UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 95014 / May 31, 2022

Admin. Proc. File No. 3-20808

In the Matter of the Application of

LEK SECURITIES CORPORATION

For Review of Action Taken by

NATIONAL SECURITIES CLEARING CORPORATION
and THE DEPOSITORY TRUST COMPANY

Appeal filed: April 4, 2022
Motion for stay filed: April 4, 2022
Last brief received: April 13, 2022

ORDER DENYING MOTION FOR A STAY AND SCHEDULING BRIEFS

Lek Securities Corporation seeks a stay, pending review pursuant to Rule 19d-3 under the Securities Exchange Act of 1934 and Commission Rule of Practice 420,[1] of action taken against it by the National Securities Clearing Corporation ("NSCC") and Depository Trust Company ("DTC"). NSCC and DTC (collectively, the "Clearing Agencies") are each wholly owned subsidiaries of the Depository Trust & Clearing Corporation ("DTCC"), a non-regulated holding company. On March 10, 2022, a hearing panel composed of members of DTCC's Board of Directors, who are also members of NSCC's and DTC's boards, issued a decision affirming the Clearing Agencies' determinations to (i) cease to act for Lek; (ii) impose an activity cap on Lek's trading activity; and (iii) impose fines and sanctions for Lek's violation of that activity cap.

Lek is a registered broker-dealer and FINRA member firm, and has been a member firm of NSCC and DTC since 1999. Lek states that it is an agency-only, self-clearing broker that provides execution services directly to its customers and provides clearing brokerage services to other brokerage firms. NSCC provides clearing, settlement, risk management, central counterparty services, and a guarantee of completion for virtually all broker-to-broker trades

[1] 17 C.F.R. § 240.19d-3; 17 C.F.R. § 201.420.

involving equity securities, corporate and municipal debt securities, and certain other securities.[2] DTC provides clearance, settlement, custodial, underwriting, registration, dividend, and proxy services for a substantial portion of all equities, corporate and municipal debt, exchange-traded funds, and money market instruments available for trading in the United States.[3]

With its application for review, Lek requested a stay of the hearing panel's decision affirming the cease to act determinations (the "Decision").[4] The effect of the cease to act determinations would be that Lek could no longer operate as a self-clearing broker. The Clearing Agencies would no longer do business with Lek. The Clearing Agencies oppose Lek's stay request. Because Lek has not met its burden for granting a stay, the motion is denied.

I. Background

On October 26, 2021, the Clearing Agencies provided Lek with written notice of their determinations to cease to act for Lek. They based their determinations on their findings that (1) Lek had weak capital and liquidity, particularly in relation to the level of its risk activity; (2) Lek had significant deficiencies in its internal controls and had made misrepresentations relating thereto; and (3) Lek failed to report material changes in its financial and business condition and engaged in a pattern of providing incomplete, misleading, or inaccurate information in non-compliance with reporting requirements and the Clearing Agencies' requests.

NSCC's notice to Lek also summarily limited Lek's clearing activity by imposing a cap of $300 million of aggregate unsettled clearing activity as measured by the gross market value of Lek's unsettled portfolio each business day coinciding with the approval of Lek's start-of-day margin call ("Activity Cap"). At Lek's request, on November 5, 2021, NSCC increased the Activity Cap to $400 million. NSCC found, and Lek does not deny, that Lek violated the

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[2] Order Approving A Proposed Rule Change to Enhance the Calculation of the Family-Issued Sec. Charge, Exchange Act Release No. 88494, 2020 WL 1659286, at *1 (Mar. 27, 2020).

[3] *Atlantis Internet Group Corp.*, Exchange Act Release No. 70620, 2013 WL 5519826, at *1 & n.1 (Oct. 7, 2013).

