

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-92437; File No. SR-NSCC-2021-009)

July 19, 2021

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of a Proposed Rule Change to Modify the Rules & Procedures of National Securities Clearing Corporation in Connection with the Implementation of Section 1446(f) of the Internal Revenue Code of 1986

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 14, 2021, National Securities Clearing Corporation (“NSCC”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change 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 from interested persons.

I. Clearing Agency’s Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of modifications to the Rules & Procedures (“Rules”)³ of NSCC in connection with the implementation of section 1446(f) of the Internal Revenue Code of 1986, as amended, that was enacted as part of the Tax Cuts and Jobs Act of 2017,⁴ and the Treasury Regulations or other official interpretations thereunder, as in effect from time to time (collectively “Section 1446(f)”), as described in greater detail below.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Capitalized terms not defined herein are defined in the Rules, available at http://www.dtcc.com/~media/Files/Downloads/legal/rules/nscc_rules.pdf.

⁴ Public Law No. 115-97 (2017), section 864(c)(8).

II. Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend the Rules in connection with the implementation of Section 1446(f). The proposed rule change also includes technical changes.

(i) **BACKGROUND**

Section 1446(f) and Section 1446(f) Withholding

Section 1446(f) was enacted on December 22, 2017, as part of the Tax Cuts and Jobs Act of 2017,⁵ and the U.S. Treasury Department (“Treasury Department”) finalized and issued various implementing regulations on October 7, 2020,⁶ including the tax withholding required pursuant to Treasury Regulation Section 1.1446(f)-4(a)⁷ upon the

⁵ Id.

⁶ Withholding of Tax and Information Reporting With Respect to Interests in Partnerships Engaged in a U.S. Trade or Business, 85 FR 76910 (Nov. 30, 2020).

⁷ 26 CFR §1.1446-4(a).

transfer of an interest in a publicly traded partnership (“Section 1446(f) Withholding”). It is NSCC’s understanding that Section 1446(f) Withholding is designed to ensure any non-U.S. person (either individual or entity) appropriately files a U.S. federal income tax return following the sale or disposition of its interest in certain partnerships.

Section 1446(f) generally imposes a ten percent (10%) withholding tax on the payment of gross proceeds arising from the sale or other disposition by a non-U.S. person of an interest in certain partnerships that are engaged in a U.S. trade or business.⁸ In such a case, a tax withholding obligation is imposed on the buyer of the partnership interest, who is required to remit the withheld tax amount to the U.S. Internal Revenue Service (“IRS”), unless or to the extent an applicable exception applies.⁹ The buyer obligated to withhold the 10% tax is liable for any amount that it underwithheld, plus associated interest and penalties.¹⁰

On October 7, 2020, the IRS and Treasury Department issued final regulations under Section 1446(f) (the “Final Regulations”),¹¹ which require Section 1446(f) Withholding on partnerships that are publicly traded on exchanges (“PTPs”) in respect of transfers that occur on or after January 1, 2022. The Final Regulations provided U.S. clearing organizations, such as NSCC, an exemption from the obligation to perform the Section 1446(f) Withholding at this time.¹² This exemption is premised in part on the

⁸ I.R.C. Section 1446(f).

⁹ Id.

¹⁰ Id.

¹¹ See note 6.

¹² See note 6, at 76922.

IRS and Treasury Department's understanding that all of NSCC's non-U.S. Members are of the types of entities that are permitted to perform the Section 1446(f) Withholding themselves.^{13,14} NSCC currently clears and settles all transactions on a netted basis. If NSCC were required to perform Section 1446(f) Withholding, NSCC would have to clear and settle transfers of PTP interest on a gross basis, which may be disruptive to the efficiency and liquidity of the trading of PTP interests in the capital markets, as noted in the Final Regulations.¹⁵

Currently, all of NSCC's non-U.S. Members are of the types of entities permitted to perform the Section 1446(f) Withholding themselves either because (i) they are the types of entities allowed to perform U.S. tax withholdings pursuant to applicable Treasury Regulations or (ii) they have entered into the requisite agreements with the IRS that allow them to perform U.S. tax withholdings (commonly known as the Qualified Intermediary Agreements). Nearly all such Members have historically accepted the responsibility to perform all U.S. tax withholdings in respect of their NSCC accounts, and it is NSCC's understanding that they would continue do the same for Section 1446(f) Withholding.

