change under Section 19(b) or a security-based swap submission under Section 3C shall not take effect until determinations are obtained under each of the other applicable statutory provisions.

11. *Exhibits*

List of exhibits to be filed, as specified in Instructions C and D:

Exhibit 1. Completed Notice of Proposed Rule Change for publication in the **Federal Register**. Amendments to Exhibit 1 should be filed in accordance with Instructions D and F.

Exhibit 1A. Completed Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice filed by Clearing Agencies for publication in the **Federal Register**. Amendments to Exhibit 1A should be filed in accordance with Instructions D and F.

Exhibit 2 (a) Copies of notices issued by the self-regulatory organization soliciting comment on the proposed rule change, security-based swap submission, or advance notice and copies of all written comments on the proposed rule change, security-based swap submission, or advance notice received by the self-regulatory organization (whether or not comments were solicited), presented in alphabetical order, together with an alphabetical listing of such comments. If such notices and comments cannot be filed electronically in accordance with Instruction F, the notices and comments shall be filed in accordance with Instruction G.

(b) Copies of any transcript of comments on the proposed rule change, security-based swap submission, or advance notice made at any public meeting or, if a transcript is not available, a copy of the summary of comments on the proposed rule change, security-based swap submission, or advance notice made at such meeting. If such transcript of comments or summary of comments cannot be filed electronically in accordance with Instruction F, the transcript of comments or summary of comments shall be filed in accordance with Instruction G.

(c) If after the proposed rule change, security-based swap submission, or advance notice is filed but before the Commission takes final action on it, the self-regulatory organization prepares or receives any correspondence or other communications reduced to writing (including comment letters) to and from such self-regulatory organization concerning the proposed rule change, security-based swap submission, or advance notice, the communications shall be filed in accordance with Instruction F. If such communications cannot be filed electronically in accordance with Instruction F, the communications shall be filed in accordance with Instruction G.

Exhibit 3. Copies of any form, report, or questionnaire covered by Item 1(a). If such form, report, or questionnaire cannot be filed electronically in accordance with Instruction F, the form, report, or questionnaire shall be filed in accordance with Instruction G.

Exhibit 4. For amendments to a filing, marked copies, if required by Instruction D, of the text of the proposed rule change as amended.

Exhibit 5. The SRO may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b–4. Exhibit 5 shall be considered part of the proposed rule change.

SPECIFIC INSTRUCTIONS FOR EXHIBIT 1—NOTICE OF PROPOSED RULE CHANGE

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34– ; File No. SR] [Date]

Self-Regulatory Organizations; [Name of Self-Regulatory Organization]; Notice of Filing [and Immediate Effectiveness] of a Proposed Rule Change Relating to [brief description of subject matter of proposed rule change]

General Instructions

A. Format Requirements

The notice must comply with the guidelines for publication in the **Federal Register**, as well as any requirements for electronic filing as published by the Commission (if applicable). For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, **Federal Register** cite, **Federal Register** date, and corresponding file number (e.g., SR–[SRO]–XX–XX). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0–3 under the Act (17 CFR 240.0–3). Leave a 1-inch margin at the top, bottom, and right hand side, and a 1½ inch margin at the left hand side. Number all pages consecutively, consistent with Rule 0–3 under the Act (17 CFR 240.0–3). Double space all primary text and single space lists of items, quoted material when set apart from primary text, footnotes, and notes to tables.

B. Need for Careful Preparation of the Notice

The self-regulatory organization must provide all information required in the notice and present it in a clear and comprehensible manner. It is the responsibility of the self-regulatory organization to prepare Items I, II and III of the notice. The Commission cautions self-regulatory organizations to pay particular attention to assure that the notice accurately reflects the information provided in the Form 19b–4 it accompanies. Any filing that does not comply with the requirements of Form 19b–4, including the requirements applicable to the notice, may be returned to the self-regulatory organization. Any document so returned shall for all purposes be deemed not to have been filed with the Commission. See Instruction B to Form 19b–4.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on (date) *, the (name of self-regulatory organization) filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

Information to Be Included in the Completed Notice

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

(Supply a brief statement of the terms of substance of the proposed rule change. If the proposed rule change is relatively brief, a separate statement need not be prepared, and the text of the proposed rule change may be inserted in lieu of the statement of the terms of substance. If the proposed rule change amends an existing rule, indicate changes in the rule by brackets for words to be deleted and underlined for words to be added.)