[4] Although Lek focuses on the Decision's cease to act determinations, Lek contends in a footnote that, "[b]ecause the Decision's bases for upholding the imposition of the Activity Cap and fines are the same as the rationale for upholding the 'cease to act' determinations, the censure and fine should also be stayed pending the SEC appeal." Based on the same reasons, Lek also seeks a stay of a separate decision that the hearing panel issued on April 6, 2022, ordering Lek to pay $383,449.14 in hearing costs. Because we deny a stay with respect to the Decision's cease to act determinations, finding that Lek has not established that serious legal questions exist, we also deny a stay as to the imposition of the Activity Cap, fines, and hearing costs.

Activity Cap six times between November 1 and 7, 2021. On November 5 and 7, 2021, NSCC notified Lek that it was censuring Lek and fining it $20,000 for each violation.

Lek timely requested a hearing regarding the Clearing Agencies' determinations. A panel of members of DTCC's Board of Directors held a two-day hearing in February 2022. On March 10, 2022, the hearing panel issued its Decision upholding the determinations of the Clearing Agencies to cease to act, to impose the Activity Cap, and to censure and fine Lek.

A. The Decision found that the Clearing Agencies had the authority to cease to act for Lek.

The Decision upheld the Clearing Agencies' determinations that their respective rules authorized them to cease to act for Lek. The Decision noted that NSCC Rule 46 authorizes NSCC to prohibit or limit a participant's access to NSCC's services if that participant is "in such financial or operating difficulty" that NSCC determines, "in its discretion, that such action is necessary for the protection of [NSCC], the participants, creditors or investors"; if "such participant has failed to comply with any financial or operational requirement of" NSCC; or "in any circumstances in which, in the discretion of [NSCC], adequate cause exists to do so."[5] The Decision also noted that DTC Rule 10 contains analogous requirements with respect to DTC. As a result, the Decision stated, membership can only be granted or maintained by a member that DTCC determines has the capability to meet its financial obligations to DTCC.

B. The Decision found that Lek's capital and liquidity were inadequate and provided a sufficient basis for the cease to act determinations.

The Decision found that Lek could not assure the Clearing Agencies that it could meet its financial obligations. Lek had been on NSCC's "Watch List" since 2006 and under "Enhanced Surveillance" as an enhanced credit risk since 2013. Then, in early 2021, as a result of a rule change that the Commission approved, Lek's margin requirements with NSCC increased—i.e., the amount of collateral that brokers such as Lek must post due to the financial risk between the time trades are executed and the time trades are settled. Also during 2021, Lek lost two bank lines of credit totaling $100 million. The Decision found that the current bank financing available to Lek is not sufficient to meet its heightened margin requirements and that Lek conceded that if it failed to satisfy its margin requirements even once it would be out of business.

Accordingly, Lek implemented what it called the "Lek Holdings Note Program." Under this program, Lek's customers would loan Lek money on an unsecured basis "in an amount necessary to cover what [Lek] calculates to be the initial required margin on the trade."

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[5] NSCC Rule 46, Sec. 1 (c), (f); *see also* Order Approving Proposed Rule Change, Exchange Act Release No. 23151, 1986 WL 626454, at *4 & n.16 (Apr. 21, 1986) ("Action taken by NSCC may include ceasing to act for the Settling Member or such other limits on access to its services that NSCC determines to be appropriate." (citing NSCC Rule 46, Sec. 4)).

The Decision found that the Lek Holdings Note Program presented "numerous disqualifying factors" as a means of meeting Lek's margin requirements. First, the Decision found Lek would have to use the program just to meet its minimum margin obligations. Every NSCC member must post a minimum Required Fund Deposit with NSCC, and in November 2021, NSCC increased Lek's minimum Required Fund Deposit from $20 million to $27 million. The Decision determined that Lek's reported capital and unsecured lines of credit were insufficient to fund the minimum Required Fund Deposit. As a result, the Decision found that "even if there was no trading activity at all Lek would still have to utilize the Lek Holdings Note Program" to meet this obligation. Yet it was "not clear that any of Lek's customers would be willing to loan money to Lek . . . under the program without making a corresponding trade."

