

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

Release No. 34-63557; File No. S7-44-10

RIN 3235- AK87

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: Proposed 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 proposing 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 proposing 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 proposing 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. Furthermore, the Commission is

proposing 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: Comments should be received on or before February 14, 2011.

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

Electronic Comments:

- Use the Commission's Internet comment form

(<http://www.sec.gov/rules/proposed.shtml>); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-44-10 on the subject line; or

- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File Number S7-44-10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/proposed.shtml>). Comments also are available for website 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. All comments received will be posted without change; we do not edit personal

identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Kim Allen, Attorney Fellow, Catherine Moore, Senior Special Counsel, Kenneth Riitho, Special Counsel or Andrew Bernstein, Attorney-Advisor, at (202) 551-5710; Office of Clearance and Settlement, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION:

The Dodd-Frank Act seeks to ensure that, wherever possible and appropriate, derivatives contracts formerly traded exclusively in the over-the-counter (“OTC”) market be cleared.¹ One key way in which the Dodd-Frank Act promotes clearing of such contracts is by setting forth a process by which the Commission would determine whether a security-based swap is required to be cleared; 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 unless an exception applies.

The Commission may determine that a security-based swap is required to be cleared based on a 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

¹ 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.”).

for clearing (i.e., a Security-Based Swap Submission (as defined below)).² 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.³ In addition, paragraph (b)(1) of new Section 3C of the Exchange Act, as added by Section 763(a) of the Dodd-Frank Act (“Exchange Act Section 3C”) 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”).⁴

Consistent with the policy objective of the Dodd-Frank Act to bring security-based swaps into a central clearing environment where appropriate, the Commission is proposing to amend Rule 19b-4 under the Exchange Act to incorporate two new requirements applicable to clearing agencies under Exchange Act Section 3C, and under Section 806(e) of the Dodd-Frank Act (“Section 806(e”). The proposed amendments to Rule 19b-4 would mandate that submissions required under Exchange Act Section 3C for a security-based swap, or any group, category, type or class of security-based swaps, that a clearing agency plans to accept for clearing (“Security-Based Swap Submissions”) and advance notices required under Section 806(e) of proposed changes to rules, procedures or operations of financial market utilities (“Advance Notices”) be

² See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(2)(C)) (“[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.”).

³ See 15 U.S.C. 78s(b) and 12 U.S.C. 5465(e).

⁴ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(1)). The Dodd-Frank Act does not require rulemaking with respect to Commission-initiated Reviews.

filed with the Commission on Form 19b-4. The proposed amendments to Rule 19b-4 also would specify the manner of notice the clearing agency must provide to its members of Security-Based Swap Submissions.

Additionally, the Commission is proposing two related rules under Exchange Act Section 3C. Proposed Rule 3Ca-1 would establish the procedure by which the Commission, at the request of a counterparty or on its own initiative, may stay the requirement that a security-based swap is subject to mandatory clearing. Proposed Rule 3Ca-2 is 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 central counterparty. Finally, the Commission is proposing 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”).

I. Introduction

On July 21, 2010, the President signed the Dodd-Frank Act into law.⁵ The Dodd-Frank Act was enacted to, among other purposes, promote the financial stability of the United States by improving accountability and transparency in the financial system and by providing for enhanced regulation and oversight of institutions designated as systemically important.⁶ Title VII and Title VIII of the Dodd-Frank Act are intended to further these goals and to mitigate systemic risk in part by imposing new requirements with respect to clearance and settlement systems.

⁵ The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, H.R. 4173).

⁶ See Pub. L. No. 111-203, Preamble.

Title VII of the Dodd-Frank Act (“Title VII”) provides the Commission and the Commodity Futures Trading Commission (“CFTC”) with enhanced authority to regulate OTC derivatives following the recent financial crisis.⁷ 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 and is capable of affecting significant sectors of the U.S. economy. 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.”⁸

⁷ 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.”)

⁸ 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, shall jointly 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.” These terms are defined in Sections 721 and 761 of the Dodd-Frank Act and, with respect to the term “eligible contract participant,” in Section 1a(18) of the Commodity Exchange Act, 7 U.S.C. 1a(18), as re-designated and amended by Section 721 of the Dodd-Frank Act. Further, Section 721(c) of the Dodd-Frank Act requires the CFTC to adopt a rule to further define the terms “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant,” and Section 761(b) of the Dodd-Frank Act permits the Commission to adopt a rule to further define the terms “security-based swap,” “security-based swap dealer,” “major security-based swap participant,” and “eligible contract participant,” with regard to security-based swaps, for the purpose of including transactions and entities that have been structured to evade Title VII of the Dodd-Frank Act. Finally, Section 712(a) of the Dodd-Frank Act provides that the Commission and CFTC, after consultation with the Board, shall jointly prescribe regulations regarding “mixed swaps” as may be necessary to carry out the purposes of Title VII. To assist the Commission and CFTC in further defining the terms specified above, and to prescribe regulations regarding “mixed swaps” as may be necessary to carry out the purposes of Title VII, the Commission and the CFTC have requested comment from interested parties. See Securities Exchange Act Release No. 62717 (Aug. 13, 2010), 75 FR 51429 (Aug. 20, 2010) (Advance Joint Notice of Proposed Rulemaking Regarding Definitions Contained in Title VII of the Dodd-Frank Act).

The OTC derivatives 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.⁹ Clearing of swaps and security-based swaps was at the heart of Congressional reform of the derivatives markets in Title VII of the Dodd Frank Act.¹⁰ Clearing agencies are broadly defined under the Exchange Act and undertake a variety of functions.¹¹ One such function is to act as a central counterparty (“CCP”), which is an entity that interposes itself between the counterparties to a trade.¹² For example, when an OTC derivatives 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

⁹ See, e.g., Financial Stability Board, Implementing OTC Derivatives Market Reforms (Oct. 25, 2010) available at http://www.financialstabilityboard.org/publications/r_101025.pdf.

¹⁰ 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 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).

¹¹ The term “clearing agency” means 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 (i) 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 (ii) 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).

¹² 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.

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.¹³ Structured and operated appropriately, CCPs may improve the management of counterparty risk and may provide additional benefits such as multilateral netting of trades.

Exchange Act Section 3C sets forth a mandatory clearing requirement for security-based swaps. This section requires the Commission to adopt rules for submissions for review of security-based swaps that a clearing agency plans to accept for clearing for a determination by the Commission of whether the security-based swap (or group, category, type or class of security-based swaps) is required to be cleared, *i.e.*, is subject to mandatory clearing.¹⁴ The Commission is proposing amendments to Rule 19b-4 under the Exchange Act to implement the requirement in Exchange Act Section 3C that a clearing agency submit for Commission review each security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing and provide notice to its members of such Security-Based Swap Submission. The Commission also is proposing new Rules 3Ca-1 and 3Ca-2 under the Exchange Act. Proposed Rule 3Ca-1 specifies the procedure for staying the clearing requirement applicable to a security-based swap, based either on an application of a counterparty to a security-based swap or on the Commission's own initiative, until the Commission completes a review of the terms of the security-based swap and the clearing arrangement. Proposed Rule 3Ca-2 establishes a rule designed 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 central counterparty.

¹³ See Cecchetti, Gyntelberg and Hollanders, Central counterparties for over-the-counter derivatives, BIS Quarterly Review, September 2009, available at http://www.bis.org/publ/qtrpdf/r_qt0909f.pdf.

¹⁴ Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(2)(C)).

The Commission also is proposing rules to implement a filing requirement applicable to certain clearing agencies under Title VIII of the Dodd-Frank Act (“Title VIII”). Title VIII provides for enhanced regulation of financial market utilities, which include 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.¹⁵ 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.¹⁶

Section 806(e)(1)(A) of Title VIII requires any financial market utility designated by the Council under Section 804 of the Dodd-Frank Act as systemically important to file 60 days advance notice of changes to its rules, procedures or operations that could materially affect the

¹⁵ The definition of “financial market utility” in Section 803(6) of the Dodd-Frank Act contains a number of exclusions including but 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).

¹⁶ Pursuant to Section 803(9) of the Dodd-Frank 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). Under Section 804 of the Dodd-Frank 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 Dodd-Frank Act). Finally, Section 804 of the Dodd-Frank 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.

nature or level of risk presented by the financial market utility.¹⁷ In addition, Section 806(e)(1)(B) requires each Supervisory Agency¹⁸ to adopt rules, in consultation with the Board of Governors of the Federal Reserve System (“Board”), that define and describe when designated financial market utilities are required to file Advance Notices with their Supervisory Agency.¹⁹

Clearing agencies registered with the Commission are financial market utilities, as defined in Section 803(6) of Title VIII,²⁰ thus, the Commission may be the Supervisory Agency of a clearing agency that is designated as systemically important by the Council (“designated clearing agency”).²¹ A clearing agency must begin filing Advance Notices pursuant to Section 806(e) once the Council designates the clearing agency as systemically important.²² The Commission is proposing to implement the Section 806(e) filing requirement by amending Rule 19b-4 to define and determine when Advance Notices must be filed by designated clearing agencies and to require that Advance Notices be filed on Form 19b-4.

¹⁷ 12 U.S.C. 5465(e)(1)(A).

¹⁸ Section 803(8) of the Dodd-Frank 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 Dodd-Frank 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). 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 Dodd-Frank Act. 12 U.S.C. 5462(8).

¹⁹ 12 U.S.C. 5465(e)(1)(B).

²⁰ 12 U.S.C. 5462(6).

²¹ See supra note 18 discussing the definition of “Supervisory Agency” under the Dodd-Frank Act.

²² Pursuant to Section 814 of the Dodd Frank Act, Title VIII took effect on the date of enactment.

The Commission is proposing that Security-Based Swap Submissions and Advance Notices be filed with the Commission on Form 19b-4 using the existing Electronic Form 19b-4 Filing System (“EFFS”). Currently, EFFS is used by self-regulatory organizations (“SROs”), which include registered clearing agencies,²³ to file proposed rule changes electronically with the Commission pursuant to Exchange Act Section 19(b).²⁴ The Commission is proposing to require clearing agencies to use EFFS for the filing of Security-Based Swap Submissions and Advance Notices because registered clearing agencies already use EFFS for Exchange Act Section 19(b) filings and because there are similarities between the requirement to file proposed rule changes under Exchange Act Section 19(b) and the new requirements under the Dodd-Frank Act to file Security-Based Swap Submissions and Advance Notices. For example, a proposed rule change under Exchange Act Section 19(b) includes a change in a “stated policy, practice, or interpretation” of an SRO rule. A “stated policy, practice, or interpretation” is defined in Exchange Act Section 19(b) as “any material aspect of the operation of the facilities of the SRO; or any statement made generally available to the membership of, to all participants in, or to persons having or seeking access . . . 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 (1) the rights, obligations, or privileges of specified persons . . . ; or (2) the meaning, administration, or enforcement of an existing rule.”²⁵ In cases

²³ 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). All SROs are required to file proposed rule changes with the Commission under Exchange Act Section 19(b). 15 U.S.C. 78s(b).

²⁴ 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”). 15 U.S.C. 78s(b)(1).

²⁵ 17 CFR 240.19b-4(c).

where accepting a security-based swap (or group, category, type or class of security-based swaps) for clearing constitutes a change in a “stated policy, practice, or interpretation” of the clearing agency, the clearing agency also would be required to file a proposed rule change. Similarly, if a change that a designated clearing agency proposes to make that would require an Advance Notice would also constitute a change in a “stated policy, practice, or interpretation” of the clearing agency, the clearing agency would be required to file a proposed rule change in addition to the Advance Notice.

The Commission also is proposing to amend 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.²⁶ Section 916 provides new deadlines by which the Commission must publish and act upon proposed rule changes submitted by SROs and new standards for approval, disapproval and temporary suspension of proposed rule changes.²⁷ In addition, the Commission is proposing a number of technical and clarifying amendments to Rule 19b-4 and Form 19b-4.

In proposing these rules, the Commission is mindful that there are differences between the security-based swap market and the other securities markets that the Commission regulates. The Commission also is mindful that over time and as a result of Commission proposals to implement the Dodd-Frank Act, further development of the security-based swap market may alter the policy objectives and considerations relating to the clearing of security-based swaps. During the process of implementing the Dodd-Frank Act and beyond, the Commission therefore will closely monitor developments in the security-based swap market, including how the Security-Based Swap Submission and clearing processes interact with the evolving business and practices of security-based swap clearing agencies and other entities.

²⁶ Pub. L. No. 111-203, section 916 (amending Exchange Act Section 19(b)(2)).

²⁷ Id.

II. Discussion of the Proposed Rules

The Commission is proposing to adopt 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 (found in Title VII), the Commission is proposing amendments to Rule 19b-4 and Form 19b-4 and new Rule 3Ca-1 under the Exchange Act to establish processes for (i) clearing agencies registered with the Commission to submit for review each security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing for a determination by the Commission of whether the security-based swap (or group, category, type or class of security-based swaps) 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 proposing new Rule 3Ca-2 to prevent evasions of the clearing requirement. In addition, the Commission is proposing amendments to Rule 19b-4 and Form 19b-4 to implement the requirement, pursuant to Section 806(e), that any designated clearing agency for which the Commission is the Supervisory Agency will be required to provide advance notice to the Commission of changes to its rules, procedures or operations that could materially affect the nature or level of risks presented by the designated clearing agency. This release also discusses the filing requirements in Exchange Act Section 19(b), Exchange Act Section 3C, and Section 806(e) and a clearing agency's obligation to fully comply with and seek a determination pursuant to each separate statutory requirement, when applicable.

A. Security-Based Swap Submissions

Exchange Act Section 3C creates, among other things, a clearing requirement with respect to security-based swaps. Specifically, the 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.”²⁸

Exchange Act Section 3C requires the Commission, not later than one year after the date of the enactment of the Dodd-Frank Act, to adopt 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.²⁹ In connection with rulemaking related to Security-Based Swap Submissions, the Commission is proposing rules related to (i) the process for making Security-Based Swap Submissions to the Commission, (ii) the substance of Security-Based Swap Submissions and (iii) the timing related to Security-Based Swap Submissions. The Commission also is proposing a process and timing for clearing agencies to provide notice to their members of Security-Based Swap Submissions.

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

A clearing agency that plans to accept a security-based swap for clearing must file a Security-Based Swap Submission with the Commission for a determination by the Commission

²⁸ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(a)(1)). The requirement that a security-based swap be cleared stems from a determination 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 (i.e., a Security-Based Swap Submission). See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(2)(C)) (“[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.”

²⁹ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(2)(A)).

of whether a security-based swap, or a group, category, type or class of security-based swaps, is required to be cleared. As discussed in Section I, in cases where accepting a security-based swap (or group, category, type or class of security-based swaps) for clearing constitutes a change in a “stated policy, practice, or interpretation” of the clearing agency, the clearing agency also would be required to file a proposed rule change. In such cases, the Commission must determine (i) whether to approve the clearing agency’s proposed rule change to clear the applicable security-based swap and (ii) whether the security-based swap would be subject to the mandatory clearing requirement.

