CME Group

Craig S. Donohue
Chief Executive Officer

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Via Electronic Mail: rule-comments@sec.gov

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Amendment to Rule Filing Requirements for Dually-Registered Clearing Agencies (SEC Release No. 34-64832)(File No. S7-29-11)(RIN 3235-AL18)

CME Group Inc. ("CME Group") appreciates the opportunity to comment on the Securities and Exchange Commission's (the "Commission") interim final rule amending the Rule 19b-4 filing requirements for dually-registered clearing agencies (the "Interim Final Rule").[1]

CME Group operates four separate derivatives exchanges, including Chicago Mercantile Exchange Inc. ("CME"), the Board of Trade of the City of Chicago, Inc. ("CBOT"), the New York Mercantile Exchange, Inc. ("NYMEX") and the Commodity Exchange, Inc. ("COMEX"). The CME Group exchanges offer the widest range of benchmark products available across all major asset classes, including futures and options based on interest rates, equity indexes, foreign exchange, energy, metals, agricultural commodities, and alternative investment products. CME is registered as a derivatives clearing organization ("DCO") with the Commodity Futures Trading Commission ("CFTC") and is one of the largest central counterparty clearing services in the world. CME provides clearing and settlement services for exchange-traded contracts as well as for over-the-counter derivatives transactions.

Impact of Dodd-Frank on CME's CDS Clearing Business

CME has offered clearing for certain credit default swaps ("CDS") based on broad-based indices since December 2009. These activities were initially conducted pursuant to temporary conditional exemptive relief granted by the Commission.[2]

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") recognized the value of central counterparty ("CCP") participation in the CDS space. It amended the Securities Exchange Act of 1934 (the "1934 Act") to ensure that DCOs such as CME that were clearing swaps (including CDS) before the date of enactment would be "deemed to be registered" as clearing agencies

[1] See SEC Release No. 34-64832, 76 FR 41056 (July 13, 2011).
[2] See SEC Release No. 34-63388.

20 South Wacker Drive Chicago, Illinois 60606 T 312 930.8275 F 312 930.3209 craig.s.donohue@cmegroup.com cmegroup.com

under the securities laws solely for the purpose of clearing security-based swaps.[3] This "deemed registered" provision, which was designed to facilitate continued clearing of CDS products, took effect on July 16, 2011.

Dodd-Frank also addressed the division of regulatory jurisdiction for CDS products between the CFTC and the Commission. Under Dodd-Frank, the Commission has jurisdiction over "security-based" swaps including single name CDS. The Commission therefore regulates entities that clear such products. The CFTC, on the other hand, has exclusive jurisdiction over products that are "swaps," including CDS based on broad-based indices, and regulates DCOs clearing such swaps.[4] The Commission and the CFTC have concurrent jurisdiction over "mixed swaps" under Dodd-Frank.

To this point in time, CME has cleared only broad-based CDS products that fall within the exclusive jurisdiction of the CFTC. However, because CME is "deemed registered" as a clearing agency pursuant to Dodd-Frank, it is also subject to the Commission's oversight on that basis. Additionally, CME has plans to offer clearing services for CDS that are security-based swaps in the near future.

Amendments Made by the Interim Final Rule

Because CME clears products that are subject to the CFTC's jurisdiction under the Commodity Exchange Act ("CEA"), it complies with the core principles that apply to DCOs under the CEA and is subject to the CFTC's extensive oversight concerning every aspect of its clearing operations. In particular, CME complies with the CFTC's rule filing procedures for all changes to its rulebook and other documents that are treated as rules under the CEA. Most CME proposed rule amendments are submitted via self-certification procedures that are available under Rule 40.6 of CFTC regulations. Even though CME is not currently clearing any products under the Commission's jurisdiction, staff has informed CME that it is also subject to the rule filing procedures contained in the 1934 Act due to its "deemed registered" status.[5]