Second, the Decision found that the program was problematic "[e]ven to fund an initial margin deposit" for a trade. Under the program, when a customer orders a trade, Lek calculates the NSCC margin requirement for that trade. The customer then loans cash in the amount of the anticipated margin requirement to Lek's parent company. The parent company then loans the cash to Lek, which then uses it to post the required margin at NSCC. But the Decision noted that "[n]ot a single one of these steps (other than [Lek's] requirement to post margin at NSCC) is required through any contract, rule, or other legally binding requirement." The customers are not obligated to loan money to Lek's parent company, and Lek's parent company is not obligated to loan money to Lek. The Decision found that even Lek's own internal procedures did not require its customers to loan anything to Lek's parent company before being allowed to trade.

The Decision also found "a stark difference between customer loans in the Lek Holdings Note Program and bank lines of credit." Established financial institutions such as banks are in the business of lending money; they have reliable sources of capital to lend and the infrastructure to assure that lines of credit work effectively, reliably, and on short notice. The Decision stated that "DTCC cannot rely on any of the actors in the Lek Holdings Note Program in the same way." The Decision added that the client participants in the program are an unknown to DTCC. The customers who are to be the ultimate source of cash have not been vetted to determine whether they are reliable sources of capital. Accordingly, DTCC "simply does not know who or what they are and whether or not they can be relied on as dependable lenders."

The Decision found further that Lek's CEO made "knowingly false" and "unequivocally. . . not accurate" representations about FINRA's statements regarding the Lek Holdings Note Program. In an affirmation, the CEO represented that Lek had "answered FINRA's questions about the Lek Holdings Note Program and alleviated any concerns it had." But the record established that FINRA continued to have concerns about the Lek Holdings Note Program.

Finally, the Decision emphasized that, by Lek's own description, even if the Lek Holdings Note Program worked perfectly, it only covers the initial margin requirement at the time of the trade. The value of securities can change significantly in the two days between a trade and settlement, and the margin required to cover a potential failed trade would change significantly as a result. Indeed, the Decision found that since Lek's customers engage in trading in illiquid and microcap securities, "margin swings for [Lek] are even more likely to happen and be material." The Decision concluded that, in light of Lek's minimal capital and lines of credit,

Lek "has essentially no liquidity sources, and certainly no reasonably assured liquidity sources, to compensate for significant moves in margin requirements between trade and settlement."

For these reasons, the Decision found the Lek Holdings Note Program "completely inadequate" as the primary way for Lek to meet its margin requirements. The Decision noted that Lek's failure to be candid about the Lek Holdings Note Program, such as through its CEO's misrepresentations as discussed above, exacerbated its concerns with the program. Accordingly, the Decision found Lek's lack of adequate capital and liquidity "[w]as more than sufficient grounds alone to support the cease to act determinations." The Decision also found that the Clearing Agencies' determinations to impose the Activity Cap during the pendency of the action was appropriate given the risks presented by Lek's capital and liquidity position. And the Decision affirmed the censure and fines imposed for Lek's violations of the Activity Cap.

C. The Clearing Agencies informed Lek that they would soon cease to act for it.

The Clearing Agencies subsequently notified Lek that NSCC would stop accepting trades for Lek on May 4, 2022, that NSCC would cease to act for Lek on May 11, 2022, and that DTC would cease to act for Lek on June 9, 2022. Lek then filed this appeal and stay request.[6] On April 28, 2022, Lek filed a supplement to its stay request, in which it stated that the Clearing Agencies had informed Lek that they "have temporarily adjourned the effective dates of the cease to act determinations and will provide [Lek] with at least ten calendar days prior notice and six weeks prior notice for the ceases to act for the NSCC and DTC, respectively." Lek stated further that "the effective dates of the cease to act determinations have not been adjourned pending the Commission's decision on the pending Motion to Stay, thus this change in the timing of the effective dates does not obviate the need for the requested stay."

