

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80378; File No. S7-03-14)

April 5, 2017

Order Granting a Temporary Exemption to Covered Clearing Agencies from Compliance with Rule 17Ad-22(e)(3)(ii) and Certain Requirements in Rules 17Ad-22(e)(15)(i) and (ii) under the Securities Exchange Act of 1934

I. Introduction

On September 28, 2016, the Securities and Exchange Commission (“Commission”) adopted amendments to Rule 17Ad-22 pursuant to Section 17A of the Securities Exchange Act of 1934 (“Exchange Act”) and Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.¹ Among other things, the amendments added new Rule 17Ad-22(e), which establishes an enhanced regulatory framework for registered clearing agencies that meet the definition of a covered clearing agency.² The amendments to Rule 17Ad-22 became

¹ See Exchange Act Release No. 34-78961 (Sept. 28, 2016), 81 FR 70786 (Oct. 13, 2016) (“CCA Standards Adopting Release”).

² Under Rule 17Ad-22(a)(5), “covered clearing agency” means (i) a designated clearing agency or (ii) a clearing agency involved in activities with a more complex risk profile for which the Commodity Futures Trading Commission is not the supervisory agency as defined in Section 803(8) of the Payment, Clearing, and Settlement Supervision Act of 2010 (“Clearing Supervision Act”). See 17 CFR 240.17Ad-22(a)(5).

In addition, Rule 17Ad-22(a)(6) defines “designated clearing agency” to mean a clearing agency registered with the Commission under Section 17A of the Exchange Act that is designated systemically important by the Financial Stability Oversight Council pursuant to the Clearing Supervision Act and for which the Commission is the supervisory agency as defined in Section 803(8) of the Clearing Supervision Act. Rule 17Ad-22(a)(4) defines “clearing agency involved in activities with a more complex risk profile” to mean a clearing agency registered with the Commission under Section 17A of the Exchange Act that: (i) provides central counterparty (“CCP”) services for security-based swaps; (ii) has been determined by the Commission to be involved in activities with a more complex risk profile at the time of its initial registration; or (iii) is subsequently determined by the Commission to be involved in activities with a more complex risk profile pursuant to Rule 17Ab2-2(b) under the Exchange Act. See 17 CFR 240.17Ad-22(a)(4), (6).

effective on December 12, 2016, and covered clearing agencies must be in compliance with the amendments by April 11, 2017.³ For the reasons discussed below, the Commission is using its authority under Section 17A(b)(1) of the Exchange Act to grant covered clearing agencies a temporary exemption from compliance with Rule 17Ad-22(e)(3)(ii) and certain requirements in Rules 17Ad-22(e)(15)(i) and (ii) until December 31, 2017.

II. Background

Rule 17Ad-22(e) generally requires a covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to address, among other things, its governance arrangements and risk management framework.⁴ Rule 17Ad-22(e)(3) requires a covered clearing agency to establish, implement, maintain and enforce policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, and which, among other things, includes plans for recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.⁵ In adopting Rule 17Ad-22(e)(3)(ii), the Commission stated its belief that recovery and wind-down plans, and material changes thereto, would constitute a proposed rule change under Section 19(b) of the Exchange Act and, for designated clearing agencies, an advance

³ See CCA Standards Adopting Release at 70848.

⁴ See id. at 70792.

⁵ 17 CFR 240.17Ad-22(e)(3)(ii).

notice under the Clearing Supervision Act, subjecting them to Commission review and public comment.⁶

In addition, Rule 17Ad-22(e)(15) requires a covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage the covered clearing agency's general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that the covered clearing agency can continue operations and services as a going concern if those losses materialize, including, among other things, by (i) determining the amount of liquid net assets funded by equity based upon its general business risk profile and the length of time required to achieve a recovery or orderly wind-down, as appropriate, of its critical operations and services if such action is taken and (ii) holding liquid net assets funded by equity equal to the greater of either (x) six months of its current operating expenses or (y) the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of the covered clearing agency, as contemplated by the recovery and wind-down plans established under Rule 17Ad-22(e)(3)(ii).⁷

III. Discussion

A. Background and Exemptive Request

As noted in the CCA Standards Adopting Release, the Commission believes that, taken together, the policies and procedures requirements related to recovery and wind-down plans in Rules 17Ad-22(e)(3)(ii) and (15) should help ensure that a covered clearing agency is able to remain resilient in times of market stress and to sustain its operations for sufficient time to

⁶ See CCA Standards Adopting Release at 70809.

⁷ 17 CFR 240.17Ad-22(e)(15)(i), (ii).

achieve orderly wind-down if such action is necessary.⁸ Unlike some other aspects of Rule 17Ad-22(e), until now recovery and wind-down plans have not been part of the Commission's regulatory framework for registered clearing agencies.⁹

Since the adoption of Rule 17Ad-22(e), Commission staff has been aware of the ongoing development of recovery and wind-down plans by covered clearing agencies in anticipation of the April 11, 2017 compliance date. Nevertheless, the development of recovery and wind-down plans continues to present novel and complex questions, and one entity, on behalf of its three subsidiaries that are covered clearing agencies, has requested that the Commission provide a temporary exemption from compliance until December 31, 2017 so that the clearing agencies can finalize their recovery and wind-down plans.¹⁰ The entity states its view that recovery and wind-down plans are an important new input into industry efforts to manage systemic risk that must be carefully designed to address concerns unique to each covered clearing agency and its members.¹¹ The entity asserts that the topic of recovery and wind-down remains under active discussion in the industry, that a substantial amount of work remains to be completed, and that it would be prudent to provide for a longer period of time for consultation concerning the relevant

⁸ See CCA Standards Adopting Release at 70868, 70876.