The Commission's rule filing regime is very different from that which applies to CFTC registrants under the CEA. The Commission's process requires self-regulatory organizations ("SROs") to submit most rule amendments to the Commission for review and approval prior to effectiveness. This "regular way" filing treatment under Sections 19(b)(1) and (2) of the 1934 Act generally involves a lengthy public comment and agency review period. The 1934 Act also has mechanisms that allow certain categories of filings, for example, those that are administrative in nature, to qualify for summary effectiveness under Section 19(b)(3)(A). In contrast, the normal course rule filing procedures in the CEA allow SROs to submit changes under a self-certification regime that in most cases does not involve a public comment process and does not require approval of the agency prior to effectiveness, although the CFTC can request further information and can challenge proposed changes if it concludes that the proposed change does not comport with the applicable core principles set forth in the CEA. Critically, however, the CFTC's process provides much greater certainty concerning the timing of effectiveness for proposed new rules

[3] Section 763 of the Dodd-Frank Act.
[4] See Sections 712, 721 and 722 of the Dodd-Frank Act.
[5] The release accompanying the Interim Final Rules, at page 41058, explains that a clearing agency "deemed" registered with the Commission would be expected to comply with the Exchange Act's rule filing requirements "to the extent it clears security-based swaps after the effective date of the Deemed Registered Provision." To date, CME has not cleared any security-based swaps.

and rule changes. This ensures that the effectiveness of such changes – and thus an exchange's or clearinghouse's ability to respond to new developments, changes in the marketplace, new opportunities and certainly market emergencies – is not delayed by a lengthy review, comment and approval process.

Recognizing the significant differences between the two rule filing regimes and the CFTC's comprehensive oversight, the Interim Final Rules expanded the list of categories that qualify for summary effectiveness under Section 19(b)(3)(A) to accommodate dually-registered clearinghouses such as CME. The release accompanying the Interim Final Rules (the "Release") explains that the amendments were "intended to eliminate any burdens resulting from delays that could arise due to the differences between the Commission's rule filing process and the CFTC's self-certification process, which generally allows rule changes to become effective immediately upon or shortly after filing."[6] The new effective on filing category brought in by the Interim Final Rules applies to any change in an existing service of a registered clearing agency that:

(A) Primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures; and
(B) Does not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service…"

The Release explains that, for purposes of this requirement, a clearinghouse's "futures clearing operations" should be interpreted to generally include "any activity that would require the Registered Clearing Agency to register with the CFTC as a DCO in accordance with the CEA".[7] The Release notes that the new category "should help limit the potential for delays by providing a streamlined process for allowing rule changes to become effective that primarily concern the futures clearing operations of a clearing agency which, unless such operations were linked to securities clearing operations, would not be subject to regulation by the Commission."[8]

The Amendments Do Not Adequately Address the Issues

CME appreciates the Commission's efforts to address the difficulties associated with applying the Rule 19b-4 rule filing regime to a futures clearinghouse. However, in our view, current formulation of the Interim Final Rules does not adequately address the issues involved. CME's current business covers both futures clearing *and* swaps clearing, and CME has cleared certain OTC swap products for many years under the CFTC's oversight. CME currently clears agricultural swaps and interest rate swaps and offers clearing for other OTC commodity products such as gold forwards and freight forwards. We may in the future clear OTC products in other asset classes in which CME Group exchanges have deep experience, such as energy and FX. Although these products are not futures, they have no impact on CME's CDS clearing offering. Moreover, at this point in time, CME's entire business line, including the clearing of CDS on broad-based indices, falls under the exclusive jurisdiction of its primary regulator, the CFTC.

The text of the Commission's Interim Final Rule offers effective on filing treatment to rules primarily affecting CME's "futures clearing operations" with respect to "futures that are not security futures," but

[6] See Release at 41058.
[7] See Release at 41058.
[8] See Release at 41059.

contains no reference to swaps or other OTC contracts that fall within the CFTC's jurisdiction, regardless of asset class or the potential to genuinely impact the clearing of securities or security-based swaps. Although the commentary to the Release made clear that "futures clearing operations" was intended to include any activity that requires DCO registration, and swaps clearing requires DCO registration, staff at the Commission informed CME that the new filing category is not available for CME filings that primarily relate to swaps (rather than futures) under the CFTC's jurisdiction because the text of the new rule does not specifically reference "swaps".