II. Analysis

A stay pending appeal is an "'extraordinary remedy,'" and the movant bears the burden of establishing that relief is warranted.[7] We emphasize that our conclusions with respect to a stay motion are not final, and that final resolution must await the Commission's determination of

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[6] The Clearing Agencies filed a copy of the index to the record on April 15, 2022, pursuant to Rule 420(e) of the Rules of Practice. 17 C.F.R. § 201.420(e).

[7] *Bloomberg L.P.*, Exchange Act Release No. 83755, 2018 WL 3640780, at *7 (July 31, 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 432–34 (2009)); *accord Alpine Sec. Corp.*, Exchange Act Release No. 87599, 2019 WL 6251313, at *5 & n.51 (Nov. 22, 2019); *Mark E. Laccetti*, Exchange Act Release No. 79138, 2016 WL 6137057, at *2 & n.10 (Oct. 21, 2016).

the merits of an applicant's appeal.[8] We base the conclusions we reach in considering a stay motion only on a review of the record and arguments currently before us.[9]

In determining whether to grant a stay under Rule of Practice 401,[10] we consider whether (i) there is a strong likelihood that the movant will eventually succeed on the merits of the appeal; (ii) the movant will suffer irreparable harm without a stay; (iii) no other person will suffer substantial harm as a result of a stay; and (iv) a stay is likely to serve the public interest.[11] "The appropriateness of a stay turns on a weighing of the strengths of these four factors; not all four factors must favor a stay for a stay to be granted."[12] "The first two factors are the most critical, but a stay decision rests on the balancing of all four factors."[13]

To obtain a stay under this framework, a movant need not establish that it is likely to succeed on the merits, but it must at least show "that the other factors weigh heavily in its favor" and that it has "raised a 'serious legal question' on the merits."[14] "Because the moving party must not only show that there are 'serious questions' going to the merits, but must additionally establish that 'the balance of hardships tips *decidedly* in its favor,' its overall burden is no lighter than the one it bears under the 'likelihood of success' standard."[15] Lek has not met its burden.

A. Lek has not raised a serious question on the merits.

The Decision affirmed the Clearing Agencies' determinations that Lek's "capital and liquidity are inadequate," and found that this conclusion provided "more than sufficient grounds alone to support the[ir] cease to act determinations."[16] We find that Lek has failed to raise a

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8 *Bloomberg*, 2018 WL 3640780, at *7 (quoting *Harry W. Hunt*, Exchange Act No. 68755, 2013 WL 325333, at *4 (Jan. 29, 2013)).

9 *Id.*

10 17 C.F.R. § 201.401; *see also* Exchange Act Section 19(d)(2), 15 U.S.C. § 78s(d)(2) (authorizing Commission to stay challenged self-regulatory organization action).

11 *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *3 (Nov. 27, 2017).

12 *Bloomberg*, 2018 WL 3640780, at *7.

13 *Id.*

14 *Zipper*, 2017 WL 5712555, at *6 (quoting *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011)).

15 *Id.* (quoting *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (emphasis in original)).

16 *See* NSCC Rule 46, Sec. 1 (providing that NSCC may "prohibit or limit" a participant's access to NSCC services if "the participant is in such financial or operating difficulty, that [NSCC] determined, in its discretion, that such action is necessary for the protection of [NSCC], the participants, creditors, or investors" or "in any circumstances in which, in the discretion of

serious question on the merits with respect to its challenge to the Clearing Agencies' cease to act determinations.