The Commission is proposing to require clearing agencies to use EDFS and Form 19b-4 for Security-Based Swap Submissions. Clearing agencies, as SROs, are already required to file proposed rule changes on Form 19b-4 on EDFS. 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. In addition, the Commission anticipates that a submission to clear a security-based swap, or any group, category, type or class of security-based swaps, may be required to be filed under both Exchange Act Section 19(b) and Exchange Act Section 3C. This is because a submission that must be filed with the Commission for a determination under new Exchange Act Section 3C also may qualify as a proposed rule change that must be filed with the Commission under Exchange Act Section 19(b).³⁰ 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

³⁰ A clearing agency rule is defined broadly in the Exchange Act to include the constitution, articles of incorporation, by-laws, and rules, or instruments corresponding to the foregoing. 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).

Section 3C and Exchange Act Section 19(b), the Commission preliminarily believes that the most efficient use of the Commission's and clearing agencies' resources would be to require clearing agencies to use the existing Form 19b-4 filing process for both types of filings.

Accordingly, the proposed rules related to the Security-Based Swap Submission process would be added to existing Rule 19b-4, which currently governs the process for filing proposed rule changes.

The Commission's proposed approach would eliminate the need for multiple submissions to the Commission and could be accomplished by adding a box to Form 19b-4 that clearing agencies would check to indicate that they are making a Security-Based Swap Submission. As a practical matter, the Commission 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 reviews will be carried out in tandem. 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, EFS and Form 19b-4 still would be used for the Security-Based Swap Submission.

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

In reviewing a Security-Based Swap Submission, the Commission is required to review whether the submission is consistent with Exchange Act Section 17A.³¹ Accordingly, the Commission is proposing that each Security-Based Swap Submission contain a statement regarding how the submission is consistent with Exchange Act Section 17A.³² Exchange Act Section 17A specifies, among other things, that the Commission is directed, having due regard

³¹ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(4)(A)).

³² Proposed Rule 19b-4(o)(3)(i).

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.³³

The Commission must review whether a proposed rule change filed by an SRO pursuant to Exchange Act Section 19(b) is consistent with Exchange Act Section 17A.³⁴ 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.”³⁵ Presently, in complying with this requirement, registered clearing agencies, among other things, specify how the proposed rule change is consistent with the requirements under Exchange Act Section 17A(b)(3). All registered clearing agencies must comply with the standards in Exchange Act Section 17A, which include requirements under Exchange Act Section 17A(b)(3) 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

³³ 15 U.S.C. 78q-1.

³⁴ See 15 U.S.C. 78s(b)(2)(C)(i), which provides that the Commission shall approve a proposed rule change of an SRO if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations issued thereunder that are applicable to such organization.

³⁵ Item 3(b) of Form 19b-4. 17 CFR 240.819. Exchange Act Section 19(b) has a similar but not identical requirement. It requires that an SRO provide a statement of the basis of the proposed rule change and provides that the Commission shall only approve a proposed rule change 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).

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.³⁶ A registered clearing agency is also required under Exchange Act Section 17A(b)(3) 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.³⁷ Under the proposed amendments to Rule 19b-4, a clearing agency would be required to specify how the Security-Based Swap Submission is consistent with Exchange Act Section 17A and specifically the requirements applicable under subsection 17A(b)(3).

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

The Dodd-Frank Act requires the Commission to take into account several factors in addition to consistency with Exchange Act Section 17A in reviewing a clearing agency's Security-Based Swap Submission.³⁸ The Commission is proposing to require clearing agencies to provide information relevant to these factors through the proposed amendments to Rule 19b-4 and Form 19b-4. Specifically, clearing agencies would be required to submit quantitative and qualitative information to assist the Commission in the consideration of the five factors Exchange Act Section 3C requires the Commission to take into account in reviewing a Security-Based Swap Submission, which include:

- (i) The existence of significant outstanding notional exposures, trading

³⁶ See 15 U.S.C. 78q-1(b)(3)(F).

³⁷ 15 U.S.C. 78q-1(b)(3)(A), (B) and (F).

³⁸ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(4)(B)(i)-(v)).

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.³⁹

Each Security-Based Swap Submission would be required to address the factors listed above to the extent they are applicable to the security-based swap, the clearing agency and the market.

For example, in connection with the discussion responsive to factor (i) above, the clearing agency 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 discussion of factor (ii) above, the statement

³⁹ Proposed Rule 19b-4(o)(3)(ii).

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 could include the methods to address and communicate requests for, and posting of, collateral. With respect to factor (iii) 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 factor (iv) 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 factor (v) above, the discussion could address segregation of accounts and all other customer protection measures under insolvency.

In describing the security-based swap, or any group, category, type or class of security-based swaps, that a clearing agency plans to accept for clearing, the clearing agency could include the relevant product specifications, including copies of any standardized legal documentation, generally accepted contract terms,⁴⁰ standard practices for managing and communicating any life cycle events associated with the security-based swap and related adjustments,⁴¹ 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 subject to the clearing

⁴⁰ For example, for some security-based swaps, industry standard documentation would include the applicable International Swaps and Derivatives Association, Inc. Master Agreement and any related asset-class-specific definitions.

⁴¹ The Commission has proposed Regulation SBSR, which contains a definition of "life cycle event." See Exchange Act Release No. 63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010) ("Regulation SBSR – Reporting and Dissemination of Security-Based Swap Information").

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. Substance of Security-Based Swap Submissions: Open Access

New 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.⁴² 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, the proposed rule provides that the Security-Based Swap Submission must include a statement regarding how a 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

⁴² See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(a)(2) (“[t]he 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.”)).

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.⁴³

In making a determination, the Commission proposes to take into account the factors specified in Exchange Act Section 3C and any additional information the Commission determines to be appropriate. The proposed rule also requires a clearing agency to provide any additional information requested by the Commission as necessary to make a determination.⁴⁴ The Commission believes that such a requirement would provide appropriate flexibility to facilitate our regulatory responsibilities. 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.⁴⁵

d. Timing related to Security-Based Swap Submissions

Under Exchange Act Section 3C, as added by Section 763(a) of the Dodd-Frank Act, 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.⁴⁶ The 90-day determination

⁴³ Proposed Rule 19b-4(o)(3)(ii).

⁴⁴ Proposed Rule 19b-4(o)(6)(i).

⁴⁵ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(4)(C)) and Proposed Rule 19b-4(o)(6)(ii).

⁴⁶ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(3)). Further, pursuant to proposed 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

period may be extended with the consent of the clearing agency making such Security-Based Swap Submission.⁴⁷ The Commission is required 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.”⁴⁸ This 30-day comment period enables 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 proposes to make the Security-Based Swap Submission available for a 30-day public comment period within the 90-day determination period. The Commission would publish notice of the Security-Based Swap Submission in the Federal Register and publish notice on the Commission’s publicly-available website at www.sec.gov. Such notice would include the solicitation of public comment. This proposed publication process would be consistent with the current process that is in place for proposed rule changes under Exchange Act Section 19(b)(2) and Rule 19b-4.

e. Notice to clearing agency members

New Exchange Act Section 3C requires that a clearing agency provide notice to its members, in a manner determined by the Commission, of its Security-Based Swap Submissions.⁴⁹ To meet the requirement of providing notice of Security-Based Swap Submissions to members, the Commission is proposing amendments to Rule 19b-4 that would require clearing agencies to post on their websites such submissions to the Commission, and any

a Security-Based Swap Submission and the Commission would be required to inform the clearing agency within twenty-one business days of such submission.

⁴⁷ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(3)).

⁴⁸ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(2)(C)).

⁴⁹ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(2)(A)).

amendments thereto.⁵⁰ This public posting would be required to be completed within two business days following the Security-Based Swap Submission to the Commission. This timeframe is consistent with the notice requirement that currently applies to proposed rule changes,⁵¹ and the Commission believes that such timeframe would provide members of the clearing agency and the public with timely notice of the submission. The clearing agency would be required to maintain such material on its website 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.⁵² 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. Any correspondence the SRO receives after it files a proposed rule change, but before the Commission takes final

⁵⁰ Proposed Rule 19b-4(o)(5).

⁵¹ Commission rules currently require SROs to post on their websites 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 Securities Exchange Act Release No. 50486 (Oct. 4, 2004), 69 FR 60287 (Oct. 8, 2004) (Final Rules Regarding Proposed Rule Changes of Self-Regulatory Organizations).

⁵² Proposed Rule 19b-4(o)(5).

action on the proposed rule change, also is required to be filed with the Commission.⁵³ 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.⁵⁴ The Commission is proposing that in connection with Security-Based Swap Submissions, clearing agencies would be subject to these same requirements. The Commission preliminarily believes that its proposal to apply such requirements in the instructions to Form 19b-4 to Security-Based Swap Submissions would provide the Commission with an opportunity to consider the various viewpoints expressed by commenters by making sure relevant comments are included in the materials provided to the Commission.

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

The proposed amendments to Rule 19b-4 and Form 19b-4 would require that clearing agencies submit security-based swaps for review by group, category, type, or class to the extent it is practicable and reasonable to do so.⁵⁵ Any aggregation would be required to be clearly described in a Security-Based Swap Submission so that market participants and the public know which security-based swaps may be subject to a clearing requirement. The Commission preliminarily believes that including 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

⁵³ See Items 5 and 9 (Exhibit 2) of Form 19b-4. 17 CFR 240.819.

⁵⁴ Item 5 of Form 19b-4. 17 CFR 240.819.

⁵⁵ Proposed Rule 19b-4(o)(4). In its release proposing rules to implement Section 723 of the Dodd-Frank Act, the CFTC has proposed a similar rule. 75 FR 67277 (November 2, 2010).

submission process for Commission staff and the clearing agencies. This in turn would allow more security-based swaps to be reviewed in a timely manner.

Request for Comments

The Commission generally requests comments on all aspects of the proposed amendments to Rule 19b-4 that would incorporate the process for making Security-Based Swap Submissions. In addition, the Commission requests comments on the following specific issues:

- Are there specific considerations that the Commission should weigh more heavily in reviewing whether a Security-Based Swap Submission is consistent with Exchange Act Section 17A? If so, what are such considerations?
- Should the information included in this release as examples of the kinds of information the clearing agency should include in its Security-Based Swap Submission be required in all cases and incorporated into the rules?
- To describe the security-based swap, or any group, category, type or class of security-based swaps, that a clearing agency plans to accept for clearing, should a clearing agency be required to include in its Security-Based Swap Submissions specific 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? If not, why not? Is there other information relating to the description of the security-based swaps that clearing agencies should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?

- What specific information should a clearing agency be required to include in its Security-Based Swap Submissions regarding 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)? Is there other information relating to pricing that clearing agencies should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?
- What specific information should a clearing agency be required to include in its Security-Based Swap Submissions pertaining to the rules, policies or procedures applicable to the clearing of the relevant security-based swap? Is there other information relating to rule framework, capacity, operational expertise and resources the clearing agency should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?
- Is there specific information a clearing agency should be required to include in its Security-Based Swap Submissions regarding the methods to address and communicate requests for, and posting of, collateral? Is there other information relating to collateral that the clearing agency should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?
- What specific information should a clearing agency be required to include in its Security-Based Swap Submissions regarding the clearing agency's risk management procedures, pertaining to 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? Is there other information relating to risk management that the clearing agency should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?

- Should a clearing agency, in connection with each submission or in some circumstances, be required to include an independent validation of its margin methodology and its ability to maintain sufficient financial resources? Why or why not, or in which circumstances? If independent validation is required, how should the Commission assess the independence and technical expertise of the party providing the independent validation? What are the critical techniques, risk factors and components that should be covered by the model validation and why? If the clearing of the security-based swap described in the Security-Based Swap Submission would not require a change in the clearing agency's margin methodology, do commenters believe it would be sufficient for the Commission to permit the clearing agency to refer to an applicable independent validation of the clearing agency's margin methodology previously provided to the Commission with a statement explaining why the existing methodology does not require a change in connection with clearing the new security-based swap and how the current validation is still applicable in the context of the security-based swap the clearing agency plans to clear? If not, why not?
- What information should a clearing agency be required to include in its Security-Based Swap Submissions regarding fees and charges and address any volume incentive programs that may apply or impact the fees and charges? Is there other information

relating to fees and charges that the clearing agency should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?

- Should a clearing agency be required to include in its Security-Based Swap Submission information regarding segregation of accounts and all other customer protection measures under insolvency? If not, why not? Is there other information relating to insolvency of the clearing agencies' members the clearing agency should be required to provide? If so, what information and why? Should this information be required in all cases and incorporated into the rules?
- Should a clearing agency be required to include in its Security-Based Swap Submission information on whether cross-margining is available to the clearing agency's members with respect to their positions at other clearing agencies? If not, why not? What types of effects on competition are such cross-margining arrangements likely to have? Is there any specific information regarding cross-margining arrangements that the Commission should collect? If not, why not? If so, what information and why? Should this information be required in all cases and incorporated into the rules?
- What information should a clearing agency be required to include in its Security-Based Swap Submission regarding its financial and operational capacity to provide clearing services to all customers subject to the clearing requirements as applicable to the particular security-based swap? Should this information be required to 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

- Is the process for notice to clearing agency members by posting on the clearing agency website, as proposed by the Commission, adequate as a notice mechanism for members? If not, what should change? Is the two-day posting requirement appropriate to provide timely notice to members? Would a shorter or longer period be appropriate?
- What other method of notice to clearing agency members could or should be required rather than website posting?
- Should the Commission utilize the proposed rule change filing system for Security-Based Swap Submissions? What other methods of submitting Security-Based Swap Submissions to the Commission should the Commission consider and why?
- What alternatives should the Commission consider to requiring clearing agencies to submit security-based swaps for review by group, category, type, or class, to the extent it is practicable and reasonable to do so?
- Should the Commission consider consolidating multiple Security-Based Swap Submissions from one clearing agency into a group, category, type, or class of Security-

Based Swap Submissions, or subdividing a clearing agency's submission of a group, category, type, or class of security-based swaps, as appropriate, for review?

- What information should the clearing agency include in its Security-Based Swaps Submissions to identify the scope of the group, category, type or class of security-based swaps it plans to clear that will provide sufficient parameters to put people on notice that a security-based swap may be required to be cleared?
- What characteristics of security-based swaps should be common among security-based swaps in order to aggregate them by group, category, type or class? Would these characteristics be the same across asset classes such as security-based equities derivatives, credit derivatives and loan-based swaps? Should the Commission specify those attributes in the rule?
- Are there any factors that would make aggregation more difficult? Would these be the same or different across asset classes?
- Are there factors that may be clearing-agency specific with respect to aggregation? If so, what are those factors?

As discussed above, Exchange Act Section 3C provides, among other things, for a determination by the Commission of whether security-based swaps are required to be cleared.⁵⁶ The Commission may determine that a security-based swap is required to be cleared based on a 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 (i.e., a Security-Based Swap Submission).⁵⁷ Consistent with proposal, if the

⁵⁶ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(a)(1)).