¹³ Id.

¹⁴ The Final Regulations provided that if a direct clearing member of a U.S. clearing organization is not of a type of entity permitted to perform Section 1446(f) Withholding, the IRS and Treasury Department will issue proposed guidance that would revise the Final Regulations to require Section 1446(f) Withholding by U.S. clearing organization on such direct clearing member. Id.

¹⁵ See note 6, at 76922.

(ii) **PROPOSED RULE CHANGES**

In order to comport with the legislative understanding underlying the Section 1446(f) Withholding exemption, NSCC is proposing amendments to its Rules to ensure that all NSCC FFI Members that are Members would accept the responsibility to perform the Section 1446(f) Withholding.¹⁶

Rule 1 (Definitions and Descriptions)

NSCC is proposing to add the following terms and definitions in Rule 1 (Definitions and Descriptions), as described below.

The term “Section 1446(f)” would mean section 1446(f) of the Code and the related Treasury Regulations or other official interpretations thereof, as in effect from time to time.

The term “Section 1446(f) Withholding” would mean the tax withholding required pursuant to Treasury Regulation Section 1.1446(f)-4(a), upon the transfer of an interest in a publicly traded partnership. As defined, “Section 1446(f) Withholding” would not apply to any tax withholding required on distributions made by such a partnership.

The term “Section 1446(f) Withholding Agent” would mean an FFI Member that is a Member and has certified to NSCC that Section 1446(f) Withholding would not apply to any Gross Credit Balance of such FFI Member by providing to NSCC a Tax Certification (as defined below and in the proposed rule text).

¹⁶ It is NSCC’s understanding that, based on the types of services that NSCC provides to Limited Members, notwithstanding any exemption, NSCC would not need to perform Section 1446(f) Withholding with respect to Limited Members’ activities at NSCC.

The term “Section 1446(f) Withholding Compliance Date” would mean January 1, 2022 or, if the commencement of Section 1446(f) Withholding is delayed beyond January 1, 2022 under Section 1446(f), two calendar months plus one calendar day before such delayed effective date.

NSCC is proposing to delete “FATCA Certification” and replace it with “Tax Certification.” As proposed, the term “Tax Certification” would mean an executed copy of the relevant tax form required by the IRS, as in effect from time to time, that each Member and Limited Member (or applicant to become such) shall provide from time to time to NSCC as set forth under the Rules and Procedures.

NSCC is also proposing two technical changes. First, NSCC is proposing to delete “FATCA Compliance Date” from Rule 1 because it would no longer be used in the Rules under the proposal. Second, NSCC is proposing to delete the definition of “Code” that is currently embedded within the definition of “FATCA” and add it as a standalone definition entry in Rule 1 so that it can be readily identified.

Rule 2 (Members and Limited Members)

NSCC is proposing to retitle Section 4(iii) of Rule 2 (Members and Limited Members) from “FATCA” to “FATCA and Section 1446(f).”

NSCC is also proposing to delete a reference to FATCA Compliance Date in the first paragraph of Section 4(iii) of Rule 2 because it is no longer relevant given FATCA is already in effect. In addition, NSCC is proposing to add a paragraph to Section 4(iii) of Rule 2 to require that, beginning on the Section 1446(f) Withholding Compliance Date, each FFI Member that is a Member must agree not to conduct any transaction or activity through NSCC if such FFI Member is not a Section 1446(f) Withholding Agent, unless

such requirement has been explicitly waived in writing by NSCC with respect to the specific FFI Member.¹⁷

In addition, NSCC is proposing to revise the last two paragraphs in Section 4(iii) of Rule 2 by changing FATCA Certification to Tax Certification, deleting a reference to FATCA, as well as adding references to Section 1446(f) Withholding Agent. As revised, each FFI Member is required to certify and periodically recertify to NSCC that such FFI Member is FATCA Compliant and/or a Section 1446(f) Withholding Agent, as applicable, by providing to NSCC a Tax Certification. In addition, an FFI Member shall indemnify NSCC for any loss, liability or expense sustained by NSCC as a result of such FFI Member failing to be FATCA Compliant or a Section 1446(f) Withholding Agent.