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements. (Reproduce the headings, and summarize briefly the most significant aspects of the responses, to Items 3, 4, and 5 of Form 19b–4, redesignating them as A, B, and C, respectively.)

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

(If the proposed rule change is to be considered by the Commission pursuant to Section 19(b)(2) of the Act, the following paragraph should be used.)

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

(If the proposed rule change is to take, or to be put into, effect pursuant to Section 19(b)(3)(A) of the Act and paragraph (f)(6) of Rule 19b-4 thereunder, the following paragraph should be used.)

Because the foregoing proposed rule change does not:

(i) significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change 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 Act.

(If the proposed rule change is to take, or to be put into, effect pursuant to Section 19(b)(3)(A) of the Act and subparagraphs (1)–(5) of paragraph (f) of Rule 19b–4 thereunder, the following paragraph should be used.)

* To be completed by the Commission. This date will be the date on which the Commission receives the proposed rule change if the filing complies with all requirements of this form. See Instruction B to Form 19b–4.

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and paragraph (f) of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change 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 Act.

(If the proposed rule change is to be considered by the Commission pursuant to Section 19(b)(7)(D) of the Act, the following paragraph should be used.)

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) after consultation with the Commodity Futures Trading Commission, institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov. Please include File Number XX on the subject line.*

Paper Comments

- Send paper comments in triplicate to [Name of Secretary], Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number **XX**. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the [self-regulatory organization]. 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. All submissions should refer to File Number **XX** and should be submitted on or before [insert date 21 days from publication in the **Federal Register**].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[1]

Secretary

SPECIFIC INSTRUCTIONS FOR EXHIBIT 1A—NOTICE OF PROPOSED RULE CHANGE, SECURITY-BASED SWAP SUBMISSION, OR ADVANCE NOTICE FILED BY CLEARING AGENCIES

EXHIBIT 1A

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34- ; File No. SR] [Date]

Self-Regulatory Organizations; [Name of Clearing Agency]; Proposed Rule Change, Security-Based Swap Submission, or Advance Notice Relating to [brief description of subject matter of proposed rule change, security-based swap submission, or advance notice]

General Instructions

A. Format Requirements

The notice must comply with the guidelines for publication in the **Federal Register**, as well as any requirements for electronic filing as published by the Commission (if applicable). For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, **Federal Register** cite, **Federal Register** date, and corresponding file number (e.g., SR–[SRO]–XX–XX). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0–3 under the Act (17 CFR 240.0–3). Leave a 1-inch margin at the top, bottom, and right hand side, and a 1½ inch margin at the left hand side. Number all pages consecutively, consistent with Rule 0–3 under the Act (17 CFR 240.0–3). Double space all primary text and single space lists of items, quoted material when set apart from primary text, footnotes, and notes to tables.

B. Need for Careful Preparation of the Notice

The clearing agency must provide all information required in the notice and present it in a clear and comprehensible manner. It is the responsibility of the clearing agency to prepare Items I, II and III of the notice. The Commission cautions clearing agencies to pay particular attention to assure that the notice accurately reflects the information provided in the Form 19b–4 it accompanies. Any filing that does not comply with the requirements of Form 19b–4, including the requirements applicable to the notice, may be returned to the clearing agency. Any document so returned shall for all purposes be deemed not to have been filed with the Commission. See Instruction B to Form 19b–4

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1) and Rule 19b–4, 17 CFR 240.19b–4, notice is hereby given that on (date)*, the (name of clearing agency) filed with the Securities and Exchange Commission the proposed rule change, security-based swap submission, or advance notice as described in Items I, II and III below, which Items have been prepared by the clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change, security-based swap submission, or advance notice from interested persons.

[1] 17 CFR 200.30–3(a)(12).

* To be completed by the Commission. This date will be the date on which the Commission receives the proposed rule change, security-based swap submission, or advance notice filing if the filing complies with all requirements of this form. See Instruction B to Form 19b–4.