⁵⁷ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(2)(C)) (“[t]he Commission shall . . . review each submission made under subparagraphs (A) and

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.⁵⁸ 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” (i.e., a Commission-initiated Review).⁵⁹

The proposed addition of paragraph (o) to Rule 19b-4 and related amendments to Form 19b-4 are intended to provide a process for Security-Based Swap Submissions. The Commission is required under the Dodd-Frank Act to adopt rules specifying the process for Security-Based Swap Submissions. As part of the process of review of each Security-Based Swap Submission (and in each Commission-initiated Review), the Commission must take into account the five factors specified in Exchange Act Section 3C(b)(4)(B):

- (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.

(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.”).

⁵⁸ See 15 U.S.C. 78s(b) (proposed rule changes) and 12 U.S.C. 5465(e) (Advance Notices).

⁵⁹ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(1)). The Dodd-Frank Act does not require rulemaking with respect to Commission-initiated Reviews.

- (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.⁶⁰

Proposed Rule 19b-4(o) and related amendments for Form 19b-4 would require clearing agencies to include in their Security-Based Swap Submissions information that will assist the Commission in the quantitative and qualitative assessment of the statutory factors listed above. The proposal also set forth examples of the information clearing agencies should include in addressing these five factors.⁶¹

Promoting clearing is a critical component of the reform mandated by the Dodd-Frank Act, which seeks to bring transactions and counterparties into a robust, conservative and transparent risk management framework.⁶² Exchange Act Section 3C(b)(4)(B)⁶³ sets forth the

⁶⁰ Proposed Rule 19b-4(o)(3)(ii).

⁶¹ See Section II.A.1.b for a discussion of the types of information that should be included in a Security-Based Swap Submission.

⁶² See 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) (“Congress determined that clearing is at the heart of reform – bringing transactions and counterparties into a robust, conservative and transparent risk management framework. Congress also acknowledged

factors the Commission is required to take into account in determining whether a security-based swap is required to be cleared or should be required to be cleared in connection with a Security-Based Swap Submission or Commission-initiated Review, respectively. The Commission recognizes that in interpreting and applying these factors, it should be guided by the general principles underlying the Dodd-Frank Act, including in particular the goal of promoting clearing where appropriate. At the same time, the Commission is mindful that its application of these factors may have a significant effect on the market for individual security-based swaps. In addition, an overly broad or narrow application of the mandatory clearing requirement could undermine the policy objectives of the Dodd-Frank Act. For example, a premature determination that a security-based swap is subject to mandatory clearing may, in certain circumstances, limit the ability of certain market participants to utilize that product (including for risk management purposes) which in turn could ultimately result in less clearing and more limited use of the security-based swap than might otherwise have been the case if it had been permitted to trade without being subject to a mandatory clearing requirement for a longer period of time.

On the other hand, an overly narrow application of the mandatory clearing requirement would undermine the potential benefits of centralized clearing for counterparties and the marketplace generally that Exchange Act Section 3C was intended to provide. Moreover, because security-based swaps that are subject to the clearing requirement also are required to be

that clearing may not be suitable for every transaction or every counterparty. End users who hedge their risks may find it challenging to use a standard derivative contract to exactly match up their risks with counterparties willing to purchase their specific exposures. Standardized derivative contracts may not be suitable for every transaction.”). Additionally, and as discussed herein in Section II.A.1.a, Exchange Act Section 3C(b)(4)(A) requires the Commission to review whether a Security-Based Swap Submission is consistent with Exchange Act Section 17A.

⁶³ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(4)(B)).

executed on a national securities exchange or a swap execution facility if such an exchange or facility makes the security-based swap available to trade, imposing a clearing requirement could have a substantial impact generally on the trading environment of the relevant instruments, which in turn could affect the relative transparency and liquidity of those instruments in ways that may promote, or detract from, the overall goals of the Dodd-Frank Act.

In short, the Commission recognizes, as did Congress, that a determination that clearing is required could have ancillary consequences. The Dodd-Frank Act includes an exception from the mandatory clearing requirement to help address concerns regarding circumstances when clearing may not be appropriate.⁶⁴

However, because the Commission must still apply the statutory factors, in light of the policy goals of the Dodd-Frank Act, to determine whether clearing is required, the Commission is seeking comment generally on how the factors identified in the statute should be applied in making determinations as to whether particular security-based swaps are or should be required to be cleared.

Request for Comments

- Are there specific considerations that the Commission should weigh more heavily in making a determination that a security-based swap is, or should be, required to be

⁶⁴ See 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. Also, OTC (contracts not cleared centrally) should still be subject to reporting, capital, and margin requirements so that regulators have the tools to monitor and discourage potentially risky activities, except in very narrow circumstances. These exceptions should be crafted very narrowly with an understanding that every company, regardless of the type of business they are engaged in, has a strong commercial incentive to evade regulatory requirements.”).

cleared? If so, what are such considerations and why should they be given greater weight?

- In a Commission-initiated review, should the Commission consider information that is different from the information the Commission has proposed for a clearing agency to provide in a Security-Based Swap Submission to enable the Commission to make a determination regarding a clearing requirement? If so, what information should be considered and why?
- How should the Commission measure “significant outstanding notional exposures”? Should the Commission consider a threshold or a range for what qualifies as “significant outstanding notional exposures”? If so, should this threshold or range vary depending on the asset class?
- How should the Commission analyze whether pricing data is adequate?
- In taking into account the effect of requiring a security-based swap (or group, category, type or class of security-based swaps) to be cleared on the mitigation of systemic risk, how should the Commission evaluate the resources of the clearing agency available to clear the security-based swaps?
- In considering the existence of legal certainty in the event of the insolvency of the relevant clearing agency or one or more of its clearing members, are there specific factors that the Commission should take into account? Would seeking information from third-party sources such as legal opinions be appropriate? Are there any cross-border considerations that should be considered?

- How should the Commission analyze the pool of potential counterparties to a security-based swap (or group, category, type or class of security-based swaps) subject to the clearing requirement?
- How should the Commission analyze the potential effect, including the potential effect on liquidity, trading activity, use of security-based swaps by direct and indirect market participants and any potential disruption or benefit to the market for a security-based swap (or group, category, type, or class of security-based swaps) required to be cleared?
- Is there information reported to the swap data repository that is otherwise not available to the public that a clearing agency would require to prepare its Security-Based Swap Submission? If so, what information would be required, and why?

2. Prevention of Evasion of the Clearing Requirement.

Exchange Act Section 3C directs the Commission to prescribe rules (and interpretations of rules) the Commission determines to be necessary to prevent evasions of the clearing requirements.⁶⁵ The term “clearing agency” is defined broadly under the Exchange Act,⁶⁶ and clearing agencies may offer a spectrum of clearing services. Specifically, 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.⁶⁷ As a result,

⁶⁵ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(d)(1), which states 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.”).

⁶⁶ See supra note 11 discussing the definition of “clearing agency” pursuant to Exchange Act Section 3(a)(23)).

⁶⁷ See Securities Exchange Act Release Nos. No. 20221 (Sept.23, 1983), 48 FR 45167 (October 3, 1983), (Order Approving the Clearing Agency Registration of Four

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 preliminarily 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.”⁶⁸ 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 submit 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 preliminarily believes that other types of clearing functions and services offered by clearing agencies would not achieve the goal of central clearing contemplated under the Dodd-Frank Act – improving the management of counterparty risk.⁶⁹ The Commission preliminarily believes that proposed Rule 3Ca-2 would 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, proposed Rule 3Ca-2 would clarify the reference to “submits such security-based swap for clearing to a

Depositories and Four Clearing Corporations) and 39829 (April 6, 1998), 63 FR 17943 (April 13, 1998) (Confirmation and Affirmation of Securities Trades; Matching).

⁶⁸ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(a)(1)).

⁶⁹ 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. Structured and operated appropriately, CCPs may improve the management of counterparty risk and may provide additional benefits such as multilateral netting of trades. See supra note 67 and Section I.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.⁷⁰ Submission to a clearing agency for clearing services other than central clearing as a CCP would not meet the clearing requirement.

Request for Comments

The Commission generally requests comments on all aspects of proposed Rule 3Ca-2. In addition, the Commission requests comments on the following specific issues:

- Should the Commission require security-based swaps to be submitted for central clearing to a clearing agency that acts as a CCP to meet the clearing requirement?
- Are there clearing agency functions or services that are not CCP functions performed by a clearing agency but that may provide comparable benefits to those of a CCP? If so, please identify such functions or services and the benefits they provide.

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

Exchange Act Section 3C states 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.⁷¹ 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-

⁷⁰ Proposed Rule 3Ca-2. The definitional section of the Exchange Act provides that defined terms may have different meanings in different contexts. See Exchange Act Section 3(a) (“When used in this title, unless the context otherwise requires . . .”). 15 U.S.C. 78c(a)

⁷¹ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(c)(1)).

based swaps, that the clearing agency has accepted for clearing.⁷² Proposed Rule 3Ca-1 would establish a procedure for staying the clearing requirement and the Commission's subsequent review of the terms of the security-based swap and the clearing arrangement.

Under proposed 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 would be 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 proposed Rule 19b-4(o).⁷³ The Commission preliminarily believes that such information would assist the Commission in determining whether to grant the stay. Under proposed Rule 3Ca-1, the counterparty's statement to the Commission requesting the stay of the clearing requirement would be made available to the public on the Commission's website in order to provide the public with notice of the submission of the stay. 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 Commission would provide notice to the public regarding a stay of the clearing requirement that is generally applicable.

Pursuant to Exchange Act Section 3C, in undertaking its review of the clearing

⁷² See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(c)(4)).

⁷³ Proposed Rule 3Ca-1(b).

requirement subsequent to granting a stay, the Commission would consider the clearing agency's clearing of the security-based swap (or group, category, type of class of security-based swaps) for consistency with the determination criteria under Exchange Act Section 3C(b)(4).⁷⁴ The Commission also may take into consideration the clearing agency's rules for open access as related to the security-based swap (or group, category, type or class of security-based swaps) subject to review.⁷⁵ The Commission may determine that it requires additional information in the possession of the clearing agency (as distinguished from the information it received from the counterparty). Accordingly, proposed Rule 3Ca-1 requires the application for the stay to identify the clearing agency that is clearing the security-based swap⁷⁶ and also requires that any clearing agency that has accepted for clearing the security-based swap, or any group, category, type or class of security-based swaps, subject to the stay, provide information requested by the Commission in the course of its review during the stay.⁷⁷ Exchange Act Section 3C also 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.⁷⁸

Proposed Rule 3Ca-1 provides that, upon completion of its review, 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,

⁷⁴ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(c)(3)(A)).

⁷⁵ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(a)(2)).

⁷⁶ Proposed Rule 3Ca-1(b)(3).

⁷⁷ Proposed Rule 3Ca-1(d).

⁷⁸ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(c)(2)).

category, type or class of security-based swaps) must be cleared.⁷⁹ Alternatively, 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).⁸⁰ 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 proposed rule makes clear that clearing may continue on a non-mandatory basis.⁸¹ As previously noted, moving security-based swaps into clearing in a gradual manner through non-mandatory clearing may in certain circumstances be appropriate. For example, a premature determination that a product is subject to mandatory clearing may, in certain circumstances, limit the ability of certain market participants to utilize that product (including for risk management purposes) which in turn could ultimately result in less clearing and more limited use of the product than might otherwise have been the case if it had been permitted to trade without being subject to a mandatory clearing requirement for a longer period of time.

Request for Comments

The Commission generally requests comments on all aspects of proposed Rule 3Ca-1. In addition, the Commission requests comments on the following specific issues:

- Does the proposal provide sufficient guidance regarding the process for a stay? Are there any alternative approaches the Commission should consider?
- Should the Commission require a counterparty applying for a stay to provide information that is broader or in addition to the information the Commission has proposed? If so,

⁷⁹ Proposed Rule 3Ca-1(e)(1) and Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(c)(3)(A)).

⁸⁰ Proposed Rule 3Ca-1(e)(2) and Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(c)(3)(B)).

⁸¹ See proposed Rule 3Ca-1(e)(2).

what information should be added to the requirement?

- Should the informational requirement imposed on a counterparty applying for a stay be narrower than that which the Commission has proposed? If so, what information should be eliminated from the requirement?
- Are there any terms or conditions that the Commission should generally consider imposing as part of a stay?
- Under what circumstances would it be reasonable for the Commission to determine that clearing is not required after making an initial determination that clearing is required?
- Should a Commission determination to allow clearing of a securities-based swap on a non-mandatory basis be subject to ongoing review or limited by a certain timeframe? What type of timeframe may be appropriate?

C. Title VIII Notice Filing Requirements for Designated Clearing Agencies

The Commission is proposing to add a new paragraph (n) to Rule 19b-4 to implement the filing requirement in Section 806(e). New paragraph (n) would require that an Advance Notice be submitted to the Commission electronically on Form 19b-4. In addition, new paragraph (n) would 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 would determine when an Advance Notice under Section 806(e) must be filed with the Commission. The Commission also is proposing 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).⁸² 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). 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.⁸³ Accordingly, and similar to the proposal for Security-Based Swap Submissions, the Commission is proposing to require clearing agencies to use the existing filing system, EFFS, and Form 19b-4 for the filing of Advance Notices under Section 806(e). This would allow designated clearing agencies to comply with the 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 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.

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

⁸² If the proposed change is related to clearing a type, group, class, or category of security-based swap, it may also be required to be filed as a Security-Based Swap Submission under Exchange Act Section 3C.

⁸³ 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 require a rule filing under 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.

financial market utility.⁸⁴ The Commission is proposing that for purposes of this requirement, the phrase “materially affect the nature or level of risks presented”⁸⁵ would be defined 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.⁸⁶ The proposed definition is 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.⁸⁷

In order to help designated clearing agencies determine whether an Advance Notice is required, the Commission is proposing to include in the rule a list of categories of changes to rules, procedures or operations that the Commission preliminarily believes could materially affect the nature or level of risks presented by a designated clearing agency. The proposed list of such changes may include, but are 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, or otherwise generally affect risk management processes or capabilities.⁸⁸ The Commission preliminarily 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

⁸⁴ 12 U.S.C. 5465(e)(1)(A).

⁸⁵ Id.

⁸⁶ Proposed Rule 19b-4(n)(2)(i).

⁸⁷ 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.

⁸⁸ Proposed Rule 19b-4(n)(2)(ii).

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 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 would 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 Title VIII and desirable to permit a review of all matters that impact the risks presented by clearing agencies, not every change to a designated clearing agency's rules, procedures or operations will be material. Accordingly, the Commission has included two broad categories of examples in the proposed rule of changes to rules, procedures or operations that the Commission preliminarily believes would not materially affect the nature or level or 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 financial market utility 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 financial market utility 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.⁸⁹

The Commission preliminarily believes that the proposed definition of “materially affect the nature or level of risks presented” provides sufficient information for designated clearing agencies to know when advance notice under Section 806(e) is required while allowing flexibility to capture all relevant proposed changes as specific circumstances warrant. However, as this would be a new requirement, the Commission expects that designated clearing agencies may discuss, at least initially, proposed changes with Commission staff prior to determining if 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.

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. Accordingly, new paragraph (n) of Rule 19b-4 would provide that, upon the filing of any Advance Notice by a designated clearing agency, the Commission would publish notice 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.⁹⁰ This requirement is consistent with the existing procedures for proposed rule changes under Exchange Act Section 19(b) and the proposed procedures for Security-Based

⁸⁹ Proposed Rule 19b-4(n)(2)(iii).

