

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82908; File No. SR-NSCC-2017-017)

March 20, 2018

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Adopt a Recovery & Wind-down Plan and Related Rules

I. Introduction

On December 18, 2017, National Securities Clearing Corporation (“NSCC”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² proposed rule change SR-NSCC-2017-017 to adopt a recovery and wind-down plan and related rules (“Proposed Rule Change”).³ The Proposed Rule Change was published for comment in the Federal Register on January 8, 2018.⁴ The Commission did not receive any comments on the Proposed Rule Change. On February 8, 2018, pursuant to Section 19(b)(2)(A)(ii)(I) of the Act,⁵ the Commission designated a longer period within which to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ On December 18, 2017, NSCC filed this proposal as an advance notice (SR-NSCC-2017-805) with the Commission pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (“Clearing Supervision Act”) and Rule 19b-4(n)(1)(i) of the Act (“Advance Notice”). On January 24, 2018, the Commission extended the review period of the Advance Notice for an additional 60 days pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act. See 12 U.S.C. 5465(e)(1); 17 CFR 240.19b-4(n)(1)(i); 12 U.S.C. 5465(e)(1)(H); and Securities Exchange Act Release No. 82581 (January 24, 2018), 83 FR 4327 (January 30, 2018) (SR-NSCC-2017-805).

⁴ Securities Exchange Act Release No. 82430 (January 2, 2018), 83 FR 841 (January 8, 2018) (SR-NSCC-2017-017) (“Notice”).

⁵ 15 U.S.C. 78s(b)(2)(A)(ii)(I).

approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.⁶ This order institutes proceedings, pursuant to Section 19(b)(2)(B) of the Act,⁷ to determine whether to approve or disapprove the Proposed Rule Change.

II. Summary of the Proposed Rule Change

As described in the Notice,⁸ NSCC proposes to adopt a Recovery & Wind-down Plan (“R&W Plan”) and three proposed rules that would facilitate the implementation of the R&W Plan: (i) proposed Rule 41 (Corporation Default) (“Corporation Default Rule”), (ii) proposed Rule 42 (Wind-down of the Corporation) (“Wind-down Rule”), and (iii) proposed Rule 60 (Market Disruption and Force Majeure) (“Force Majeure Rule”). Additionally, NSCC proposes to re-number existing Rule 42 (Wind-down of a Member, Fund Member or Insurance Carrier/Retirement Services Member) to Rule 40, which is currently reserved for future use.

NSCC states that the R&W Plan is intended to be used by NSCC’s Board of Directors and management in the event that NSCC encounters scenarios that could potentially prevent it from being able to provide its critical services as a going concern.⁹ The R&W Plan would be structured to provide a roadmap, define the strategy, and

⁶ Securities Exchange Act Release No. 82669 (February 8, 2018), 83 FR 6653 (February 14, 2018) (SR-DTC-2017-021; SR-FICC-2017-021; SR-NSCC-2017-017).

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ The description of the Proposed Rule Change is based on the statements prepared by NSCC in the Notice. See Notice, supra note 4. Capitalized terms used herein and not otherwise defined herein are defined in NSCC’s Rules & Procedures, available at www.dtcc.com/~media/Files/Downloads/legal/rules/nscc_rules.pdf.

⁹ See Notice, supra note 4, at 842.

identify the tools available to NSCC to either (i) recover in the event it experiences losses that exceed its prefunded resources or (ii) wind-down its business in a manner designed to permit the continuation of its critical services in the event that such recovery efforts are not successful.¹⁰ The R&W Plan would include tools that are provided for in NSCC's existing rules, policies, procedures, and contractual arrangements,¹¹ as well as the proposed Corporation Default Rule, the proposed Wind-down Rule, and the proposed Force Majeure Rule.¹²

NSCC states that the proposed Corporation Default Rule, proposed Wind-down Rule, and proposed Force Majeure Rule are designed to (i) facilitate the implementation of the R&W Plan when necessary; (ii) provide Members and Limited Members with transparency around critical provisions of the R&W Plan that relate to their rights, responsibilities and obligations; and (iii) provide NSCC with the legal basis to implement the provisions of the R&W Plan that concern the proposed Corporation Default Rule, the proposed Wind-down Rule, and the proposed Force Majeure Rule, when necessary.¹³

NSCC states that it is proposing to re-number existing Rule 42 (Wind-down of a Member, Fund Member or Insurance Carrier/Retirement Services Member) to Rule 40 to align the order of NSCC's proposed rules with the order of comparable rules in the

¹⁰ Id. at 843.

¹¹ Contractual arrangements include, for example, NSCC's existing committed or pre-arranged liquidity arrangements.

¹² See Notice, supra note 4, at 842.

¹³ Id. at 841.

rulebooks of The Depository Trust Company and Fixed Income Clearing Corporation,¹⁴ which, together with NSCC, are subsidiaries of The Depository Trust & Clearing Corporation (“DTCC”), a user-owned and user-governed holding company.¹⁵

As an overview, the R&W Plan would provide, among other matters, (i) an overview of the business of NSCC and its parent DTCC; (ii) an analysis of NSCC’s intercompany arrangements and critical links to other financial market infrastructures; (iii) a description of NSCC’s services, and the criteria used to determine which services are considered critical; (iv) a description of the NSCC and DTCC governance structure; (v) a description of the governance around the overall recovery and wind-down program; (vi) a discussion of tools available to NSCC to mitigate credit/market¹⁶ and liquidity risks, including recovery indicators and triggers, and the governance around management of a stress event along a “Crisis Continuum” timeline; (vii) a discussion of potential non-default losses and the resources available to NSCC to address such losses, including recovery triggers and tools to mitigate such losses;¹⁷ (viii) an analysis of the recovery

¹⁴ Id. at 851.