Information to Be Included in the Completed Notice

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change, Security-Based Swap Submission, or Advance Notice

(Supply a brief statement of the terms of substance of the proposed rule change, security-based swap submission, or advance notice. If the proposed rule change is relatively brief, a separate statement need not be prepared, and the text of the proposed rule change may be inserted in lieu of the statement of the terms of substance. If the proposed rule change amends an existing rule, indicate changes in the rule by brackets for words to be deleted and underlined for words to be added.)

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change, Security-Based Swap Submission, or Advance Notice

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change, security-based swap submission, or advance notice and discussed any comments it received on the proposed rule change, security-based swap submission, or advance notice. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements. (Reproduce the headings, and summarize briefly the most significant aspects of the responses, to Items 3, 4, 5, 9 or 10 of Form 19b–4, as applicable, redesignating them as A, B, C, D or E, as applicable, respectively.)

III. Date of Effectiveness of the Proposed Rule Change, Security-Based Swap Submission, and Advance Notice and Timing for Commission Action

(If the proposed rule change is to be considered by the Commission pursuant to Section 19(b)(2) of the Act, the following paragraph should be used.)

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

(If the proposed rule change is to take, or to be put into, effect pursuant to Section 19(b)(3)(A) of the Act and paragraph (f)(6) of Rule 19b–4 thereunder, the following paragraph should be used.)

Because the foregoing proposed rule change does not:

(i) significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change 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 Act.

(If the proposed rule change is to take, or to be put into, effect pursuant to Section 19(b)(3)(A) of the Act and subparagraphs (1)–(5) of paragraph (f) of Rule 19b–4 thereunder, the following paragraph should be used.)

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and paragraph (f) of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change 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 Act.

(If the proposed rule change is to be considered by the Commission pursuant to Section 19(b)(7)(D) of the Act, the following paragraph should be used.)

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) after consultation with the Commodity Futures Trading Commission institute proceedings to determine whether the proposed rule change should be disapproved.

(If the proposed change is filed as a security-based swap submission pursuant to Section 3C of the Act, the following paragraph should be used.)

Within 90 days after receiving a security-based swap submission, unless the submitting clearing agency agrees to an extension of time limitation, the Commission shall by order make its determination whether the security-based swap, or group, category, type or class of security-based swaps, described in the security-based swap submission is required to be cleared. In making its determination that the clearing requirement shall apply, the Commission may include such terms and conditions to the requirement as the Commission determines to be appropriate in the public interest.

The clearing agency shall post notice on its Web site of any clearing requirement that is implemented.

(If the proposed change is filed as an advance notice pursuant to the Payment, Clearing and Settlement Supervision Act, the following paragraph should be used.)

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission or the Board of Governors of the Federal Reserve System providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency shall post notice on its Web site of proposed changes that are implemented.

(If the proposed change is filed following the implementation of a change on an emergency basis pursuant to the Payment, Clearing and

Settlement Supervision Act, the following paragraph should be used.)

The clearing agency implemented a proposed change that otherwise would be required to be filed as an advance notice because the clearing agency determined that (i) an emergency existed and (ii) immediate implementation was necessary for the clearing agency to continue to provide its services in a safe and sound manner. The Commission may require modification or recision of the proposed change if it finds it is not consistent with the purposes of the Payment, Clearing and Settlement Supervision Act or any applicable rules, orders, or standards prescribed under Section 805(a).

(If the proposal is submitted pursuant to more than one filing requirement, the clearing agency shall add the following language in addition to the language above.)

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, security-based swap submission, or advance notice is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov. Please include File Number* **XX** *on the subject line.*

Paper Comments

- Send paper comments in triplicate to [Name of Secretary], Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number **XX**. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change, security-based swap submission, or advance notice that are filed with the Commission, and all written communications relating to the proposed rule change, security-based swap submission, or advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the [clearing agency]. 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. All submissions should refer to File Number **XX** and should be submitted on or before [insert date 21 days from publication in the **Federal Register**].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[1]

Secretary

By the Commission.

Dated: June 28, 2012.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–16233 Filed 7–12–12; 8:45 am]

BILLING CODE 8011–01–P

[1] 17 CFR 200.30–3(a)(12).