⁹⁰ Proposed Rule 19b-4(n)(1).

Swap Submissions under Exchange Act Section 3C. In addition, the Commission is proposing that designated clearing agencies post Advance Notices and any amendments thereto on their websites 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.⁹¹ Consistent with the use and proposed use of Form 19b-4, the purpose of this proposed rule would be 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.⁹² Comments and other information received would be considered by the Commission in determining whether to object to an Advance Notice.

Section 806(e)(3) requires that the Commission provide the Board with a complete copy of any information it receives in connection with the Advance Notice.⁹³ To satisfy this requirement, new paragraph (n) would require 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.⁹⁴ Such copies would be provided to the Board in triplicate and in hard copy format, pursuant to proposed changes to the instructions of Form 19b-4.

⁹¹ Proposed Rule 19b-4(n)(3).

⁹² 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.

⁹³ 12 U.S.C. 5465(e)(3). In addition, the Commission is required to provide the Board with any information it issues or submits in connection therewith.

⁹⁴ Proposed Rule 19b-4(n)(5).

The Commission also is proposing that a designated clearing agency be required to post a notice on its website 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).⁹⁵ The purpose of this proposed 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) – i.e., it will not issue a public order granting approval as it does with proposed rule changes under Exchange Act Section 19(b). As a result, there will not be a Commission action to indicate when an Advance Notice has been permitted to take effect. Moreover, the designated clearing agency also would be required to post notice on its website 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. To be consistent with the notice requirements applicable to proposed rule changes under Exchange Act Section 19(b) and to give interested parties timely notice of the change, this notice would be required to be posted within two business days of the effective date.⁹⁶ Once the notice of the effectiveness of the proposed change has been posted, the designated clearing agency would be permitted to remove its original posting of the Advance Notice and any amendments thereto from its website. A designated clearing agency also could remove the Advance Notice from its website if it withdrew the notice or if it was notified that such notice was not properly filed.⁹⁷

⁹⁵ Proposed Rule 19b-4(n)(4)(i).

⁹⁶ Proposed Rule 19b-4(n)(4)(ii).

⁹⁷ Proposed Rule 19b-4(n)(3).

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

Section 806(e) does not require the Commission to approve affirmatively a proposed change referred to in the Advance Notice; however, Section 806(e) requires that the Commission notify the designated clearing agency of any objection to the proposed change. Section 806(e)(1)(E) provides that an objection must be made 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.⁹⁸ Additionally, pursuant to Section 806(e)(1)(H), the Commission may 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.⁹⁹ 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.¹⁰⁰ 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 is not proposing any rules related to these timeframes.

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 if the Commission notifies it of an

⁹⁸ 12 U.S.C. 5465(e)(1)(E).

⁹⁹ 12 U.S.C. 5465(e)(1)(H).

¹⁰⁰ 12 U.S.C. 5465(e)(4).

objection during the applicable review period.¹⁰¹ Section 806(e), however, provides two exceptions to this prohibition. First, Section 806(e)(1)(I) permits the designated clearing agency to implement a change before the 60-day review period (or such longer period as extended in accordance with the statute) 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.¹⁰² 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.¹⁰³

Second, Section 806(e)(2) allows a designated clearing agency to implement a change that would otherwise require providing an Advance Notice if it 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.¹⁰⁴ 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.¹⁰⁵ 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

¹⁰¹ 12 U.S.C. 5465(e)(1)(F).

¹⁰² 12 U.S.C. 5465(e)(1)(I).

¹⁰³ 12 U.S.C. 5465(e)(4).

¹⁰⁴ 12 U.S.C. 5465(e)(2)(A).

¹⁰⁵ 12 U.S.C. 5465(e)(2)(B).

provide its services in a safe and sound manner.¹⁰⁶ 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 Title VIII, including all applicable rules, orders, or the risk management standards prescribed under Section 805(a) of Title VIII.¹⁰⁷ The procedures for implementing a proposed change to a designated clearing agency's rules, procedures or operations before the expiration of the standard review period or on an emergency basis are set forth in Section 806(e). The Commission is not proposing any rules related to these implementation procedures.

Request for Comments

The Commission generally requests comments on all aspects of the proposed amendments to Rule 19b-4 to incorporate the process for designated clearing agencies to file Advance Notices with the Commission pursuant to Section 806(e). In addition, the Commission requests comments on the following specific issues:

- Do the proposed rules sufficiently define and describe when advance notice of proposed changes to rules, procedures or operations are required to be filed by designated financial market utilities in accordance with Section 806(e)?
- Is the proposed definition for the term “materially affect the nature or level of risks presented” by a designated clearing agency broad enough to capture all types of changes that could materially affect the nature or level of risks presented by a designated clearing

¹⁰⁶ 12 U.S.C. 5465(e)(2)(C).

¹⁰⁷ 12 U.S.C. 5465(e)(2)(D). 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 with the Board in order to help meet this requirement.

agency? Alternatively, should the definition include a greater degree of specificity regarding the proposed changes that must be filed as Advance Notices with the Commission?

- Should additional examples be provided regarding the categories of changes that may materially affect the nature or level of risks presented by a designated clearing agency and, as a result, would be required to be filed with the Commission under Section 806(e)? Should additional examples be provided regarding the categories of changes that may not materially affect the nature or level of risks presented by a designated clearing agency and, as a result, would not be required to be filed with the Commission under Section 806(e)? If so, what additional examples should be provided?
- Should the Commission utilize the proposed rule change filing system under Rule 19b-4 for Advance Notices required to be filed by designated clearing agencies under Section 806(e)? Do commenters have suggestions for other methods of filing Advance Notices with the Commission?
- Should the Commission specify any additional requirements to those already in Section 806(e) with respect to Advance Notices implemented on an emergency basis? If so, please specify such requirements. Is the proposed rule's requirement for proposed changes implemented on an emergency basis too onerous? If so, please specify changes that should be made.
- Is there any specific additional information that should be included in the Advance Notice filing requirement regarding the nature or level of risks presented by the designated clearing agency?

D. Amendments to Form 19b-4

In conjunction with the proposed Rule 19b-4 amendments, the Commission is proposing to amend Form 19b-4 to include Security-Based Swap Submissions and Advance Notices. Specifically, the Commission is proposing to amend 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). A clearing agency would 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 more than one filing requirement, the clearing agency would be able 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 proposing to amend the General Instructions for Form 19b-4 regarding the filing requirements for Security-Based Swap Submissions and Advance Notices. The Commission is proposing to amend 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 proposed amendments to the Form 19b-4 General Instructions would require clearing agencies to include 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. Additionally, in order to facilitate the Commission's review of a Security-Based Swap Submission, the proposed instructions provide

examples of the types of information the clearing agency should provide relating to product specifications; pricing sources, models and procedures; risk management procedures; measures of market liquidity and trading activity; credit support; the effect of a clearing requirement on the market for the swap; applicable rules, policies, or procedures; terms and trading conventions on which the swap is currently traded; and financial and operational capacity.

With respect to Advance Notices, the proposed amendments to the Form 19b-4 General Instructions would 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 and it must provide a description of how the designated clearing agency will manage any identified risks. A designated clearing agency also would be instructed to 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 is proposing to provide 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 would be used only by clearing agencies. All other SROs would continue to use the current Exhibit 1 to prepare the Federal Register notice for proposed rule changes. The Commission is proposing a separate exhibit for clearing agencies because the proposed rule to require notice of Security-Based Swap Submissions and Advance Notices to be published in the Federal Register would apply only to clearing agencies. Instructions on preparing a Federal Register notice for Security-Based Swap Submissions and Advance Notices would be unnecessary for all other SROs. In order to avoid any confusion, the Commission is

proposing to provide 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 proposed amendments to the General Instructions for Form 19b-4 also would incorporate the statutory timeframes and other procedural requirements that are 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 proposed rules, Rule 19b-4(j) would be modified such that it would apply also 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 proposed changes to the General Instructions for Form 19b-4 would 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 proposing 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.¹⁰⁸

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

¹⁰⁸ See proposed amendments to the General Instructions for Form 19b-4.

imposed by the SRO qualifies for this designation, regardless of whether the fee, due or other charge is applicable only to a member.¹⁰⁹ The General Instructions for Form 19b-4 have been modified to reflect this clarification.

The Commission requests comment on all aspects of the proposed amendments to Form 19b-4. In addition, the Commission requests comments on the following specific issues:

- Do the proposed amendments to Form 19b-4 adequately capture the filing requirements in Exchange Act Section 3C and Section 806(e) while allowing clearing agencies to meet the requirements for filing notice of proposed rule changes under Exchange Act Section 19(b)? If not, why not?
- Would additional changes to Rule 19b-4 or Form 19b-4 be useful in order to accommodate the filing of Advance Notices under Section 806(e)? If so, what specific changes should the Commission consider?

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

Under Exchange Act Section 19(b)(2)(E),¹¹⁰ as amended by the Dodd-Frank Act, the Commission is required to send the SRO notice to the Federal Register for publication thereof within 15 days of the date on which the SRO's website publication is made. The Commission is proposing to amend Rule 19b-4 to provide that if a SRO does not post a proposed rule change on its website 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 website. The purpose of this change is to advise the Commission of the date the SRO posted the proposed rule change filing to its website, as such posting initiates the timing for the requirement of the Commission to

¹⁰⁹ 15 U.S.C. 78s(b)(3)(A).

¹¹⁰ 15 U.S.C. 78s(b)(2)(E).

send notice of the proposed rule change to the Federal Register.

The Commission requests comment on all aspects of the proposed amendments to Rule 19b-4 relating to Section 916 of the Dodd-Frank Act. In addition, the Commission requests comments on the following specific issues:

- Should the Commission specify the manner and form by which the SRO should inform the Commission of the date on which it posted the proposed rule change on its website? If so, what manner and form should the notification take?

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

The proposed amendments to Rule 19b-4 and Form 19b-4 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 new Section 806(e). As discussed previously, the Commission anticipates that in many cases a clearing agency may take an action that would trigger more than one of these filing requirements¹¹¹ and it seeks to streamline the filing

¹¹¹ 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 change proposed in a Security-Based Swap Submission or Advance Notice also meets the criteria for a proposed rule change.

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.

The amendments to Rule 19b-4 and to Form 19b-4 are being proposed 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 a proposal pursuant to more than one of these sections must meet the requirements of each 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 likely 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 a proposed rule change filing 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, it is also possible that a rule change filing would be required under Exchange Act Section 19(b) but 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 different,¹¹² 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 would remain distinct from the other processes. Each proposed rule change filing, Security-Based Swap Submission and Advance Notice would be reviewed and evaluated independently by the Commission in accordance with the applicable

¹¹² Assuming the Commission utilizes its maximum allotment of time under Exchange Act Section 19(b)(2), including with respect to any extensions of time requiring the consent of the SRO, the Commission must either approve, disapprove or institute proceedings with respect to a proposed rule change filing within approximately 105 days after receipt. See Pub. L. No. 111-203, section 916 (amending Exchange Act Section 19(b)(2)). 15 U.S.C. 78s(b)(2). Similarly, 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. See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(b)(3)). The Commission is not required to approve affirmatively a proposed change filed as an Advance Notice under Section 806(e), but it must notify the designated clearing agency of any objection to the proposed change 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. 12 U.S.C. 5465(e)(1)(G).

statute and regulatory authority. Moreover, the proposed imposition of new requirements to file Advance Notices with the Commission and to make Security-Based Swap Submissions would not replace Exchange Act Section 19(b) notice process provision, nor will a filing made under one of the two new requirements eliminate the need to satisfy the requirements of the other process to the extent they are applicable. 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 meets 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 Exchange Act Section 17A 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 preliminarily 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.¹¹³ Accordingly, under the proposal, where a proposed change is required to be filed pursuant to more than one filing requirement, the change would not become effective until determinations are obtained under each of the other applicable statutory

¹¹³ For example, a rule proposal may provide for sound risk management practices but have an anticompetitive aspect that would not satisfy the requirements of the Exchange Act.

provisions. 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.

III. General Request for Comment

The Commission seeks comment generally on all aspects of the proposed amendments to Rule 19b-4 and Form 19b-4 and proposed Rules 3Ca-1 and 3Ca-2. Commenters are encouraged to provide empirical data or economic studies to support their views and arguments related to the proposed rules. In addition to the questions above, commenters are welcome to offer their views on any other matter raised by the proposed rules. With respect to any comments, we note that they are of greatest assistance to the Commission if accompanied by supporting data and analysis of the issues addressed in those comments and if accompanied by alternative suggestions to our proposal where appropriate.

In addition, Title VII requires that the Commission consult and coordinate to the extent possible with the CFTC for the purposes of assuring regulatory consistency and comparability, to the extent possible,¹¹⁴ and states that in adopting rules, the CFTC and Commission shall treat functionally or economically similar products or entities in a similar manner.¹¹⁵

The CFTC is required to adopt rules related to the process for review of swaps for mandatory clearing as required under Section 723 of the Dodd-Frank Act.¹¹⁶ Understanding that the Commission and the CFTC regulate different products and markets, and as such,

¹¹⁴ Pub. L. No. 111-203, section 712(a)(7).

¹¹⁵ Id.

¹¹⁶ See Pub. L. No. 111-203, section 723 (amending Section 2 of the Commodity Exchange Act). See also supra note 55 discussing the CFTC's proposed rules pursuant to Section 723 of the Dodd-Frank Act.

appropriately may be proposing alternative regulatory requirements, we request comments on the impact of any differences between the Commission and CFTC approaches to the process for submissions for review of security-based swaps and swaps for mandatory clearing. Specifically, do the regulatory approaches under the Commission's proposed rulemaking pursuant to Exchange Act Section 3C and the CFTC's proposed rulemaking pursuant to Section 723 of the Dodd-Frank Act result in duplicative or inconsistent efforts on the part of market participants subject to both regulatory regimes or result in gaps between those regimes? If so, in what ways do commenters believe that such duplication, inconsistencies, or gaps should be minimized? Do commenters believe the approaches proposed by the Commission and the CFTC to regulate the process for review of security-based swaps and swaps for mandatory clearing are comparable? If not, why not? Do commenters believe there are approaches that would make the regulation of the process for review of security-based swaps for mandatory clearing more comparable? If so, what are they? Do commenters believe that it would be appropriate for us to adopt an approach proposed by the CFTC that differs from our proposal? If so, which one? We request commenters to provide data, to the extent possible, supporting any such suggested approaches.