¹⁵ Id. at 843.

¹⁶ NSCC states that NSCC manages its credit exposure to Members as part of its market risk management strategy. Id. at 844.

¹⁷ As described in more detail in the Notice, this section of the R&W Plan would describe the proposed Force Majeure Rule, which would govern how NSCC would address extraordinary events that may occur outside its control. See Notice, supra note 4, at 851. The proposed Force Majeure Rule would identify the events or circumstances that would be considered a “Market Disruption Event,” including, for example, events that lead to the suspension or limitation of trading or banking in the markets in which NSCC operates, or the unavailability or failure of any material payment, bank transfer, wire or securities settlement systems. Id. Under the proposed Force Majeure Rule, during the pendency of a Market Disruption Event, NSCC would be entitled to (i) suspend the provision of

tools' characteristics, including how they are comprehensive, effective, and transparent, how the tools provide appropriate incentives to Members to, among other things, control and monitor the risks they may present to NSCC, and how NSCC seeks to minimize the negative consequences of executing its recovery tools; and (ix) the framework and approach for the orderly wind-down and transfer of NSCC's business,¹⁸ including an estimate of the time and costs to effect a recovery or orderly wind-down of NSCC.¹⁹

The framework and approach for orderly wind-down would provide (i) for the transfer of NSCC's business, assets, and membership to another legal entity; (ii) that NSCC would effectuate the transfer in connection with proceedings under Chapter 11 of

any or all services; and (ii) take, or refrain from taking, or require Members and Limited Members to take, or refrain from taking, any actions it considers appropriate to address, alleviate, or mitigate the event and facilitate the continuation of NSCC's services as may be practicable. Id.

¹⁸ This section of the R&W Plan would refer to the proposed Wind-down Rule and the proposed Corporation Default Rule. See Notice, supra note 4, at 847-49 (discussing wind-down), 849-51 (discussing the proposed Corporation Default Rule and the proposed Wind-down Rule). The proposed Wind-down Rule would provide a mechanism to implement the framework and approach for an orderly wind-down if recovery tools do not successfully return NSCC to financial viability. Id. at 847-51. As described more fully in the Notice, the proposed Corporation Default Rule would provide a mechanism for the termination, valuation, and netting of unsettled, guaranteed Continuous Net Settlement ("CNS") transactions in the event NSCC is unable to perform its obligations or otherwise suffers a defined event of default, such as entering insolvency proceedings ("Corporation Default"). Id. at 849. Upon Corporation Default, the proposed Corporation Default Rule would provide that all unsettled, guaranteed CNS transactions would be terminated and, no later than forty-five days from the date on which the event that constitutes a Corporation Default occurred, the Board of Directors would determine a single net amount owed by or to each Member with respect to such transactions pursuant to the valuation procedures set forth in the proposed Corporation Default Rule. Id.

¹⁹ See Notice, supra note 4, at 842.

the U.S. Bankruptcy Code;²⁰ and (iii) that after effectuating this transfer, NSCC would liquidate any remaining assets in an orderly manner in bankruptcy proceedings.²¹ NSCC states that it believes that the proposed transfer approach to a wind-down would meet its objectives of (i) assuring that NSCC's critical services will be available to the market as long as there are Members in good standing, and (ii) minimizing disruption to the operations of Members and financial markets generally that might be caused by NSCC's failure.²²

III. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act²³ to determine whether the Proposed Rule Change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the Proposed Rule Change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to comment on the Proposed Rule Change, and provide the Commission with arguments to support the Commission's analysis as to whether to approve or disapprove the Proposed Rule Change.

²⁰ 11 U.S.C. 101 et seq.

²¹ See Notice, supra note 4, at 847.

²² Id.

²³ 15 U.S.C. 78s(b)(2)(B).

Pursuant to Section 19(b)(2)(B) of the Act,²⁴ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the Proposed Rule Change's consistency with Section 17A of the Act,²⁵ and the rules thereunder, including the following provisions:

- Section 17A(b)(3)(F) of the Act,²⁶ which requires, among other things, that the rules of a clearing agency, such as NSCC, must be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible and to protect investors and the public interest; and
- Rule 17Ad-22(e)(3)(ii) under the Act,²⁷ which requires a covered clearing agency,²⁸ such as NSCC, to, among other things, establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, 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 NSCC, which includes plans for the recovery and orderly wind-down of NSCC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.

²⁴ Id.

²⁵ 15 U.S.C. 78q-1.

²⁶ 15 U.S.C. 78q-1(b)(3)(F).

²⁷ 17 CFR 240.17Ad-22(e)(3)(ii).

²⁸ See 17 CFR 240.17Ad-22(a)(5) for the definition of a covered clearing agency.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the Proposed Rule Change. In particular, the Commission invites the written views of interested persons concerning whether the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act,²⁹ Rule 17Ad-22(e)(3)(ii) under the Act,³⁰ or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4(g) under the Act,³¹ any request for an opportunity to make an oral presentation.³²

Interested persons are invited to submit written data, views, and arguments regarding whether the Proposed Rule Change should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

²⁹ 15 U.S.C. 78q-1(b)(3)(F).

³⁰ 17 CFR 240.17Ad-22(e)(3)(ii).

³¹ 17 CFR 240.19b-4(g).

³² Section 19(b)(2) of the Act grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

The Commission asks that commenters address the sufficiency of NSCC's statements in support of the Proposed Rule Change, which are set forth in the Notice,³³ in addition to any other comments they may wish to submit about the Proposed Rule Change.

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-2017-017 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NSCC-2017-017. 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

³³ See Notice, supra note 4.

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-2017-017 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁴

Eduardo A. Aleman
Assistant Secretary

³⁴ 17 CFR 200.30-3(a)(57).