CME is now faced with the requirement to submit rule filings that relate to CFTC-regulated swaps to the Commission for its prior review and approval. Because the Commission did not categorically exempt futures and swaps-related filings for dually-registered entities, but rather choose to address the issue by creation of a new effective on filing category, CME is now subject to substantial potential delays in implementing rule changes that deal with matters over which the Commission has no jurisdiction, and even though CME will have the CFTC's requirements for such changes to become effective. In essence, the Commission's interpretation has replaced the CEA rule filing regime with the 1934 Act's pre-approval rule filing regime for swaps.

We believe this is an unreasonable result. The "deemed registered" provision in Dodd-Frank was intended to facilitate *increased* CCP clearing of CDS by ensuring that those clearing agencies that were already authorized to and engaged in the clearing of CDS could continue to do so without undue disruption of their service offerings. CME does not believe it was intended to reshape the basic division of agency oversight with respect to organizations like CME Group that are primarily futures markets and that may also offer (or intend in the future to offer) clearing for over-the-counter security-based swaps products. The Commission's jurisdiction in this context is limited to regulating the narrow band of CME Group's business falling under its purview, that is, CME's clearing of security-based swaps.[9] The CFTC, pursuant to the CEA, is responsible for overseeing CME's rulebook as it relates to activities that do not involve security-based swaps. Congress had no intention of changing this fundamental division of responsibilities.

There is also no reasonable basis for this outcome under a costs-benefits analysis. The guiding principle of President Obama's Executive Order 13563 is that federal agencies should 'consider the costs and benefits of their regulations and choose the least burdensome path available" in their rulemaking.[10] The Commission's interpretation in this area creates a situation where one federal agency will conduct a lengthy public comment review process over a matter that has already been addressed by another federal agency under the relevant statutory authority, *as to matters over which that other agency has exclusive or primary jurisdiction*. This duplicative and unnecessary oversight is surely not the least burdensome path available, it comes at tremendous cost to CME, its clearing members and customers, and it offers no clear regulatory benefit. To the extent the Commission identified any issue in a current or proposed rule related to CME's deemed registered status and its future plans to clear security-based swaps, the Commission would still have the necessary regulatory tools to require resolution given its

[9] The Commission's jurisdiction would, of course, also extend to any future clearing by CME of security futures, which products are subject to joint oversight by the Commission and the CFTC. CME does not presently clear any security futures products.

[10] See 76 FR 3821 (January 18, 2011).

authority to abrogate the rules of a self-regulatory organization that do not meet the requirements of the 1934 Act.

CME respectfully submits that the Commission should revise its rule-filing procedures for "deemed registered" clearing agencies so only rules that relate directly to security-based swap clearing activities must be filed under the Rule 19(b)(2) process. This should include rules of general applicability for product categories, such as CDS, where clearing is offered for both swaps and security-based swaps. It should not include other swap or OTC product categories with no direct or significant impact on security-based swaps, and it should not include broad rules of general applicability as to clearing operations that will not have any particular or significant impact on security-based swaps clearing. For such rules, although they may have a peripheral impact on the clearing of security based swaps, the Commission should defer to the rule-filing processes of the CFTC. Above all, the Commission's final rule must provide dually-registered clearing agencies with reasonable certainty. CME staff would welcome the opportunity to work with Commission to achieve a clear and workable standard while still preserving the Commission's appropriate regulatory authority over the clearing of security-based swaps.

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CME thanks the Commission for the opportunity to comment on this matter. If the Commissioners or Commission staff has any comments or questions, please feel free to contact me at (312) 930-8275, Ann Shuman, Managing Director and Deputy General Counsel at (312) 648-3851, or Tim Elliott, Director and Associate General Counsel, at (312) 466-7478.

Sincerely,

Craig S. Donohue

cc: Chairman Mary Schapiro
Commissioner Kathleen Casey
Commissioner Elisse Walter
Commissioner Troy Paredes
Commissioner Luis Aguilar
Chairman Gary Gensler
Commissioner Michael Dunn
Commissioner Bart Chilton
Commissioner Jill Sommers
Commissioner Scott O'Malia

20 South Wacker Drive Chicago, Illinois 60606 T 312 930.8275 F 312 930.3209 craig.s.donohue@cmegroup.com cmegroup.com