Similarly, the CFTC is required to adopt rules related to the process, pursuant to Section 806(e), by which any financial market utility designated by the Council as systemically important (and for which the CFTC is the Supervisory Agency) will be required to provide advance notice to the CFTC of changes to its rules, procedures or operations that could materially affect the nature or level of risks presented by such financial market utility.¹¹⁷ The Commission requests comments on the impact of any differences between the Commission and CFTC approaches to the process for submitting proposed changes to rules, procedures or

¹¹⁷ 75 FR 67282 (November 2, 2010).

operations for review pursuant to Section 806(e). Specifically, do the regulatory approaches under the Commission’s proposed rulemaking and the CFTC’s proposed rulemaking pursuant to Section 806(e) result in duplicative or inconsistent efforts on the part of market participants subject to both regulatory regimes or result in gaps between those regimes? If so, in what ways do commenters believe that such duplication, inconsistencies, or gaps should be minimized? Do commenters believe the approaches proposed by the Commission and the CFTC with respect to the process for submitting advance notice of proposed changes to rules, procedures or operations for review pursuant to Section 806(e) are comparable? If not, why not? Do commenters believe there are approaches that would make the regulation of the process for submitting for advance review notices of proposed changes to rules, procedures or operations pursuant to Section 806(e) more comparable? If so, what are they? Do commenters believe that it would be appropriate for us to adopt an approach proposed by the CFTC that differs from our proposal? If so, which one? We request commenters to provide data, to the extent possible, supporting any such suggested approaches.

IV. 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”).¹¹⁸ 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. The Commission is proposing to submit 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 is proposing to submit the current collection of

¹¹⁸ 44 U.S.C. 3501 *et seq.*

information titled “Form 19b-4 under the Securities Exchange Act of 1934” (OMB Control No. 3235-0045). The Commission also is proposing to submit 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”. 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.

A. Summary of Collection of Information

1. Proposed 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 website within two business days of its filing, and to post and maintain a current and complete set of its rules on its website.

The Commission is proposing 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 proposed amendments would 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.

The proposed rule would require clearing agencies to file information with the Commission under Exchange Act Section 3C and Section 806(e) on Form 19b-4. 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 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 would 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 would be able to submit on a Form 19b-4, proposals 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 would 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 would be required to include as part of the 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 clearing agency also would be required to 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 proposed amendments to Rule 19b-4 also would require a clearing agency to post certain information on its website, and require a SRO that does not post a proposed rule change on its website on the same day that it filed the proposal with the Commission to inform the Commission of the date on which it posted such proposal on its website.¹¹⁹ Security-Based Swap Submissions and Advance Notices, and any amendments thereto, would be required to be posted on the clearing agency's website within two business days of filing the information with the Commission. The information generally shall remain posted on the clearing agency's website until a determination is made with respect to the Security-Based Swap Submission or the Advance Notice becomes effective. A clearing agency also would be required to post notice on its website 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

¹¹⁹ Proposed Rule 19b-4(l).

Section 806(e).

2. Stay of Clearing Requirement

Proposed Rule 3Ca-1 provides that 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) 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 any group, category, type, or class of security-based swaps, would be required to submit to the Commission the information set forth in proposed Rule 3Ca-1(b).

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 would 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. The Commission preliminarily believes such information would likely include updates to the information the clearing agency provided in the Security-Based Swap Submission relating to the security-based swap then subject to the stay under review.

B. Proposed Use of Information

1. Proposed 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 rule change proposals filed by SROs pursuant to Exchange Act

Section 19(b)(1)¹²⁰ 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 comment 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 proposed amendments to Rule 19b-4 and Form 19b-4 would be used by the Commission to evaluate Security-Based Swap Submissions and Advance Notices. The Commission would 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 is required to be cleared pursuant to Exchange Act Section 3C(1).

The Commission would 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 would 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 and to consult with the Board before taking any action on or completing its review of the Advance Notice.¹²¹ 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

¹²⁰ 15 U.S.C. 78s(b)(1).

¹²¹ 12 U.S.C. 5465(e)(3) and (4).

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 proposed to be filed on Form 19b-4 relating to Exchange Act Section 3C and Section 806(e) also would 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 is proposing to require that a clearing agency post the information on its website. In addition, pursuant to Exchange Act Section 3C, a clearing agency would 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 would 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 website (if such posting date is not the same as the filing date) would 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 proposed Rule 3Ca-1 would 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 would continue to apply to such security-based swap, or any group, category, type, or class of security-based swaps.

C. Respondents

1. Proposed Amendments to Rule 19b-4 and Form 19b-4

There are currently 25 SROs subject to the collection of information under Rule 19b-4 and Form 19b-4, although that number may vary owing to the consolidation of SROs or the introduction of new entities. In fiscal year 2009, these SRO respondents filed 1,405 rule change proposals subject to the current collection of information, of which 1,071 proposed rule changes ultimately became effective.

Although Rule 19b-4 and Form 19b-4 apply to all SROs, the new collection of information requirements in the proposed rules would apply to clearing agencies and, in certain limited circumstances, to other SROs. The proposed amendments relating to Exchange Act Section 3C would apply to clearing agencies that clear security-based swaps. Currently, four clearing agencies are authorized to clear credit default swaps, which include security-based swaps,¹²² pursuant to temporary conditional exemptions under Exchange Act Section 36.¹²³ The obligation to centrally clear security-based swap transactions is a new requirement under Title

¹²² The Commission authorized five entities to clear credit default swaps. See Securities Exchange Act Release Nos. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009) and 61973 (April 23, 2010), 75 FR 22656 (April 29, 2010) (CDS clearing by ICE Clear Europe Limited); 60373 (July 23, 2009), 74 FR 37740 (July 29, 2009) and 61975 (April 23, 2010), 75 FR 22641 (April 29, 2010) (CDS clearing by Eurex Clearing AG); 59578 (March 13, 2009), 74 FR 11781 (March 19, 2009), 61164 (December 14, 2009), 74 FR 67258 (December 18, 2009) and 61803 (March 30, 2010), 75 FR 17181 (April 5, 2010) (CDS clearing by Chicago Mercantile Exchange Inc.); 59527 (March 6, 2009), 74 FR 10791 (March 12, 2009), 61119 (December 4, 2009), 74 FR 65554 (December 10, 2009) and 61662 (March 5, 2010), 75 FR 11589 (March 11, 2010) (CDS clearing by ICE Trust US LLC); 59164 (December 24, 2008), 74 FR 139 (January 2, 2009) (temporary CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.) (collectively, “CDS Clearing Exemption Orders”). LIFFE A&M and LCH.Clearnet Ltd. allowed their order to lapse without seeking renewal.

¹²³ 15 U.S.C. 78mm. Of the four clearing agencies granted temporary exemptions from registration, only three have cleared products that likely are classified as security-based swaps under Title VII.

VII, and it is anticipated that clearing agencies operating under temporary conditional exemptions will register or will become registered security-based swap clearing agencies.¹²⁴ Based on the fact that there are currently four clearing agencies authorized to clear security-based swaps and that there could conceivably be a few more in the foreseeable future,¹²⁵ the Commission preliminarily estimates that four to six clearing agencies may plan to centrally clear security-based swaps and be subject to the information collection requirements in the proposed rules relating to Exchange Act Section 3C. The Commission is using the higher estimate (six) for the PRA analysis.

The amendments to Rule 19b-4 and Form 19b-4 relating to the Section 806(e) advance notice requirement of changes to rules, procedures or operations would 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 six clearing agencies registered with the Commission; however, only four of these clearing agencies are currently clearing securities transactions. In addition, it is anticipated that several more clearing agencies will be registered with the Commission following the effectiveness of Title VII to clear security-based swaps. For purposes of the PRA analysis, the Commission estimates that the four registered securities clearing agencies that are currently clearing securities and the six estimated clearing agencies that may clear security-based swaps would be subject to the applicable collection of information requirements.

2. Stay of Clearing Requirement

The Commission preliminarily estimates that six security-based swap clearing agencies'

¹²⁴ See Pub. L. No. 111-203, section 763(b).

¹²⁵ The Commission does not expect there to be a large number of clearing agencies that clear security-based swaps, based on the significant level of capital and other financial resources necessary for the formation of a clearing agency.

activities associated with security-based swap clearing requirements would potentially be subject to the collection of information under proposed Rule 3Ca-1 in connection with any counterparty requesting a stay of clearing requirement.

D. Total Annual Reporting and Recordkeeping Burden

1. Background

The proposed 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. When amended, Form 19b-4 would enable clearing agencies to submit Security-Based Swap Submissions and Advance Notices electronically with the Commission. The proposed amendments to Rule 19b-4 also would require a clearing agency to post on its website any Security-Based Swap Submissions and any Advance Notices, and any amendments thereto, submitted to the Commission within two business days of submission. A further amendment to Rule 19b-4 would require an SRO that filed a proposed rule change with the Commission to inform the Commission of the date on which it posted such proposal on its website if the posting did not occur on the same day that the SRO filed the proposal with the Commission. Finally, proposed Rule 3Ca-1 would specify the process for a security-based swap counterparty to apply to the Commission for a stay of the clearing requirement.

2. Rule 19b-4 and Form 19b-4

In order to estimate the collection of information, the Commission received informal comments from a few clearing agencies that would be subject to the new requirements in the proposed amendments to Rule 19b-4 and Form 19b-4. Clearing agencies would have to train

personnel and develop policies and procedures to implement the proposed 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, 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 would be required to be filed and the nature and extent of information that would 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. As a result, the estimates provided as part of the survey are preliminary and may change after clearing agencies have the opportunity to review and closely evaluate the proposed rules.

The estimates 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, some clearing agencies are currently registered with the Commission while others are not. Clearing agencies registered with the Commission already file proposed rule changes under Exchange Act Section 19(b) and have more familiarity with the collection of information requirements related to Rule 19b-4 and Form 19b-4, while clearing agencies that are not registered with the Commission are not as familiar with these requirements

and may incur a greater burden in connection with learning EDFS and training personnel.

The Commission heard from staff of eight clearing agencies. The estimates varied among clearing agencies, and therefore the Commission is using conservative numbers in developing its estimates for the PRA. In addition, in order to provide a conservative estimate, the Commission has calculated the burden for the requirements related to Advance Notices assuming that they would apply to all 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 recognizes that there would likely to 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 clear 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 issue, 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 an unrelated Security-Based Swap Submission, Advance Notice and proposed rule change. Nevertheless, the Commission is calculating the PRA burden for each process individually without accounting for any reduction due to the anticipated overlap. The Commission has decided to calculate the burdens in this manner in order to provide the most conservative estimates possible. Additionally, the estimates of each of the following burdens are derived from discussions between the Commission's staff and personnel of the clearing agencies, as described above.

a. Internal Policies and Procedures

The Commission preliminarily believes that newly-registered clearing agencies could incur some one-time costs associated with training their personnel about the procedures for submitting Security-Based Swap Submissions and/or Advance Notices in electronic format through EFFS. Based on staff discussions with the clearing agencies, the Commission preliminarily estimates that each newly registered clearing agency will 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 estimates that the total one-time burden of training staff members of newly-registered clearing agencies to use EFFS will be 120 hours (six clearing agencies X 20 hours).

Going forward, the Commission preliminarily estimates that each existing SRO (including currently-registered clearing agencies) will spend approximately 10 hours annually training new staff members and updating the training of existing staff members to use EFFS, resulting in a total annual burden of 310 hours ((six newly-registered clearing agencies X 10 hours) + (25 SROs X 10 hours)). The Commission preliminarily believes that only a minimal amount of EFFS training will be submission-specific and that training a person to submit either a proposed rules change, Security-Based Swap Submission or Advance Notice will generally be sufficient to allow such person to make one or more of the other types of submissions.

Based on staff discussions with the clearing agencies, the Commission preliminarily estimates 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 X six newly-registered

clearing agencies). In addition, the Commission preliminarily estimates that there will be a one-time paperwork burden of 30 hours for each currently-registered clearing agency to draft and implement modifications to existing internal policies and procedures for using EDFS 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 X four currently-registered clearing agencies).

b. Proposed Rule Changes

An SRO rule change proposal is generally 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, 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.¹²⁶ Based on the filings it currently receives from SROs, the Commission preliminarily believes that these estimates remain valid and has relied on these figures to prepare the analysis discussed below.¹²⁷

In fiscal year 2009, 25 SRO respondents filed 1,405 rule change proposals subject to the

¹²⁶ See Exchange Act Release No. 50486, 69 FR 60287, *supra* note 51.

¹²⁷ In 2008, 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. 73 FR 5245 (January 29, 2008) (Submission for OMB review; comment request). The PRA analysis conducted in 2008 estimated that the average time to complete a proposed rule change filing was 23.22 hours, without differentiating between average and complex rule filings. In light of the changes made to Exchange Act Section 19(b) pursuant to Section 916 of Dodd-Frank, which provides for new deadlines by which the Commission must publish and act upon proposed rule changes, the Commission has decided to revert to the figures contained in the PRA analysis conducted in 2004. Specifically, the shortened time period by which proposed rule changes will be reviewed by the Commission is likely to cause the SROs to spend additional time preparing and checking the filing, as there will be less time for them to correct a filing after it has been made, justifying the use of the more conservative estimates.

current collection of information. Of this total, the Commission estimates that 60 proposed rule changes could be characterized as novel or complex and 1,345 proposed rule changes could be characterized as average. The Commission preliminarily estimates that the total annual reporting burden for filing proposed rule changes with the Commission under the proposed amendments to Rule 19b-4 and Form 19b-4 will be 66,303 hours $((1,345/25) \times 31^{128}$ average rule change proposals $\times 34$ hours) $+ ((60/25) \times 31$ complex rule change proposals $\times 129$ hours)). Thus, on average, the reporting burden for filing proposed rule changes is 38.06 hours $(66,303$ hours $/ (1668$ average rule change proposals $+ 74$ complex rule change proposals)).

c. Security-Based Swap Submissions

The time required by clearing agencies to prepare, review and submit Security-Based Swap Submissions to comply with proposed Rule 19b-4(o)(1) likely will vary significantly based on the unique characteristics of each Security-Based Swap Submission and the submitting clearing agency. Based on staff discussions with the clearing agencies, the Commission preliminarily estimates that the amount of time that a clearing agency would require to internally prepare, review and submit a Security-Based Swap Submission is 140 hours. The Commission also estimates that each clearing agency will submit 20 Security-Based Swap Submissions annually. Accordingly, the Commission estimates that the total annual reporting burden for clearing agencies submitting Security-Based Swap Submissions electronically with the Commission under the proposed amendments to Rule 19b-4 and Form 19b-4 will be 16,800 hours $(20$ Security-Based Swap Submissions $\times 140$ hours \times six respondents).

The Commission also preliminarily estimates that a clearing agency would require 60 hours of outside legal work to prepare, review and submit a Security-Based Swap Submission,

¹²⁸ The number of projected SROs is equal to 31 (25 currently registered SROs + six newly-registered clearing agencies).

based on staff discussions with the clearing agencies. Assuming an hourly cost of \$354 for an outside attorney,¹²⁹ the total annual cost in the aggregate for the six respondent clearing agencies to meet these requirements would be \$2,548,800 (60 hours X \$354 per hour for an outside attorney X 20 Security-Based Swap Submissions X six respondent clearing agencies).

d. Advance Notices

With respect to Advance Notices, the Commission preliminarily estimates 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 proposed Rule 19b-4(n)(1) is 90 hours. This figure is based on the staff's discussions with the clearing agencies. The Commission also estimates that two hours should be added to the time required to prepare each Advance Notice to comply with the requirement contained in proposed 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 preliminarily estimates that each designated clearing agency will submit 35 Advance Notices to the Commission annually. Accordingly, the Commission estimates that the total annual reporting burden on designated clearing agencies submitting Advance Notices electronically with the Commission under the proposed amendments to Rule 19b-4 and Form 19b-4 will be 32,200 hours (35 Advance Notices X 92 hours X ten respondents).