Rule 2A (Initial Membership Requirements)

NSCC is proposing to revise Section 1.B and 1.C of Rule 2A (Initial Membership Requirements) by including a reference to Section 1446(f) Withholding Agent and replacing FATCA Certification with Tax Certification, respectively. As proposed, Section 1.B of Rule 2A would provide that any applicant that shall be an FFI Member must be FATCA Compliant and/or a Section 1446(f) Withholding Agent, as applicable. In addition, as proposed, Section 1.C of Rule 2A would provide that, as part of its membership application, each applicant shall complete and deliver to NSCC a Tax Certification instead of a FATCA Certification. NSCC is also proposing a technical change by deleting an extraneous comma from Section 1.C of Rule 2A.

¹⁷ NSCC may waive this requirement from time to time with respect to a specific FFI Member if the FFI Member is unable to satisfy the requirement due to unusual and/or extraordinary circumstances, such as an unanticipated regulatory change in the tax withholding requirement or if the FFI Member is rectifying an unexpected change in its tax withholding status.

Rule 2B (Ongoing Membership Requirements and Monitoring)

NSCC is proposing to revise Section 2.B.(c) of Rule 2B (Ongoing Membership Requirements and Monitoring) by removing a reference to FATCA Compliance Date because it is no longer relevant given FATCA is already in effect. NSCC is also proposing to replace FATCA Certification with Tax Certification in Section 2.B.(c)(i) of Rule 2B and change two days to two calendar days in that section. Lastly, NSCC is proposing to add a new sentence to Section 2.B.(c) of Rule 2B that provides, beginning on the Section 1446(f) Withholding Compliance Date, each FFI Member that is a Member shall inform NSCC, both orally and in writing, if it has reason to know that it is not, or will not be, a Section 1446(f) Withholding Agent within two calendar days of knowledge thereof.

Rule 53 (Alternative Investment Product Services and Members)

NSCC is proposing to revise Sections 1(d)(iv) and 5(e)(i) of Rule 53 (Alternative Investment Product Services and Members) by replacing references of FATCA Certification with Tax Certification. In addition, NSCC is proposing to retitle Section 5(e) of Rule 53 as “Tax Considerations – AIP Settling Sub-Accounts.”

Addendum O (Admission of Non-US Entities as Direct NSCC Members)

NSCC is proposing to revise Addendum O (Admission of Non-U.S. Entities as Direct NSCC Members) to include requirements associated with Section 1446(f) Withholding. As proposed, NSCC would require each non-U.S. entity that is applying to become a Member or certain Limited Member to (i) agree not to conduct any transaction or activity through NSCC if the non-U.S. entity is not FATCA Compliant and/or is not a Section 1446(f) Withholding Agent, as applicable and (ii) indemnify NSCC for any loss, liability or expense sustained by NSCC as a result of the non-U.S. entity failing to be

FATCA Compliant or a Section 1446(f) Withholding Agent. NSCC is also proposing to retitle the second bullet in Addendum O to “FACTA Compliance, Section 1446(f) Withholding, and Tax Certification.” In addition, NSCC is proposing to remove the reference to FATCA Compliance Date from the second bullet in Addendum O because it is no longer relevant given FATCA is already in effect. Furthermore, NSCC is proposing to revise the second bullet in Addendum O by (i) adding references to Section 1446(f) Withholding Compliance Date and Section 1446(f) Withholding Agent and (ii) replacing FATCA Certification with Tax Certification. As proposed, the second bullet in Addendum O would provide, in part, that each non-U.S. entity that is applying to become a Member or certain Limited Member must be at all times FATCA Compliant and, beginning on the Section 1446(f) Withholding Compliance Date, be a Section 1446(f) Withholding Agent, if applicable, and must certify and recertify to NSCC that it is FATCA Compliant and/or a Section 1446(f) Withholding Agent, as applicable, by providing to NSCC a Tax Certification, unless such requirements have been explicitly waived in writing by NSCC.