⁹ As discussed in CCA Standards Adopting Release, certain requirements in Rule 17Ad-22(e) contain requirements substantially similar to those in Rule 17Ad-22(d) or reflect current practices at registered clearing agencies. Certain other requirements in Rule 17Ad-22(e) contain provisions that are similar to those in Rule 17Ad-22(d) but would also impose additional requirements not found in Rule 17Ad-22(d). A few requirements have no comparable requirement under Rule 17Ad-22(d) and therefore may require more extensive changes to policies and procedures or other additional steps to achieve compliance. See *id.* at 70891.

¹⁰ See letter from Michael C. Bodson, President and Chief Executive Officer, The Depository Trust & Clearing Corporation, Feb. 15, 2017, <https://www.sec.gov/comments/s7-03-14/s70314-1594398-132354.pdf>.

¹¹ See *id.* at 1.

documents and filings under the Rule 19b-4 and advance notice processes related to recovery and wind-down plans.¹² The entity believes, in particular, that covered clearing agencies, their members, and other interested persons would benefit from further thought development concerning whether and how the plans should address the continued provision of critical operations and services in the event that recovery tools fail. The entity emphasizes that additional time is necessary because of the complexity of the planning process, the need for further discussion and consultation, and the advisability of conducting appropriate member outreach prior to the submission of formal filings under the Rule 19b-4 and advance notice processes.¹³

B. Exemptive Relief

Section 17A(b)(1) of the Exchange Act provides that the Commission, by order and upon its own motion, may conditionally or unconditionally exempt any clearing agency or class of clearing agencies from any provisions of Section 17A or the rules and regulations thereunder if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of Section 17A, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds.¹⁴

Recognizing that the reasons stated by the entity may apply to covered clearing agencies generally, the Commission believes that all covered clearing agencies would benefit from additional time to finalize the development of their recovery and wind-down plans. As noted above, unlike some other aspects of Rule 17Ad-22(e), recovery and wind-down plans continue to

¹² See id. at 2.

¹³ See id.

¹⁴ 15 U.S.C. 78q-1(b)(1).

present novel and complex questions. The recovery and wind-down plans described in Rule 17Ad-22(e)(3)(ii) are new requirements not previously included in the Commission's regulatory framework for clearing agencies, and the topics of recovery and wind-down remain under active discussion in the industry. The Commission believes that providing additional time to develop recovery and wind-down plans will facilitate further discussion, consultation, and member outreach by the covered clearing agencies that could help resolve the novel and complex questions presented. This in turn would help promote the development of plans that comprehensively address how a covered clearing agency could continue to provide critical operations and services in the event that recovery tools fail and that are consistent with the policies and procedures requirements of Rule 17Ad-22(e)(3)(ii). Therefore, the Commission finds that a temporary exemption from compliance with Rule 17Ad-22(e)(3)(ii) until December 31, 2017 is consistent with the public interest, the protection of investors, and the purposes of Section 17A of the Exchange Act.

In addition, compliance with certain aspects of Rule 17Ad-22(e)(15) depends in part on a covered clearing agency having established recovery and wind-down plans under Rule 17Ad-22(e)(3)(ii). Specifically, these include the following: (i) the requirement in Rule 17Ad-22(e)(15)(i) for policies and procedures for determining the amount of liquid net assets funded by equity based upon the length of time required to achieve a recovery or orderly wind-down, as appropriate, of its critical operations and services if such action is taken ("RWP clause"); and (ii) clause (y) of Rule 17Ad-22(e)(15)(ii) requiring policies and procedures for holding liquid net assets funded by equity equal to the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of the covered clearing agency, as contemplated by the plans established under Rule 17Ad-22 (e)(3)(ii). The

Commission therefore finds that a temporary exemption from compliance with these subsections of Rule 17Ad-22(e)(15) until December 31, 2017 is consistent with the public interest, the protection of investors, and the purposes of Section 17A of the Exchange Act.

The Commission is not granting relief from the April 11, 2017 compliance date for any other provision of the amendments to Rule 17Ad-22. In particular, the Commission notes that the temporary exemption from compliance does not apply to either of the following: (i) the requirement in Rule 17Ad-22(e)(15)(i) for policies and procedures for determining the amount of liquid net assets funded by equity based upon its general business risk profile; or (ii) clause (x) of Rule 17Ad-22(e)(15)(ii) requiring policies and procedures for holding liquid net assets funded by equity equal to six months of the covered clearing agency's current operating expenses.

Accordingly, as of the April 11, 2017 compliance date for the amendments to Rule 17Ad-22, a covered clearing agency is required to have policies and procedures for determining the amount of liquid net assets funded by equity based upon its general business risk profile pursuant to Rule 17Ad-22(e)(15)(i) and for holding liquid net assets funded by equity equal to six months of the covered clearing agency's current operating expenses pursuant to clause (x) of Rule 17Ad-22(e)(15)(ii), regardless of whether the covered clearing agency has met the condition for obtaining relief under this temporary exemption.

As a condition to obtaining relief under the temporary exemption, a covered clearing agency must notify the Commission in writing of its intent to rely upon the temporary exemption no later than April 11, 2017.

IV. Conclusion

The Commission hereby grants, pursuant to Section 17A(b)(1) of the Exchange Act, covered clearing agencies a temporary exemption from compliance with Rule 17Ad-22(e)(3)(ii),

the RWP clause of Rule 17Ad-22(e)(15)(i), and clause (y) of Rule 17Ad-22(e)(15)(ii) until December 31, 2017, subject to the condition contained in this order.

By the Commission.

Eduardo A. Aleman
Assistant Secretary