Based on staff discussions with the clearing agencies, the Commission also preliminarily estimates that a designated clearing agency will require 40 hours of outside legal work to prepare, review and electronically file each Advance Notice with the Commission. Assuming an

¹²⁹ The hourly rate for an 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.

hourly cost of \$354 for an outside attorney,¹³⁰ the total annual cost in the aggregate for the ten respondent clearing agencies to meet these requirements would be \$4,956,000 (40 hours X \$354 per hour for an outside attorney X 35 Advance Notices X ten respondents).

e. Summary

The Commission preliminarily 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 115,303 hours (16,800 hours for Security-Based Swap Submissions + 32,200 hours for Advance Notices + 66,303 hours for proposed rule changes). The Commission also preliminarily estimates that the total annual cost in the aggregate for the respondent 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 \$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 Websites.

The Commission preliminarily believes that newly-registered clearing agencies could incur some one-time costs associated with posting Security-Based Swap Submissions, Advance Notices and proposed rule changes on their websites. The Commission preliminarily estimates that each newly-registered clearing agency will spend approximately 15 hours creating or updating its existing website in order to provide the capability to post these submissions online resulting in a total one-time burden of 90 hours (six clearing agencies X 15 hours).

With respect to annual burdens, the Commission preliminarily estimates that four hours

¹³⁰ See id.

would be required by a clearing agency to post a Security-Based Swap Submission on its website to comply with proposed Rule 19b-4(o)(5). This figure is based on the staff's discussions with the clearing agencies. The Commission estimates that the total annual reporting burden for clearing agencies to post Security-Based Swap Submissions on their websites will be 480 hours (20 Security-Based Swap Submissions X four hours X six respondents).

The Commission preliminarily estimates that four hours would be required by a designated clearing agency to post an Advance Notice on its website to comply with proposed Rule 19b-4(n)(3). The Commission preliminarily estimates that the total annual reporting burden for designated clearing agencies to post Advance Notices on their websites will be 1,400 hours (35 Advance Notices X four hours X 10 respondents).

To comply with proposed Rule 19b-4(n)(4), the Commission estimates that four hours would be required by a designated clearing agency to post notice on its website of any change to its rules, procedures or operations referred to in an Advance Notice once it has been permitted to take effect. The Commission therefore estimates that the total annual reporting burden for designated clearing agencies to post notice on their websites of any changes to their rules, procedures or operations referred to in Advance Notices would be 1,400 hours (35 Advance Notices X four hours X 10 respondents).

The Commission previously estimated that an SRO would take four hours to post proposed rule change proposals under Exchange Act Section 19(b) and amendments on its website and four hours to update the posted SRO rules on its website once the proposed rules become effective.¹³¹ The Commission preliminarily believes that these estimates remain valid. In addition, of the 1,405 proposed rule changes filed in fiscal year 2009, 1,071 were approved or

¹³¹ See supra note 127.

non-abrogated. Accordingly, the total annual reporting burden for SROs to post proposed rule change proposals on their websites and to update their posted rules on their websites once the proposed rules become effective will be 12,280 hours $((1,071/25) \times 31 \text{ SRO respondents})$ approved or non-abrogated rules \times four hours) + $((1,405/25) \times 31 \text{ SRO respondents})$ rule change proposals \times four hours)).

In summary, the Commission preliminarily 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 websites under Rule 19b-4 and Form 19b-4 will be 15,560 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 + 12,280 hours for proposed rule changes). The Commission requests comment on all of the above estimates.

4. Rule 3Ca-1

Commission staff communicated with certain clearing agencies that likely would be subject to a stay of the clearing requirement and related review under proposed Rule 3Ca-1 in order to estimate the collection of information. 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.

The Commission staff communicated with staff of three entities, representing four clearing agencies total, as two clearing agencies are subsidiaries of the same holding company. As the responses varied among clearing agencies, the Commission has generally used conservative responses in developing its estimates for the PRA.

Based on staff discussions with the clearing agencies, the Commission preliminarily estimates that a clearing agency will spend approximately 18 hours to retrieve, review and submit the information associated with the stay of the clearing requirement. The Commission preliminarily estimates that each clearing agency will 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 X 18 hours to retrieve, review and submit the information X six clearing agencies). The Commission also preliminarily estimates that a clearing agency will require seven hours of outside legal work to retrieve, review and submit the information associated with the stay of the clearing requirement. This figure is based on the staff's discussions with the clearing agencies. Assuming an hourly cost of \$354 for an outside attorney,¹³² the total estimated annual cost in the aggregate for the six respondent clearing agencies to meet these requirements would be \$74,340 (seven hours X \$354 per hour for an outside attorney X five stay of clearing applications X six respondents). The Commission requests comment on these estimates.

Finally, based on its estimates with respect to the preparation Security-Based Swap Submissions, the Commission preliminarily estimates 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 preliminarily estimates that counterparties to security-based swaps transactions will submit 30 applications requesting stays of the clearing requirement. Assuming an hourly cost of \$354 for an outside attorney,¹³³ the total annual cost in the aggregate for the respondent counterparties to meet these requirements would be \$1,062,000 (100 hours X \$354 per hour for an outside attorney X 30 stay of clearing applications).

¹³² See supra note 129.

¹³³ See supra note 129.

The Commission requests comment on all of the above estimates.

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

The Commission preliminarily estimates that the requirement that an SRO inform the Commission of the date on which it posted a proposed rule change on its website (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 an SRO. The Commission preliminarily believes that SROs currently post their proposed rule changes on their website on the same day on which they file them with the Commission. Further, it is in the interest of an SRO to continue to do so, since prompt website 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 with the Commission, which the Commission expects would be an unlikely occurrence. However, because the deadline applicable to Commission publication is tied to SRO website posting, and the Commission has no means of ascertaining when website posting was made other than receiving that information from the SRO itself, the Commission is proposing this requirement to capture necessary information to allow it to comply with Exchange Act Section 19, as amended by Section 916 of the Dodd-Frank Act.

Based on its experience receiving and reviewing proposed rule changes filed by SROs, the Commission preliminarily estimates that SROs will fail to post proposed rule changes on their websites on the same day as the filing was made with the Commission in 1% of all cases, or 14 times each year. Further, the Commission preliminarily estimates 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 website, resulting in a total annual burden of 14 hours.

Thus, the Commission preliminarily estimates that the total annual reporting burden under Rule 19b-4 and Form 19b-4 will be 131,987 hours in the initial year and 131,187 hours thereafter.¹³⁴ Additionally, the Commission preliminarily estimates that the total annual reporting burden under proposed Rule 3Ca-1 will be 540 hours. The Commission requests comment on all of the above estimates.

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

¹³⁴ In the initial year, the paperwork burden is calculated as follows: 120 hours (one-time paperwork burden to train newly-registered clearing agency staff members to use EDFS) + 780 hours (one-time paperwork burden for each newly-registered clearing agency to draft and implement policies and procedures relating to using EDFS to submit proposed rule changes, Security-Based Swap Submissions and Advance Notices) + 120 hours (one-time paperwork burden for each currently-registered clearing agency to draft and implement policies and procedures relating to using EDFS to submit Security-Based Swap Submissions and/or Advance Notices) + 90 hours (one-time paperwork burden for each newly-registered clearing agency to create or update their existing websites in order to provide the capability to post proposed rule changes, Security-Based Swap Submissions and Advance Notices online) + 115,303 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) + 15,560 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 websites + 14 hours for SROs to notify the Commission of the date on which it posted a proposed rule change on its website = 131,987 hours. After the initial year, the paperwork burden is calculated as follows: 115,303 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) + 15,560 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 on their websites) + 310 hours (the total annual burden of training new staff members and updating the training of existing staff members to use EDFS) + 14 hours for SROs to notify the Commission of the date on which it posted a proposed rule change on its website = 131,187 hours.

proposed rule changes made pursuant to Rule 19b-4) and all correspondence and other 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-1.¹³⁵

The Commission preliminarily believes that maintaining the physical signature page, 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 the authority under which a particular Security-Based Swap Submission, Advance Notice or proposed rule change was made. The Commission notes that the retention of the physical signature page is an existing maintenance requirement for SROs.¹³⁶ The Commission further notes that a similar manual signature retention requirement exists for EDGAR filers.¹³⁷

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 swaps, 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 website posting by clearing agencies of their Security-Based Swap Submissions, Advance Notices and proposed rules changes also is a mandatory collection

¹³⁵ 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.

¹³⁶ 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 proposed rules, Rule 19b-4(j) would be modified such that it would apply also to Security-Based Swap Submissions and Advance Notices.

¹³⁷ 17 CFR 232.302(b).

of information. Any collection of information pursuant to the proposed 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 SROs to inform the Commission of the date on which it posted a proposed rule change on its website (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 proposed Rule 3Ca-1 would not be kept confidential.¹³⁸ The posting of Security-Based Swap Submissions, Advance Notices and proposed rule changes would be publicly available on the SRO's website.

H. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

- (1) Evaluate whether the proposed collection of information is necessary for the performance of the functions of the agency, including whether the information shall have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;
- (3) Enhance the quality, utility and clarity of the information to be collected; and

¹³⁸ 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.

(4) Minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit comments on the collection of information requirements should direct them to the following persons: (1) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503; and (2) Elizabeth Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090 with reference to File No. S7-44-10. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The Commission has submitted the proposed collection of information to OMB for approval. Requests for the materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7-44-10, and be submitted to the Securities and Exchange Commission, Records Management, Office of Investor Education and Advocacy, Station Place, 100 F Street, NE, Washington, DC 20549-0213.

V. Consideration of Costs and Benefits

A. Processes for Security-Based Swap Submissions for Review and Staying a Clearing Requirement While the Clearing of the Security-Based Swap is Reviewed

Under Exchange Act Section 3C, Congress mandated that the Commission adopt rules: (i) for a clearing agency's submission for review of any security-based swap, or a group, category, type or class of security-based swaps, that the clearing agency seeks to accept for clearing, and the manner of notice the clearing agency must provide to its members of such

submission; and (ii) for the procedure by which the Commission may stay a clearing requirement while the clearing of a security-based swap is reviewed. The proposed rule relating to Security-Based Swap Submissions specifies the content of Security-Based Swap Submissions, how such Security-Based Swap Submissions shall be submitted, and the manner of notice the clearing agency must provide to its members regarding such submissions. The Commission also is proposing a rule to specify the procedure for staying the clearing requirement applicable to a security-based swap, based either on an application of a counterparty to a security-based swap or on the Commission's own initiative, until the Commission completes a review of the terms of the security-based swap and the clearing arrangement. The Commission is sensitive to the costs and benefits that would result from the proposed rules and has identified certain costs and benefits of the proposal, which are discussed more fully below.

1. Processes for Security-Based Swap Submissions for Review

Pursuant to Exchange Act Section 3C, a clearing agency must submit to the Commission each security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing. The Commission is required to review each Security-Based Swap Submission and determine whether the security-based swap, or any group, category, type or class of security-based swaps, described in the submission is required to be cleared. In reviewing a Security-Based Swap Submission, the Commission is required to review whether the Security-Based Swap Submission is consistent with Exchange Act Section 17A, and must take into account the following factors:

- (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.

Additionally, Exchange Act Section 3C requires, in general, that the rules of a clearing agency provide for open access, specifically requiring that the rules:

- (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.

Pursuant to Exchange Act Section 3C, the Commission is required to make available to the public any Security-Based Swap Submission and provide at least a 30-day public comment

period. The Commission is required to make its determination not later than 90 days after receiving the Security-Based Swap Submission, unless the submitting clearing agency agrees to an extension.

The proposed rule would require that the clearing agency include in each Security-Based Swap Submission information that will assist the Commission in reviewing the Security-Based Swap Submission for consistency with Section 17A and meeting the statutory requirements set forth above in items (i) – (v). Additionally, the proposed rule would require that the clearing agency specify how the clearing agency’s rules for open access (set forth in items (a) and (b) above) are applicable to the security-based swap described in the Security-Based Swap Submission. The proposed rule would specify that a clearing agency submit security-based swaps to the Commission for review by group, category, type or class to the extent reasonable and practicable to do so.

In addition, the Commission is proposing how Security-Based Swap Submissions shall be submitted by clearing agencies. Because the Commission preliminarily believes that there likely will be significant overlap between filings under Exchange Act Section 19(b) and Rule 19b-4 regarding proposed rule changes and Security-Based Swap Submissions, the Commission is proposing that Security-Based Swap Submissions be filed on Form 19b-4. In many cases, a Security-Based Swap Submission also will be a proposed rule change for purposes of Exchange Act Section 19(b).¹³⁹

¹³⁹ As discussed in section II.A.1 of this release, the Commission anticipates that registered clearing agencies, as SROs, often will be required to file a proposed rule change pursuant to Exchange Act Section 19(b) in connection with clearing a security-based swap, or any group, type, category or class of security-based swaps, and, at the same time, will be required to make a related Security-Based Swap Submission for a determination by the Commission of whether such security-based swap (or group, category, type or class of security-based swaps) is required to be cleared. A proposed rule change constitutes a

The proposed rule provides that a clearing agency must provide notice to its members of a Security-Based Swap Submission and any amendments thereto, by posting the submission on its website within two business days. The proposed rule further requires the clearing agency to maintain this information on its website until the Commission makes a determination regarding the Security-Based Swap Submission, the clearing agency withdraws the submission, or the clearing agency is notified that the submission was not properly filed.

a. Benefits

The proposed rule is designed to implement the submission and notice requirements in Exchange Act Section 3C. The Commission anticipates that the proposed rule would further the purposes of Exchange Act Section 3C by facilitating the filing and regulatory review of Security-Based Swap Submissions and reduce costs to filers by utilizing a format that clearing agencies may be familiar with or, as they become registered clearing agencies, that they will be required to use for all proposed rule changes, Form 19b-4. In addition, the proposed rule would further reduce costs to filers by avoiding a duplication of efforts in providing notice to members of the clearing agency, as well as other interested persons, such as counterparties to security-based swaps, through requiring posting of the Security-Based Swap Submission on the clearing agency's website within two business days of filing with the Commission. The Commission

change in a “stated policy, practice, or interpretation” of an SRO rule. The definition of a “stated policy, practice, or interpretation” in Exchange Act Section 19(b) includes, among other things, “any material aspect of the operation of the facilities of the SRO; or any statement made generally available to the membership of, to all participants in, or to persons having or seeking access . . . 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 (1) the rights, obligations, or privileges of specified persons . . . ; or (2) the meaning, administration, or enforcement of an existing rule.” 17 CFR 240.19b-4(b). In cases where accepting a security-based swap (or group, category, type or class of security-based swaps) for clearing constitutes a change in a “stated policy, practice, or interpretation” of the clearing agency, the clearing agency also would be required to file a proposed rule change.

anticipates this prompt notice would 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 clearing.