Although Lek disputes the Decision's determination that the Lek Holdings Note Program is not a reliable source of margin funding, it does not dispute most of the underlying facts on which that determination was made. Lek does not dispute that the program depends on several steps that are not required to happen, including that customers are not required to loan money to Lek Holdings and that Lek Holdings is not required to loan money to Lek. Nor does Lek dispute that it did not provide the names of the customers who fund the Lek Holdings Note Program or any audited financials for Lek Holdings. In this respect, the Hearing Panel found a "stark difference" between the Lek Holdings Note Program and lines of credit from established financial institutions such as banks, which have "the reliable sources of capital to lend and the infrastructure to assure that lines of credit work effectively, reliably, and on short notice." Lek also does not dispute the Decision's finding that a security's value can change significantly in the two days between a trade and settlement and that the margin required to cover a potential failed trade would change significantly with it. Lek further does not dispute that there is no mechanism in the Lek Holdings Note Program to require customers to provide additional loans to cover changes in margin following the entry of their trades. At this stage of the proceeding, these undisputed findings appear to present a reasonable basis for the Decision's conclusion that the Lek Holdings Note Program is unreliable as a means for Lek to meet its margin requirements.

Lek attacks the Decision's conclusion that its liquidity is insufficient to meet its margin requirements on several bases, but Lek's arguments do not raise a serious legal question.

1. Lek has not shown that there is a serious legal question about the Clearing Agencies' concerns regarding the Lek Holdings Note Program.

First, Lek argues that the Hearing Panel did not accord sufficient weight to several factors it believes show the cease to act determinations are not necessary. Principally, Lek argues that because it has never missed a margin call, including during its reliance on the Lek Holdings Note Program, it is not likely to miss a future margin call, and so the Decision's concerns about the reliability of the Lek Holdings Note Program are not well founded. But the fact that Lek has thus far satisfied its margin obligations while utilizing the Lek Holdings Note Program does not mean it will continue to do so in the future. And NSCC's "risk-based margin system" is

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[NSCC], adequate cause exists to do so"); *see also* DTC Rule 10, Sec. 1 (providing that "[b]ased on its judgment that adequate cause exists to do so, the Corporation may at any time . . . cease to act for a Participant" if the Participant "is in such financial or operating condition that reasonable grounds exist for a determination . . . that its continuation as a Participant or Settling Bank would jeopardize the interests of the [DTC], other Participants or Pledgees"). Lek does not challenge DTC's cease to act determination separately from its challenges to NSCC's determination.

designed "to cover its potential *future* exposure."[17] So the issue is whether the Lek Holdings Note Program is a reliable way for Lek to meet its ongoing margin obligations or whether there was adequate cause for the Clearing Agencies to view the program as inadequate. As discussed above, Lek has not established that the Clearing Agencies' concerns about the program are unfounded.

Lek also contends that, in finding its liquidity insufficient, the Decision ignored that it has a "significant built-in cash cushion to address any post-trade, pre-settlement price swings" because it must maintain a $27 million minimum Required Fund Deposit and because it requires investors participating in the Lek Holdings Note Program to make initial margin payments that include a "buffer."[18] But the Decision found that Lek could not meet even its minimum Required Fund Deposit without relying on the Lek Holdings Note Program. And Lek cannot demonstrate that the program is reliable by assuming that it will be a reliable source of funds. As for any "buffer" that Lek may require its customers to provide to cover expected margin, Lek offers no assurance that this will be sufficient to account for subsequent market movement. Indeed, Lek does not dispute the Hearing Panel's conclusion that, despite the availability of NSCC resources, even calculating the initial margin requirement at the time of the trade is not an exact science. Nor does it dispute that its margin requirements have at times exceeded $80 million.

Lek argues further that the Hearing Panel erred by rejecting Lek's assertion that it now has more available credit than it did before its margin requirements increased in 2021. According to Lek, as of January 2021, it had only an $8 million line of credit from one bank to use for posting margin at NSCC and after it lost that line of credit it established a $10 million unsecured line of credit at another bank. But, in their opposition to the stay request, the Clearing Agencies say Lek had $15.5 million in lines of credit available for posting margin in January 2021 compared to only $10 million now. Lek does not address this assertion in its reply. Regardless of whether Lek's available unsecured lines of credit increased by $2 million in 2021, it is undisputed that Lek's margin requirements also increased, that it adopted the Lek Holdings Note Program to meet those increased margin requirements, and that it lacks sufficient funds to meet its minimum Required Fund Deposit without using the Lek Holdings Note Program.

