

MEMO# 26298

July 12, 2012

SEC Adopts Rules on the Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Rules on Advance Notices Filed by Designated Clearing Agencies

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TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 41-12
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 31-12
INVESTMENT ADVISER MEMBERS No. 19-12
SEC RULES MEMBERS No. 61-12 RE: SEC ADOPTS RULES ON THE PROCESS FOR
SUBMISSIONS FOR REVIEW OF SECURITY-BASED SWAPS FOR MANDATORY CLEARING AND
RULES ON ADVANCE NOTICES FILED BY DESIGNATED CLEARING AGENCIES

The Securities and Exchange Commission (“SEC” or “Commission”) has adopted rules regarding the process for a registered clearing agency’s submissions for review of any security-based (“SB”) swap that the clearing agency plans to accept for clearing, the notice the clearing agency must provide to its members regarding the submissions, and the procedures by which the SEC may stay the requirement that an SB swap is subject to mandatory clearing pending review. [\[1\]](#) The SEC also adopted rules regarding advance notices of proposed changes to rules, procedures or operations that are required to be filed by clearing agencies that are designated as systemically important under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”). The effective and compliance date for most of the new rules and rule amendments is 30 days from the date of publication in the Federal Register. The compliance date for the swap submissions will be 60 days after the date the SEC issues its first written determination of whether an SB swap is required to be cleared (e.g., SB swaps listed for clearing by a clearing agency as of the enactment of the Dodd-Frank Act). A brief summary of the final rules is provided below.

SB Swap Submissions and Stay Requirement

Section 3C of the Securities Exchange Act of 1934 (“Exchange Act”) requires each clearing

agency that plans to accept an SB swap for clearing to file with the SEC for a determination of whether the SB swap (or any group, category, type or class of SB swaps) is required to be cleared. In new Rule 19b-4(o)(1), the SEC sets forth the underlying requirements to make the submissions. The new rule, among other things, specifies the qualitative and quantitative factors that should be discussed by a clearing agency in its submission to provide the SEC with the information necessary to make informed and timely mandatory clearing determinations. The rule also requires the submission to include a statement regarding how the clearing agency's rules provide for open access.

The Commission expects to publish notice of the submissions in the Federal Register and on its publicly-available website. Section 3C(b)(2)(C)(iii) of the Exchange Act requires the Commission to make available to the public any SB swap submissions it receives and to provide at least a 30-day public comment period. The notice will include the solicitation of public comment for the period specified in the notice, and the comment period will begin and end within the 90-day determination period rather than beginning after the SEC has made its final determination.

Section 3C(b)(2)(A) of the Exchange Act requires that a clearing agency provide notice to its members of its swap submissions. New Rule 19b-4(o)(5) will require clearing agencies to post all submissions and any amendments on their website within two business days following the submission to the SEC. As required currently for any proposed rule change, under the final rules, the clearing agencies will be required to file with the SEC copies of notices issued by the clearing agencies soliciting comment on the submission, copies of all written comments received from members or participants, and any correspondence received after the submission. The clearing agencies also will be required to summarize the substance of all comments received and respond in detail to any significant issues raised in the comment about the submission.

The SEC also adopted Rule 3Ca-2 to prevent evasion of the clearing requirement. The rule clarifies that an SB swap subject to a mandatory clearing requirement must be submitted for central clearing to a clearing agency that functions as a central counterparty. According to the SEC, an SB swap submitted to a clearing agency for clearing services other than central clearing (e.g., matching services) would not satisfy the mandatory clearing requirement.

New Rule 3Ca-1 establishes procedures for staying a mandatory clearing requirement and for the SEC's subsequent review of the terms of the relevant SB swap and the clearing arrangement. Under the new rule, a counterparty to an SB swap subject to the clearing requirement may submit a written statement to the SEC requesting a stay of the clearing requirement that contains certain information (such as the reason a stay should be granted and the SB swap should not be subject to the clearing requirement). A stay may be applicable to the counterparty requesting the stay or more broadly to the SB swap subject to the clearing requirement. The SEC intends to make each application for stay available to the public on the SEC's website. If the stay is granted, the SEC under Section 3C(c)(2) is required to complete such clearing review no later than 90 days after issuance of the stay. Upon completion of its review, the SEC may determine unconditionally or conditionally that the SB swap must be cleared or that the clearing requirement does not apply.

Title VIII Notice Filing Requirements for Clearing

Agencies Designated as Systemically Important

Title VIII of the Dodd-Frank Act provides for enhanced regulation of financial market utilities, including SEC-registered clearing agencies, that the Financial Stability Oversight Council has designated as systemically important (or likely to become systemically important). Among other things, any financial market utility designated as systemically important is required to file 60 days advance notice of changes to its rules, procedures or operations that could materially affect the nature or level of risk presented by the financial market utility. The primary regulator for the financial market utility also must adopt rules (in consultation with the Federal Reserve Board) that define and describe when a designated financial market utility is required to file the advance notice with the primary regulator.

A clearing agency designated as systemically important would become subject to the requirement to file advance notices. To implement the requirement for advance notice, new Rule 19b-4(n) defines when a proposed rule change to a clearing agency's rules, procedures or operations could materially affect the nature or level of risks presented by the designated clearing agency. The new rule sets forth the standards for determining when advance notice is required and provides a list of categories or changes to rules, procedures, or operations that the SEC believes could materially affect the nature or level of risks presented by a designated clearing agency. The list includes changes that materially affect participant and product eligibility, daily or intraday settlement procedures, default procedures, systems safeguards, and governance or financial resources of the designated clearing agency. The new rule also provides two broad categories of examples of changes to rules, procedures, or operations that the SEC believes would not materially affect the nature or level of risks presented by a designated clearing agency and therefore would not require the filing of an advance notice.

Under the final rules, upon filing of any advance notice by a designated clearing agency, the SEC would promptly publish the notice in the Federal Register. [2] Moreover, the designated clearing agency is required to post the advance notice and any amendments on its website within two business days of filing the notice or amendments. The designated clearing agency also must post, within two business days of the effective date, a notice on its website that the proposed change in the advance notice filing has been permitted to take effect. [3] A designated clearing agency generally may not implement a proposed rule change filed as an advance notice during the review period except in limited circumstances.

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endnotes

[1] 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, Release No. 34-67286, available at <http://www.sec.gov/rules/final/2012/34-67286.pdf> (June 28, 2012).

[2] The SEC expects that advance notices will be published for the same comment period (twenty-one day comment period) as is the current practice with respect to Section 19(b)

proposed rule changes.

[\[3\]](#) The purpose of this requirement is to provide a means for public notice when a proposed change under Title VIII is permitted to become effective because the SEC will not affirmatively approve an advance notice.

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