The Commission anticipates the proposed rule requiring the clearing agency to provide information the Commission requires to review Security-Based Swap Submissions would reduce the cost of acquiring necessary information. Requiring the clearing agency to provide necessary information would ensure that the information used by the Commission to evaluate the security-based swap for mandatory clearing is correct and complete, reducing the likelihood that further information requests will be required.

Proposed Rule 19b-4(o)(4) requires a clearing agency to 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. The Commission preliminarily believes a broad interpretation of what constitutes a group, category, type or class of security-based swaps is likely to provide benefits to clearing agencies and the Commission. Specifically, it would likely lower the costs associated with the Security-Based Swap Submission process since clearing agencies would be burdened with preparing fewer Security-Based Swap Submissions, and the Commission would be required to process and review fewer submissions.

b. Costs

Form 19b-4 is currently used by registered clearing agencies to file notice of proposed rule changes under Exchange Act Section 19(b) and any clearing agency that becomes registered will be required to use Form 19b-4 for all proposed rule changes. Accordingly, clearing agencies would be familiar with the electronic filing process in place for Form 19b-4 and their staffs would not be required to learn a new filing system. In addition, clearing agencies would be able

to submit a change that is both a proposed rule change under Exchange Act Section 19(b) and a Security-Based Swap Submission in the same filing. Although there are additional information requirements for a Security-Based Swap Submission, clearing agencies would be able to provide the required information as part of the Form 19b-4 submission.

More importantly, the Commission preliminarily believes much of the information the clearing agency provides in a Security-based Swap Submission would be the same as information the clearing agency collected and analyzed in making its business decision to plan to accept the security-based swap, or any group, category, type, or class of security-based swaps, for clearing. The Commission preliminarily believes that the clearing agency may incur costs in presenting this information in a clear and coherent manner in the format as required under the proposed rule.

As previously discussed in the PRA analysis in Section IV, the proposed amendments to Rule 19b-4 and Form 19b-4 will require a clearing agency to submit for a Commission determination, 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 Commission preliminarily estimates that the total annual reporting burden for clearing agencies to internally prepare, review and submit Security-Based Swap Submissions electronically with the Commission under the proposed amendments to Rule 19b-4 and Form 19b-4 will be 24,000 hours; this figure includes 7,200 hours of outside legal work. Assuming an hourly cost of \$320 for an in-house compliance attorney,¹⁴⁰ and an hourly cost of \$354 for an outside attorney,¹⁴¹ these requirements would

¹⁴⁰ The hourly rate for a compliance 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.

¹⁴¹ See supra note 129.

result in a total annual cost of \$7,924,800 in the aggregate for the six respondent clearing agencies (16,800 hours X \$320 per hour for a compliance attorney) + (7,200 hours X \$354 per hour for an outside attorney).

The Commission preliminarily estimates that there would be a one-time burden of 780 hours for all newly-registered clearing agencies to draft and implement internal policies and procedures related to using EFFS to submit Security-Based Swap Submissions, Advance Notices and proposed rule changes with the Commission. Assuming an hourly cost of \$320 for an in-house compliance attorney,¹⁴² these requirements would result in a total one-time cost of \$249,600 in the aggregate for the six respondent clearing agencies (780 hours X \$320 per hour for an in-house compliance attorney).

The Commission also preliminarily estimates that there would be a one-time burden of 120 hours for all currently-registered clearing agencies to draft and implement modifications to existing internal policies and procedures for using EFFS in order to update them for the submission of Security-Based Swap Submissions and/or Advance Notices with the Commission. Assuming an hourly cost of \$320 for an in-house compliance attorney,¹⁴³ these requirements would result in a one-time cost of \$38,400 in the aggregate for the four respondent clearing agencies (120 hours X \$320 per hour for an in-house compliance attorney).

The Commission preliminarily believes that newly-registered clearing agencies could incur some one-time costs associated with training their personnel about the procedures for submitting Security-Based Swap Submissions and/or Advance Notices in electronic format through EFFS. The Commission preliminarily estimates that six newly-registered clearing agencies would incur a one-time upfront burden of 120 hours to train clearing agency staff

¹⁴² See supra note 140.

¹⁴³ See supra note 140.

members to use EFFS to submit Security-Based Swap Submissions, Advance Notices and/or proposed rule changes electronically. The Commission preliminarily estimates that after the initial year, existing SROs (including currently-registered clearing agencies) would spend approximately 290 hours annually training new staff members and updating the training of existing staff members to use EFFS. Assuming an hourly cost of \$259 for a senior systems analyst,¹⁴⁴ these requirements would result in an overall estimated initial annual cost of \$31,080 in the aggregate for the six newly-registered clearing agencies (120 hours x \$259 per hour for a senior systems analyst) and an annual cost after the initial year of \$75,110 thereafter in the aggregate for all SROs (290 hours x \$259 per hour for a senior systems analyst).

Pursuant to existing Rule 19b-4(l), each SRO is required to post on its website a copy of any proposed rule change the SRO filed with the Commission and any amendments thereto. The proposed rule to implement the submission and notice requirements in Exchange Act Section 3C includes a similar posting requirement for Security-Based Swap Submissions. The Commission preliminarily estimates that the total annual reporting burden for clearing agencies to post Security-Based Swap Submissions on their websites would be 480 hours. Assuming an hourly cost of \$225 for a Webmaster,¹⁴⁵ these requirements would result in a total estimated annual cost of \$108,000 in the aggregate for the six respondent clearing agencies (480 hours x \$225 per hour for a Webmaster).

¹⁴⁴ The hourly rate for a senior systems analyst 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.

¹⁴⁵ The hourly rate for a Webmaster 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.

Some Security-Based Swap Submissions would be required to be filed only as Security-Based Swap Submissions under Exchange Act Section 3C and not as proposed rule changes under Exchange Act Section 19(b), for example where a clearing agency's rules already permit it to clear the security-based swap in question. As a result, clearing agencies would incur additional costs by filing a greater number of forms than they do currently under Exchange Act Section 19(b).

2. Staying a Clearing Requirement While the Clearing of the Security-Based Swap is Reviewed

Under Exchange Act Section 3C, 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.¹⁴⁶ 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.

Under proposed Rule 3Ca-1, a counterparty to a security-based swap subject to the clearing requirement who applies for a stay of the clearing requirement would 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-

¹⁴⁶ See Pub. L. No. 111-203, section 763(a) (adding Exchange Act Section 3C(c)(1)).

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 proposed Rule 19b-4(o).¹⁴⁷ The proposed rule also 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.

a. Benefits

The Commission preliminarily believes that the proposed rule provides benefits in creating an efficient mechanism for collecting information to be used in the Commission's determination to grant the requested stay and subsequent review of the clearing requirement. Specifically, the counterparty will provide information specifically within its possession – reasons why the stay should be granted and why the security-based swap should not be subject to a clearing requirement. Additionally, any information requested from the clearing agency likely will include information unique to the clearing agency and will facilitate the Commission's review of the clearing requirement subject to the stay.

b. Costs

The proposed rule requires a counterparty requesting a stay provide basic identifying information and information supporting its request for a stay and its position that the security-based swap should not be subject to a clearing requirement. With respect to the proposed rule's requirement that a clearing agency 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 preliminarily believes this information will likely be information the clearing

¹⁴⁷ Proposed Rule 3Ca-1(b).

agency has in its possession, including updates of information provided in the related Security-Based Swap Submission. The Commission preliminarily estimates that each clearing agency would receive five applications per annum to stay the clearing requirement. The Commission also preliminarily estimates that the total annual reporting burden for the six respondent clearing agencies to compile and provide the information requested by the Commission in connection with the review of the stay of clearing applications would be 750 hours; this figure includes 210 hours of outside legal work. Assuming an hourly cost of \$320 for an in-house compliance attorney,¹⁴⁸ and an hourly cost of \$354 for an outside attorney,¹⁴⁹ these requirements would result in a total estimated annual cost of \$247,140 in the aggregate for the six respondent clearing agencies (540 hours X \$320 per hour for a compliance attorney) + (210 hours X \$354 per hour for an attorney).

Finally, the Commission preliminarily estimates 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 also preliminarily estimates 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, the total annual cost in the aggregate for the respondent counterparties to meet these requirements would be \$1,062,000 (100 hours X \$354 per hour for an outside attorney X 30 stay of clearing applications).

The Commission requests that commenters provide views and supporting information regarding the costs and benefits associated with the proposed rules relating to Security-Based Swap submissions and stay of the clearing requirement and related review. The Commission seeks estimates of these costs and benefits, as well as any costs and benefits not already

¹⁴⁸ See supra note 140.

¹⁴⁹ See supra note 129.

identified. The Commission also requests comment on whether other provisions of the Dodd-Frank Act for which Commission rulemaking is required are likely to have an effect on the costs and benefits of the proposed rules.

B. Advance Notices Required Under Section 806(e)

Congress has mandated that the Commission adopt rules to define when proposed changes to a designated clearing agency's rules, procedures or operations could materially affect the nature or level of risks presented by the clearing agency. The proposed rule would determine when notice of such changes must be filed with the Commission and would prescribe how such notices shall be filed. The Commission is sensitive to the costs and benefits that would result from the proposed rule and has identified certain costs and benefits of the proposal, which are discussed more fully below.

1. Benefits

Pursuant to Section 806(e), any registered clearing agency designated as a systemically important financial market utility and for which the Commission is the Supervisory Agency will be required to file with the Commission advance notice of proposed changes to its rules, procedures or operations that could materially affect the nature or level of risks presented by the clearing agency. The proposed rule would reduce regulatory uncertainty pertaining to the filing requirement in Section 806(e) by defining the term "materially affect the nature or level of risks presented" with respect to a change to rules, procedures, or operations. The term would be defined as a matter 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. Such changes would 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 financial market utility. However, such changes generally would exclude changes to an existing procedure, control, or service that do not modify the rights or obligations of the designated financial market utility 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 financial market utility or for which it is responsible, or changes concerned solely with the administration of the designated financial market utility or related to the routine, daily administration, direction, and control of employees.¹⁵⁰

The Commission also is proposing to facilitate the compliance with the filing requirement in Section 806(e) by prescribing how Advance Notices of proposed changes to rules, procedures or operations shall be filed by designated clearing agencies. Because the requirement to file notice under Section 806(e) is similar to the filing requirement for proposed rule changes under Exchange Act Section 19(b), the Commission is proposing that Advance Notices be filed on Form 19b-4. 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), reducing costs associated with multiple filings.

The proposed rule is designed to implement the filing requirement in Section 806(e) and to establish criteria for designated clearing agencies regarding when notices shall be filed and the method for filing such notices. The Commission preliminarily believes that the proposed rule would lower the costs of filing and regulatory review of proposed changes that could materially affect the nature or level of risks presented by systemically important clearing institutions. In

¹⁵⁰ Proposed Rule 19b-4(n)(2)(iii).

addition, the proposed rule is intended to provide the public with the opportunity to comment on such proposals by designated clearing agencies. The Commission preliminarily believes the proposed rule would help to assure that the additional information required under Section 806(e) is provided through amendments to the existing Form 19b-4. However, a filing submitted under both Section 806(e) and Exchange Act Section 19(b) would be required to satisfy the standards under both sections in order to become effective.

2. Costs

The Commission preliminarily believes the costs associated with the proposed rule should not be significant for designated clearing agencies. Form 19b-4 is currently used by registered clearing agencies to file notice of proposed rule changes under Exchange Act Section 19(b). Accordingly, designated clearing agencies would be familiar with the filing process in Form 19b-4, and staffs would not be required to learn a new filing system. In addition, clearing agencies would be able to submit a change that is both a proposed rule change under Exchange Act Section 19(b) and a proposed change under Section 806(e) in the same filing. Although there are additional information requirements for a Section 806(e) filing, designated clearing agencies would be able to provide the required information as part of the Form 19b-4 submission.

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). As a result, the Commission preliminarily believes clearing agencies will incur additional costs by filing a greater number of forms than they do currently under Exchange Act Section 19(b). Based on informal comments from clearing agencies, the Commission preliminarily estimates that each designated clearing agency will file 35 Advance Notices with the Commission annually at a cost

of \$3,200 per submission (10 hours X compliance attorney at \$320 per hour) or \$1,120,000 (\$3200 X 35 Advance Notices X 10 respondent clearing agencies) in the aggregate for the ten respondent clearing agencies.

Proposed Rule 19b-4(n)(3) requires designated clearing agencies to post copies of Advance Notices filed with the Commission on their websites. The Commission estimates that the total annual reporting burden for designated clearing agencies to post Advance Notices on their websites would be 1400 hours. Assuming an hourly cost of \$225 for a Webmaster,¹⁵¹ these requirements would result in an estimated annual cost of \$315,000 in the aggregate for the ten respondent clearing agencies (1400 hours x \$225 per hour for a Webmaster).

Proposed Rule 19b-4(n)(4) requires a designated clearing agency to post notice on its website of any change to its rules, procedures or operations referred to in an Advance Notice once it has been permitted to take effect. The Commission estimates that the total annual reporting burden for designated clearing agencies to post notice on their websites of any change to their rules, procedures or operations referred to in Advance Notices once they take effect would be 1400 hours. Assuming an hourly cost of \$225 for a Webmaster,¹⁵² these requirements would result in an estimated annual cost of \$315,000 in the aggregate for the ten respondent clearing agencies (1400 hours x \$225 per hour for a Webmaster).

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

The Commission preliminarily estimates that the requirement that an SRO inform the Commission of the date on which it posted a proposed rule change on its website (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 an SRO. As discussed in Section IV.B.4., the Commission

¹⁵¹ See supra note 145.

¹⁵² See supra note 145

preliminarily believes that SROs currently post their proposed rule changes on their website on the same day on which they file them with the Commission. It would be an unlikely occurrence for an SRO to fail to post its proposed rule change on the same day that it files with the Commission, since prompt website posting triggers the requirement on the Commission to publish notice of the proposed rule change.

The Commission preliminarily estimates that SROs will fail to post proposed rule changes on their websites on the same day as the filing was made with the Commission in 1% of all cases, or 14 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 website, resulting in a total annual burden of 14 hours. Assuming an hourly cost of \$320 for an in-house compliance attorney,¹⁵³ this requirement would result in a total estimated annual cost of \$4,480 in the aggregate for all SROs (14 hours X \$320 per hour for a compliance attorney) in the aggregate for all SROs.

The Commission requests that commenters provide views and supporting information regarding the costs and benefits associated with the proposals. The Commission seeks estimates of these costs and benefits, as well as any costs and benefits not already identified. The Commission also requests comment on whether other provisions of the Dodd-Frank Act for which Commission rulemaking is required are likely to have an effect on the costs and benefits of the proposed rules.

¹⁵³ See supra note 140.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Exchange Act Section 23(a)¹⁵⁴ requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 2(b) of the Securities Act of 1933¹⁵⁵ and Exchange Act Section 3(f)¹⁵⁶ require the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. Below, the Commission addresses these issues for the amendments to Rule 19b-4 and Form 19b-4 to reflect the use of these forms for filing Security-Based Swap Submissions and Advance Notices, and proposed Rule 3Ca-1 to facilitate the process for staying the clearing requirement applicable to a security-based swap until the Commission completes a review of the terms of the security-based swap and the clearing arrangement.