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[17] Exchange Act Rule 17Ad-22(e)(6)(iii), 17 C.F.R. § 240.17Ad-22(e)(6)(iii) (emphasis added).

[18] In its reply brief, Lek claims that it will agree to place limitations on its customers' trades to keep its daily margin obligation at or below $27 million if the Commission grants a stay. But Lek has a history of exceeding previous trading caps, Lek's pledge still seemingly relies on the Lek Note Holdings Program, and Lek does not explain how it will ensure post-trade, pre-execution price swings will not cause Lek's margin obligations to exceed $27 million.

2. Lek has not shown that there is a serious legal question about the process it received.

Second, Lek argues that the Clearing Agencies failed to afford it the notice and process contemplated by Exchange Act Section 17A(b)(3)(H).[19] But the record shows that the Clearing Agencies notified Lek in writing of the basis for their action, provided an opportunity to be heard on the grounds stated therein, held a hearing and kept a record of proceedings, and, through the Decision, stated in writing the basis for the cease to act determinations from which Lek appeals.[20]

Lek nonetheless contends that the Clearing Agencies engaged in an "unfettered exercise of discretion" because their cease to act determinations were not based on any rule that specified the precise level and composition of available financial resources that a member must have.[21]

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[19] 15 U.S.C. § 78q-1(b)(3)(H) (providing that a clearing agency shall not be registered unless the Commission determines that its rules "in general, provide a fair procedure with respect to . . . the prohibition or limitation by the clearing agency of any person with respect to access to services offered by the clearing agency"); *see also id.* § 78q-1(b)(5) (providing that "[i]n any proceeding by a registered clearing agency to determine whether a person shall be . . . prohibited or limited with respect to access to services offered by the clearing agency, the clearing agency shall notify such person of, and give him an opportunity to be heard upon, the specific grounds for denial or prohibition or limitation under consideration and keep a record," and that a "determination by the clearing agency to . . . prohibit or limit a person with respect to access to services offered by the clearing agency shall be supported by a statement setting forth the specific grounds on which the denial or prohibition or limitation is based").

[20] Lek claims in a footnote to its motion that the Clearing Agencies' determinations are facially invalid because the October 26, 2021 letters that first announced their actions did not indicate whether they were taken by the Clearing Agencies' Boards of Directors, which Lek says is required by NSCC Rule 46. But Lek fails to address that, regardless of who wrote the original letters, Lek is appealing from the decision of a hearing panel composed of members of DTCC's Board of Directors, which expressly affirmed the Clearing Agencies' actions. *See, e.g.*, *Robbi J. Jones*, Exchange Act Release No. 91045, 2021 WL 396767, at *3 (Feb. 2, 2021) (observing that "generalized claims of error are insufficient to establish that a stay is warranted").

[21] Lek contends that two regulations support its argument. It cites Exchange Act Rule 17Ad-22(e)(1), which provides that "[e]ach covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonably designed to" "[p]rovide for a well-founded, clear, transparent, and enforceable legal basis for each aspect of its activities in all relevant jurisdictions." 17 C.F.R. § 240.17Ad-22(e)(1). Lek has not shown that there is a serious question on the merits regarding the Clearing Agencies' compliance with this standard. It also cites Exchange Act Rule 17Ad-22(b)(5), which provides that NSCC, "shall establish, implement, maintain and enforce written policies and procedures reasonably designed to" "[p]rovide the opportunity for a person that does not perform any dealer or security-based swap

According to Lek, NSCC refused to provide an "amount of capital and level of credit facilities it would need to have" when Lek requested that it do so. But the Decision's affirmance of the Clearing Agencies' cease to act determinations was grounded in their rules. As stated above, NSCC Rule 46 authorizes a cease to act determination when "the participant is in such financial or operating difficulty, that [NSCC] determined, in its discretion, that such action is necessary for the protection of the Corporation, the participants, creditors, or investors"; or "in any circumstances in which, in the discretion of [NSCC], adequate cause exists to do so."[22] The Decision determined that Lek lacked sufficiently reliable sources of liquidity and explained the reasons that the cease to act determinations were warranted.