(iii) MEMBER OUTREACH

Beginning in December 2020, NSCC conducted ongoing outreach to non-U.S. Members that are not currently performing U.S. tax withholding in order to provide them with notice of the proposed changes. As of the date of this filing, no written comments relating to the proposed changes have been received in response to this outreach. The Commission will be notified of any written comments received.

2. Statutory Basis

NSCC believes this proposal is consistent with Section 17A(b)(3)(F)¹⁸ of the Act for the reasons described below.

Section 17A(b)(3)(F) of the Act requires, in part, that the Rules be designed to promote the prompt and accurate clearance and settlement of securities transactions.¹⁹

NSCC believes that the proposed rule change to amend the Rules in connection with the implementation of Section 1446(f) is consistent with Section 17A(b)(3)(F) of the Act.

This is because the proposed rule change is designed to ensure that all NSCC FFI Members that are Members would accept the responsibility to perform the Section 1446(f) Withholding, consistent with the understanding of the IRS and Treasury Department as expressed in the Final Regulations.²⁰

As mentioned above, the Final Regulations provided NSCC an exemption from the obligation to perform Section 1446(f) Withholding at this time.²¹ However, the Final Regulations also provided that if a direct clearing member of a U.S. clearing organization is not of a type of entity permitted to perform Section 1446(f) Withholding, the IRS and Treasury Department will issue proposed guidance that would revise the Final Regulations to require Section 1446(f) Withholding by U.S. clearing organization, such as NSCC, on such direct clearing member.²² If the IRS and Treasury Department were to

¹⁸ 15 U.S.C. 78q-1(b)(3)(F).

¹⁹ Id.

²⁰ See note 6, at 76922.

²¹ Id.

²² Supra note 14.

revise the Final Regulations and revoke NSCC's exemption, NSCC would be required to clear and settle each transfer of PTP interest on a gross basis in order to perform Section 1446(f) Withholding on such transfer. Given that NSCC currently clears and settles all transactions on a netted basis, if NSCC has to clear and settle transfers of PTP interest on a gross basis, it may be disruptive to the efficiency and liquidity of the trading of PTP interests in the capital markets, as noted in the Final Regulations.²³

In order to be consistent with the understanding of the IRS and Treasury Department which NSCC's Section 1446(f) exemption was premised upon,²⁴ NSCC is proposing that, unless waived by NSCC, beginning on the Section 1446(f) Withholding Compliance Date, each FFI Member that is a Member would have to agree not to conduct any transaction or activity through NSCC if such FFI Member is not a Section 1446(f) Withholding Agent. In addition, each FFI Member that is a Member would have to provide periodic certifications to NSCC regarding its Section 1446(f) Withholding Agent status. Taken together, these requirements would help to ensure that all NSCC FFI Members that are Members would accept their responsibility to perform the Section 1446(f) Withholding (i.e., be a Section 1446(f) Withholding Agent).

By ensuring that all NSCC FFI Members that are Members would accept their responsibility to perform the Section 1446(f) Withholding, NSCC believes it would minimize the likelihood that the IRS and Treasury Department would revise the Final Regulations to revoke NSCC's Section 1446(f) exemption. Having the IRS and the Treasury Department continue to exempt NSCC from Section 1446(f) Withholding

²³ See note 6, at 76922.