A. Proposed Amendments to Rule 19b-4 and Form 19b-4

The proposed amendments to Rule 19b-4 and Form 19b-4 are designed to facilitate the statutorily mandated processes for submitting Security-Based Swap Submissions and Advance Notices to the Commission, and to make each process efficient by utilizing the existing process and EFFT infrastructure for proposed rule changes. Using an existing process to accomplish an additional legislative requirement would conserve both clearing agency and

¹⁵⁴ 15 U.S.C. 78w(a).

¹⁵⁵ 15 U.S.C. 77b(b).

¹⁵⁶ 15 U.S.C. 78c(f).

Commission resources. If amended, Form 19b-4 would enable clearing agencies to submit Security-Based Swap Submissions, and any amendments thereto, and any Advance Notices electronically to the Commission. Submitting Security-Based Swap Submissions and Advance Notices in this manner would impose fewer costs on clearing agencies and the Commission when compared to requiring clearing agencies to use new infrastructure or business processes to make Security-Based Swap Submissions or Advance Notices.

The proposed requirement that the clearing agency aggregate security-based swaps into groups, categories, types or classes to the extent reasonable and practicable to do so, in each Security-Based Swap Submission likely would appropriately streamline the submission process for Commission staff and clearing agencies (i.e., such aggregations would decrease the number of Security-Based Swap Submissions each clearing agency would prepare and submit, and accordingly, the Commission would review). This requirement is intended to make the Security-Based Swap Submission process more efficient.

The proposed amendments to Rule 19b-4 and Form 19b-4 also are intended to improve the transparency of security-based swaps transactions. The proposed amendments to Rule 19b-4 would require a clearing agency to post on its website any Security-Based Swap Submissions and any amendments thereto, it submitted to the Commission within two business days of submission to the Commission, to fulfill the statutory requirement that clearing agencies provide notice to their members of such submissions. The Commission preliminarily believes that public website posting of Security-Based Swap Submissions may promote competition among security-based swap clearing agencies because it will make it easier (and more timely) for clearing agencies to be able to determine the security-based swaps their competitors intend to clear and analyze whether they too wish to clear such

security-based swap.

Similarly, the proposed amendments to Rule 19b-4 would require a designated clearing agency to post on its website proposed changes to its rules, procedures, or operations that trigger the Section 806(e) advance notice requirement and a description of the subjects and issues involved within two business days of the submission of an Advance Notice to the Commission. A designated clearing agency also will be required to post a notice on its website 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, as monitored by the designated clearing agency and determined in accordance with Section 806(e). The Commission preliminarily believes that public website posting of this information may promote competition and transparency among clearing agencies by giving interested persons an opportunity to submit written data, views, and arguments concerning proposed changes that could materially affect the nature or level of risks presented by a designated clearing agency.

The proposed amendments to Rule 19b-4 and Form 19b-4 with respect to the information that clearing agencies are required to provide are intended to facilitate the Commission's review process for Security-Based Swap Submissions and Advance Notices and to make the process efficient by requiring information the clearing agency is uniquely qualified to provide and likely may already have available.

The Commission preliminarily believes none of the proposed amendments to Rule 19b-4 and Form 19b-4 would have an adverse impact on competition or capital formation, but instead should increase confidence in the robustness of the security-based swap market, encouraging participation and allowing better risk management practices. To the

extent that security-based swaps mitigate the risk associated with capital raising activities, increased investor confidence and use of security-based swaps should foster more efficient capital formation and thereby benefit issuers and investors.

Proposed Rule 3Ca-1 is designed to facilitate the statutorily mandated process for staying the clearing requirement applicable to a security-based swap until the Commission completes a review of the terms of the security-based swap and the clearing arrangement. The proposed rule is designed to create an efficient mechanism for collecting information to be used in the Commission's determination to grant the requested stay and subsequent review of the clearing requirement.

The Commission has not identified any effects on competition or capital formation of the process specified in proposed Rule 3Ca-1. The Commission preliminarily believes proposed Rule 3Ca-1 would not have an adverse impact on competition or capital formation.

The Commission generally requests comment on the competitive or anticompetitive effects of the proposed amendments to Rule 19b-4 and Form 19b-4 on any market participants if adopted as proposed. The Commission also requests comment on what impact the amendments, if adopted, would have on efficiency and capital formation. The Commission requests that commenters provide analysis and empirical data, if available, to support their views regarding any such effects. The Commission notes that such effects may be difficult to quantify. The Commission also requests comment regarding the competitive effects of pursuing alternative regulatory approaches that are consistent with Exchange Act Section 3C, as added by Section 763(a) of the Dodd-Frank Act. In addition, the Commission requests comment on how the other provisions of the Dodd-Frank Act for which Commission rulemaking is required, will interact with and influence the competitive effects of the proposed amendments to Rule 19b-4

and Form 19b-4.

VII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”),¹⁵⁷ the Commission must advise the OMB as to whether the proposed rule constitutes a “major” rule. Under SBREFA, a rule is considered “major” where, if adopted, it results or is likely to result in: (i) an annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease); (ii) a major increase in costs or prices for consumers or individual industries; or (iii) significant adverse effect on competition, investment or innovation. If a rule is “major,” its effectiveness will generally be delayed for sixty days pending Congressional review.

The Commission requests comment on the potential impact of the amendments to Rule 19b-4 and Form 19b-4 and new Rules 3Ca-1 and 3Ca-2 on the economy on an annual basis, any potential increase in costs or prices for consumers or individual industries, and any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

VIII. Regulatory Flexibility Certification

The Regulatory Flexibility Act (“RFA”)¹⁵⁸ requires the Commission, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a)¹⁵⁹ of the Administrative Procedure Act,¹⁶⁰ as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules to determine the impact of such

¹⁵⁷ Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

¹⁵⁸ 5 U.S.C. 601 et seq.

¹⁵⁹ 5 U.S.C. 603(a).

¹⁶⁰ 5 U.S.C. 551 et seq.

rulemaking on “small entities.”¹⁶¹ 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.¹⁶²

A. Clearing Agencies

The amendments to Rule 19b-4 would apply to (i) all clearing agencies that clear security-based swaps and (ii) all designated clearing agencies. Proposed Rules 3Ca-1 and 3Ca-2 would apply to all security-based swap clearing agencies. Four entities are currently exempt from registration as a clearing agency under Exchange Act Section 17A to provide central clearing services for CDS, a class of security-based swaps.¹⁶³ The Commission preliminarily 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 the proposed amendments to Rule 19b-4 and proposed Rules 3Ca-1 and 3Ca-2. In addition, the Commission preliminarily 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), which includes the four existing securities clearing agencies and the six estimated clearing agencies that may clear security-based swaps.

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

¹⁶¹ Section 601(b) of the RFA permits agencies to formulate their own definitions of “small entities.” The Commission has adopted definitions for the term “small entity” for the purposes of rulemaking in accordance with the RFA. These definitions, as relevant to this proposed rulemaking, are set forth in Rule 0-10, 17 CFR 240.0-10.

¹⁶² See 5 U.S.C. 605(b).

¹⁶³ See CDS Clearing Exemption Orders, supra note 122.

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.¹⁶⁴ 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.¹⁶⁵

Based on the Commission's existing information about the entities likely to register to clear security-based swaps, the Commission preliminarily believes that such entities will not be small entities, but rather part of large business entities that exceed the thresholds defining "small entities" set out above. Additionally, while other clearing agencies may become eligible to operate as central counterparties for security-based swaps, the Commission preliminarily does not believe that any such entities would be "small entities" as defined in Exchange Act Rule 0-10.¹⁶⁶ Furthermore, we believe 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 0-12.

¹⁶⁴ 17 CFR 240.0-10(d).

¹⁶⁵ 13 CFR 121.201, Sector 52.

¹⁶⁶ See 17 CFR 240.0-10(d).

B. Security-Based Swap Counterparties

Proposed Rule 3Ca-1 would apply to any counterparty to a security-based swap subject to the clearing requirement that applies for a stay of the clearing requirement. For the purposes of Commission rulemaking and as applicable to this proposed 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;¹⁶⁷ (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;¹⁶⁸ 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.¹⁶⁹ 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

¹⁶⁷ 17 CFR 240.0-10(d).

¹⁶⁸ 17 CFR 240.0-10(a).

¹⁶⁹ 17 CFR 240.0-10(c).

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.¹⁷⁰

With regard to security-based swap transactions that have counterparties that may meet the definition of a “small entity” under Exchange Act Rule 0-10 and, under proposed Rule 3Ca-1, apply to the Commission for a stay of the clearing requirement, the Commission believes that it is unlikely that the stay application process of proposed Rule 3Ca-1 would have a significant economic impact upon such an entity. Given that the proposed 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. 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 would be no more than 30, based on the informal discussions between the staff and the clearing agencies, in terms of number of stay requests and number of small entities making such requests. Accordingly, in respect of non-clearing agency counterparties to security-based swap transactions, the Commission preliminarily believes that proposed Rule 3Ca-1 would 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 proposed amendments to Rule 19b-4 and proposed Rules 3Ca-1 and 3Ca-2 would not have a significant economic impact on a substantial number of small entities for the purposes of the RFA. The Commission

¹⁷⁰ 13 CFR 121.201, Sector 52.

encourages written comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities, including clearing agencies eligible to clear security-based swaps, designated clearing agencies and counterparties to security-based swap transactions, and provide empirical data to support the extent of the impact.

IX. 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 Dodd-Frank Act, 12 U.S.C § 5465(e), the Commission proposes to amend Rule 19b-4 and Form 19b-4 and add new 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 Proposed Rule

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

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

1. The general authority citation for part 240 is revised 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, 78l, 78m, 78n, 78o, 78o-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; 18 U.S.C. 1350 and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

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

2. §§240.3Ca-1 and 240.3Ca-2 are added following §240.3b-19 to read as follows:

§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) of this chapter.

(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, but need not be limited to, a quantitative and qualitative assessment of the factors specified in §240.19b-4(o)(3) of this chapter. 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 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 paragraph (b);
- b. Redesignating paragraph (a) as paragraph (b);
- c. Adding new paragraph (a);
- d. In paragraph (i), by revising the phrase “of all filings made pursuant to this section” to read “of all filings, notices and submissions made pursuant to this section 240.19b-4”;
- e. In paragraph (i), adding the words “notice or submission,” after the phrase “any such filing.”;
- f. 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.”;
- g. In paragraph (j), first sentence, removing the words “with respect to proposed rule changes”;
- h. In paragraph (k) adding “240.19b-4” after the words “this section”;
- i. Revising paragraph (l), introductory paragraph;
- j. In paragraph (l)(4), replacing the phrase “Web site” to read “website”;
- k. In paragraph (m)(1), replacing the phrase “Web site” to read “website”;
- l. In paragraph (m)(2), replacing the phrase “Web site” to read “website”;
- m. In paragraph (m)(3), replacing the phrase “Web site” to read “website”;
- n. Adding paragraph (n); and
- o. Adding paragraph (o).

3. The additions and revisions read as follows:

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

* * * * *

(a) Definitions. As used in this §240.19b-4:

(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);

(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), 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 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 website 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 website 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 website. Such proposed rule change and amendments shall be maintained on the self-regulatory organization’s website until:

* * * * *

(n)(1) 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. 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.

(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 or risks presented by a designated clearing agency utility 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 or 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 financial market utility 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 financial market utility or for which it is responsible; or

(B) Changes concerned solely with the administration of the designated financial market utility 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 website within two business days after the filing of the advance notice, and any amendments, thereto the Commission. Such advance notice and amendments shall be maintained on the designated clearing agency's website 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 website 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 website 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.

(o)(1) A clearing agency shall submit to the Commission a security-based swap submission and provide notice to its members of such security-based swap submission.

(2) 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 electronically on Form 19b-4 (referenced in CFR 249.819) the information required to be submitted for a security-based swap submission, as provided in §240.19b-4 of this chapter and Form 19b-4. Any information submitted to the Commission electronically on Form 19b-4 that is not complete or otherwise in compliance with §240.19b-4 of this chapter 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.

(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); and

(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;

(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;

(F) 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.

(G) 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 website 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 website 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) Upon receipt of a security-based swap submission pursuant to this section, the Commission shall review the 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.

(i) When making a determination, the Commission will take into account the factors addressed in the security-based swap submission and any additional factors the Commission determines to be appropriate. 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.

(ii) In making a 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.

(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 to read as follows:

Authority: 15 U.S.C. 78a et seq. and 7201et 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. The section heading and §249.819 are revised 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 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) 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.

* * * * *

5. 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.]

Page 1 of <input type="text"/>	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No. SR - <input type="text"/> - <input type="text"/> Amendment No. <input type="text"/>
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Filing by <input type="text"/>	Select SRO <input type="text"/>
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934	

Initial <input type="checkbox"/>	Amendment <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) <input type="checkbox"/>	Section 19(b)(3)(A) <input type="checkbox"/>	Section 19(b)(3)(B) <input type="checkbox"/>
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action <input type="checkbox"/>	Date Expires <input type="text"/>	Rule		
			<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 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 Submission pursuant to Securities Exchange Act of 1934 Section 3C(b)(2)
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Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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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 proposed rule change.

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

For complete Form 19b-4 instructions please refer to the SRTS Online Filing website.

Form 19b-4 Information

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

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

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 2 - Notices, Written Comments, Transcripts, Other Communications

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 Sent As Paper Document

Exhibit 3 - Form, Report, or Questionnaire

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 Sent As Paper Document

Exhibit 4 - Marked Copies

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

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

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.

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 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 website 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.¹ 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

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

Supervision Act and the rules and regulations thereunder applicable to the self-regulatory organization. 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 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 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 EDFS. In order to file Form 19b-4 through EDFS, 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 website (<http://www.sec.gov>). An e-mail will be sent to the requestor that will provide a link to a secure website 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 three copies of the form, one of which shall be manually signed, including exhibits. The Municipal Securities Rulemaking Board also shall file copies of the form, including exhibits, with the Board of Governors of the Federal Reserve System, 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 also 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 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

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 (A) does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible and (B) does not significantly affect the respective rights or obligations of the clearing agency or persons using the service, 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 swaps 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;
- (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;
- (F) 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.
- (G) 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 clearing agency 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 discussion of 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 could address segregation of accounts and all other customer protection measures under insolvency.

In describing the security-based swap, or any group, category, type or class of security-based swaps, that a clearing agency plans to accept for clearing, the clearing agency could include 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 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 swap) 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 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 financial market utility 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 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 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, 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 1 1/2 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

* 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 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.)

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 e-mail 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 e-mail 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 website (<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 website 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 am and 3:00 pm. 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

¹ 17 CFR 200.30-3(a)(12).

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 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 1 1/2 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.

* 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 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 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, and 5 of Form 19b-4, redesignating them as A, B, and C, 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 website 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 website 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 rescission 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 e-mail 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 e-mail 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 website (<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 website 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 am and 3:00 pm. 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

¹¹ 17 CFR 200.30-3(a)(12).

By the Commission.

Elizabeth M. Murphy
Secretary

Dated: December 15, 2010