Moreover, the Decision was based on the quality of Lek's funding sources, not notional quantity. The Decision recognized that the Lek Holdings Note Program was initially set at $50 million and then increased to $100 million. But the Decision observed that Lek Holdings did not appear to have sufficient assets to fund the program on its own and that the ultimate source of the program's cash would come from Lek's customers or investors—none of whom were known to or vetted by NSCC. The Decision thus found that the Lek Holdings Note Program was an unreliable source of funding regardless of the amount of money Lek sought to obtain through it. The Decision determined that Lek needed to use the program to ensure it would be able to post even its minimum Required Fund Deposit. Yet the Decision concluded that, as Lek's "primary source" of liquidity, the program was "completely inadequate," and Lek does not explain why the Clearing Agencies' concerns about the program are unfounded.

3. Lek has not shown that there is a serious legal question about the Decision's conclusion that the cease to act determinations were necessary.

Third, Lek argues that the Decision did not explain why cease to act determinations were "necessary," as NSCC Rule 46 authorizes a cease to act determination when "necessary for the protection of" NSCC. Lek asserts that the Decision "hinge[s] on the hyperbolic statement that 'a failure by L[ek] would not be a failure for L[ek] alone'" but "'would cause harm to DTCC and potentially the entire financial system.'" But contrary to Lek's insinuation, the Decision did not base the cease to act determinations on a finding that Lek's failure would destroy the financial system. Rather, the Hearing Panel affirmed the Clearing Agencies' determinations that Lek's "liquidity position, including its capital position, was so weak as to present an unacceptable settlement risk to NSCC and NSCC's members other than L[ek]." Lek does not dispute that its failure to post the Required Fund Deposit would cause its own failure and harm the Clearing Agencies and their members or that it is necessary for NSCC to try to prevent such a failure.

Lek also argues that a cease to act determination is an unprecedented action and that the Decision had to show why a "less severe" action is not appropriate. But Lek cites to no statute, regulation, or NSCC or DTC rule to support this assertion. And the Clearing Agencies say in

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dealer services to obtain membership on fair and reasonable terms at the clearing agency to clear securities for itself or on behalf of other persons." 17 C.F.R. § 240.17Ad-22(b)(5). Lek has not shown that it was denied the opportunity to obtain membership on fair and reasonable terms.

22 *See* NSCC Rule 46, Sec. 1; *see also* DTC Rule 10, Sec. 1 (providing similar standards).

their opposition to the stay that, in other cases where they have prepared to cease to act for firms in financial or operational difficulty, the firms either took steps to increase capital and liquidity to levels sufficient to meet their obligations, merged with entities that had additional financial resources, or decided to voluntarily wind down their activities. In any case, the Decision explained that the cease to act determinations were necessary because Lek lacked sufficiently reliable liquidity. The Decision also explained that, in addition to the substantial risks posed by Lek's lack of liquidity, there were concerns regarding Lek's candor and openness with respect to the Lek Holdings Note Program.[23] Lek does not identify any lesser action that it contends would adequately protect the Clearing Agencies and their members from the risk caused by its financial circumstances.[24]

B. The remaining factors weigh against a stay.

Lek argues that it will suffer irreparable harm without a stay because the cease to act determinations will force Lek to stop acting as a self-clearing broker. We do not dispute that the cease to act determinations will cause Lek to suffer irreparable harm. But Lek's failure to raise a serious legal question on the merits means Lek has not met its burden for seeking a stay.[25]