²⁴ Id.

would enable NSCC to continue to clear and settle all transactions (including transfers of PTP interest) on a netted basis and avoid any potential disruption to the efficiency and liquidity of the trading of PTP interests in the capital market. By avoiding any potential disruption to the efficiency and liquidity of the trading of PTP interest in the capital market, the proposed rule change would help to promote the prompt and accurate clearance and settlement of transactions. As such, NSCC believes the proposed rule change to amend the Rules in connection with the implementation of Section 1446(f) is consistent with Section 17A(b)(3)(F) of the Act.²⁵

NSCC believes the proposal to make technical changes to the Rules is also consistent with Section 17A(b)(3)(F) of the Act.²⁶ The proposed technical changes to the Rules would help ensure that the Rules remain accurate and clear to Members. Having accurate and clear Rules would help Members to better understand their rights and obligations regarding NSCC's clearance and settlement services. NSCC believes that when Members better understand their rights and obligations regarding NSCC's clearance and settlement services, they can act in accordance with the Rules. NSCC believes that better enabling Members to comply with the Rules would promote the prompt and accurate clearance and settlement of securities transactions by NSCC. As such, NSCC believes the proposal to make technical changes to the Rules is consistent with Section 17A(b)(3)(F) of the Act.²⁷

²⁵ 15 U.S.C. 78q-1(b)(3)(F).

²⁶ Id.

²⁷ Id.

(B) Clearing Agency's Statement on Burden on Competition

NSCC believes that the proposed rule change to amend the Rules in connection with the implementation of Section 1446(f) could impose a burden on competition because the change could impose a cost on firms that currently do not do U.S. tax withholding by requiring them to perform the Section 1446(f) Withholding by the Section 1446(f) Withholding Compliance Date. However, NSCC believes any such burden is necessary and appropriate. Specifically, NSCC believes that any burden on competition that is created by the proposed rule change would be necessary in furtherance of the purposes of Section 17A(b)(3)(F) of the Act. As described above, the proposed rule change is designed to ensure that all NSCC FFI Members that are Members would accept the responsibility to perform the Section 1446(f) Withholding, consistent with the understanding of the IRS and Treasury Department as expressed in the Final Regulations.²⁸ By ensuring that all NSCC FFI Members that are Members would accept their responsibility to perform the Section 1446(f) Withholding, NSCC believes it would minimize the likelihood that the IRS and Treasury Department would revise the Final Regulations to revoke NSCC's Section 1446(f) exemption. Having the IRS and the Treasury Department continue to exempt NSCC from Section 1446(f) Withholding would enable NSCC to continue to clear and settle all transactions (including transfers of PTP interest) on a netted basis and avoid any potential disruption to the efficiency and liquidity of the trading of PTP interests in the capital market. By avoiding any potential disruption to the efficiency and liquidity of the trading of PTP interest in the capital market, the proposed rule change would help to promote the prompt and accurate

²⁸ See note 6, at 76922.

clearance and settlement of transactions, consistent with Section 17A(b)(3)(F) of the Act.²⁹ NSCC also believes that any burden that is created by the proposed rule change would be appropriate. This is because the proposed change would be limited to Section 1446(f) Withholding and associated certification and is also consistent with the understanding of the IRS and Treasury Department as expressed in the Final Regulations.³⁰

NSCC does not believe the proposal to make technical changes to the Rules would impact competition. The changes would apply equally to all Members and would not affect Members' rights and obligations. As such, NSCC believes the proposal to make technical changes to the Rules would not have any impact on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments relating to this proposed rule change have not been solicited or received. NSCC will notify the Commission of any written comments received by NSCC.

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

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:

²⁹ 15 U.S.C. 78q-1(b)(3)(F).

³⁰ See note 6, at 76922.

- (A) by order approve or disapprove such proposed rule change, or
- (B) 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 SR-NSCC-2021-009 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NSCC-2021-009. 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 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on DTCC's website (<http://dtcc.com/legal/sec-rule-filings.aspx>). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NSCC-2021-009 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.³¹

J. Matthew DeLesDernier
Assistant Secretary

³¹ 17 CFR 200.30-3(a)(12).