Additionally, in light of Lek's financial situation and the Clearing Agencies' concerns with Lek continuing to use the Lek Holdings Note Program to meet its margin requirements, a stay would pose a risk of substantial harm to the Clearing Agencies and their other members. Lek argues that NSCC already requires deposits from member firms that protect it. But because NSCC guarantees completion of every member's unsettled transactions in the event of a default, NSCC is still exposed to its members' credit risk. And because DTC is a central securities depository for U.S. transactions in equity and other securities, DTC is similarly exposed to the credit risks associated with each participant's end-of-day net funds settlement. The Clearing Agencies' rules thus reflect a risk-management framework designed to protect the Clearing Agencies and their members from another member's default or other financial and operational difficulties. Central to this framework is ensuring that individual members can meet their liquidity and margin requirements on an ongoing basis. Although Lek claims that its failure to meet its margin requirements would not cause a market-wide failure, each clearing member's

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[23] Lek fails to address many of the bases on which the Decision reached this conclusion, including two specific findings that Lek made false or misleading statements.

[24] Lek also contends that the cease to act determinations were not necessary because it meets the minimum net capital requirements set forth in NSCC's rules. But the Hearing Panel determined that Lek's own "capital, while exceeding the regulatory minimum, is plainly inadequate to meet its liquidity needs," and "falls well short of its usual margin requirements."

[25] *See, e.g., In re Revel AC, Inc.*, 802 F.3d 558, 570 (3d Cir. 2015) (stating that "'even if a movant demonstrates irreparable harm . . . [it] is still required to show, at a minimum, serious questions going to the merits'") (alteration in original) (internal citation omitted).

ability to meet its margin requirements is crucial for ensuring the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.

Here, the Decision determined that continuing to act for Lek poses an unacceptable settlement risk, because Lek cannot show that it has the necessary capital and liquidity to meet its margin requirements. And Lek, as described above, has not shown a serious legal question about that determination. Moreover, the Clearing Agencies' rules set forth a process for minimizing the impact on others when the Clearing Agencies cease to act for a member such as Lek. Among other things, NSCC's rules specify that it will promptly attempt to complete the open transactions of the member's customers, provide notice to the customer of the situation, and attempt to complete the transactions.[26] And NSCC will have ceased to accept trades from Lek before instituting this process. We thus conclude that, even assuming irreparable harm to Lek, it would not be in the public interest to stay the Clearing Agencies' actions.[27]

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Accordingly, IT IS ORDERED that Lek Securities Corporation's motion for a stay pending Commission review of its appeal of the actions taken by the National Securities Clearing Corporation and the Depository Trust Company is denied; and it is further

ORDERED, pursuant to Rule 450(a) of the Rules of Practice,[28] that a brief in support of the application for review shall be filed by June 30, 2022. A brief in opposition shall be filed by August 1, 2022, and any reply brief shall be filed by August 15, 2022. Arguments not presented in an opening brief are subject to forfeiture.[29] Pursuant to Rule of Practice 180(c), failure to file a brief may result in dismissal of this review proceeding.[30]

By the Commission.

Vanessa A. Countryman
Secretary

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26 *See* NSCC Rule 18.

27 *Se. Invs., N.C., Inc.*, Exchange Act Release No. 86097, 2019 WL 2448245, at *5 (June 12, 2019) (stating that to the extent movant's assertions would establish irreparable harm they were "outweighed by the other factors"); *Zipper*, 2017 WL 5712555, at *5 (stating that "we need not decide whether Zipper has satisfied his burden of establishing an irreparable injury because any harm to Zipper is outweighed by the other factors").

28 17 C.F.R. § 201.450(a).

29 *Robbi J. Jones*, Exchange Act Release No. 91045, 2021 WL 396767, at *3 n.17 (Feb. 2, 2021) (declining to consider arguments raised for the first time in reply brief).

30 17 C.F.R. § 201.180(c).