

415-4737, or by email to PDR.Resource@nrc.gov. The supporting statement is available in ADAMS under Accession No. ML22160A113.

- *NRC's PDR*: You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1-800-397-4209 or 301-415-4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

- *NRC's Clearance Officer*: A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2084; email: Infocollects.Resource@nrc.gov.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (<https://www.regulations.gov>). Please include Docket ID NRC-2022-0090 in your comment submission.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at <https://www.regulations.gov> and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection*: 10 CFR part 11, "Criteria and Procedures for Determining Eligibility for Access to or Control Over Special Nuclear Material."

2. *OMB approval number*: 3150-0062.

3. *Type of submission*: Extension.

4. *The form number, if applicable*: Not applicable.

5. *How often the collection is required or requested*: On occasion.

6. *Who will be required or asked to respond*: Employees (including applicants for employment), contractors, and consultant for NRC licensees and contractors whose activities involves access to, or control over, special nuclear material at either fixed sites or for transportation activities.

7. *The estimated number of annual responses*: 558.

8. *The estimated number of annual respondents*: 2.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request*: 139.4 (139 reporting and 0.4 recordkeeping).

10. *Abstract*: The NRC's regulations in part 11 of title 10 of the Code of Federal Regulations (10 CFR), establish requirements for access to special nuclear material, and the criteria and procedures for resolving questions concerning the eligibility of individuals to receive special nuclear material access authorization. The specific part 11 requirements covered under this OMB clearance include requests for exemptions to part 11 requirements, amendments to security plans that require incumbents to have material access authorizations, access authorization cancellations. In addition, licensees must keep records of the names and access authorization numbers of certain individuals assigned to shipments of special nuclear material. The information required by 10 CFR part 11 is needed to establish control over and maintain records of who is properly authorized to safeguard and have access to special nuclear material. Not knowing this information could cause harm to the public and national security.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility? Please explain your answer.

2. Is the estimate of the burden of the information collection accurate? Please explain your answer.

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated: August 29, 2022.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-95618; File No. SR-NSCC-2021-016]

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving of Proposed Rule Change To Enhance Capital Requirements and Make Other Changes

August 26, 2022.

I. Introduction

On December 13, 2021, National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR-NSCC-2021-016 (the "Proposed Rule Change") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder.² The Proposed Rule Change was published for comment in the **Federal Register** on December 29, 2021.³ On January 26, 2022, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.⁵ On March 23, 2022, the Commission instituted proceedings to determine whether to approve or

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 93856 (December 22, 2021), 86 FR 74185 (December 29, 2021) (File No. SR-NSCC-2021-016) ("Notice of Filing").

⁴ 15 U.S.C. 78s(b)(2).

⁵ Securities Exchange Act Release No. 94068 (January 26, 2022), 87 FR 5544 (February 1, 2022) (SR-NSCC-2021-016).

disapprove the Proposed Rule Change.⁶ On June 23, 2022, the Commission designated a longer period for Commission action on the proceedings to determine whether to approve or disapprove the Proposed Rule Change.⁷ The Commission received comment letters on the Proposed Rule Change.⁸ For the reasons discussed below, the Commission is approving the Proposed Rule Change.⁹

II. Description of the Proposed Rule Change

NSCC proposes to amend its Rules to (A) increase the capital requirements applicable to its members,¹⁰ (B) revise its credit risk monitoring system, and (C) make certain other clarifying, technical, and supplementary changes to implement changes (A) and (B).

A. Changes to NSCC’s Capital Requirements for Members and Limited Members

i. Members

U.S. Broker-Dealer Members: NSCC proposes to increase its minimum excess net capital (“Excess Net Capital”) requirements for its U.S. broker-dealer members.¹¹ A comparison of NSCC’s current and proposed minimum Excess Net Capital requirements is as follows:

Clearing status	Current	Proposed	
		VaR tier	Minimum excess net capital
Self-Clearing	\$500,000	<\$100,000	\$1 million Excess Net Capital.
		100,000–500,000	\$2.5 million Excess Net Capital.
		>500,000	\$5 million Excess Net Capital.
Clears for others	\$1 million	<100,000	\$2.5 million Excess Net Capital.
		100,000–500,000	\$5 million Excess Net Capital.
		>500,000	\$10 million Excess Net Capital.

As is the case with the current capital requirements applicable to Registered Broker-Dealers, the enhanced capital requirements for U.S. broker-dealers would depend on whether a member self-clears or clears for others. NSCC states that a broker-dealer that clears transactions for others has the potential to present different and greater risks to NSCC than a broker-dealer that clears transactions only for itself because it could clear for a large number of correspondent clients (*i.e.*, indirect participants), which would expand the scope and volume of risk presented to NSCC and the direct participant itself when the indirect participant’s trades are submitted to NSCC for settlement via the direct participant.¹² The indirect nature of this risk exposure also increases risk to NSCC as there is generally less transparency into the indirect activity versus if the direct participant generated all of the activity itself.¹³ NSCC states the proposed heightened capital requirements for these members would help ensure that NSCC is better able to manage the

material risks to NSCC arising from these arrangements.¹⁴

Rather than continue to set fixed minimum capital requirements,¹⁵ NSCC proposes to implement a tiered approach based on the level of risk the U.S. broker-dealer presents to NSCC, as measured by its daily volatility component calculations. NSCC proposes to use, in general terms, calculations from its value-at-risk (“VaR”) ¹⁶ model and associated Member charges as a measure of market risk in order to categorize Members into those that pose relatively minimal risk exposure, moderate risk exposure, or higher risk exposure to NSCC (“VaR Tier”). The VaR Tiers would require those members that bring more volatility (*i.e.*, risk) into the clearinghouse to hold more capital.

NSCC states that this tiered approach is tailored to better reflect the volatility risk presented by U.S. broker-dealer members.¹⁷ Currently, the minimum capital requirements for U.S. broker-dealers only consider the risk of membership type (*i.e.*, self clears or clears for others), without considering any other risks. NSCC would continue to consider membership type, but would

also incorporate volatility risk of the U.S. broker-dealer’s own positions at NSCC (*i.e.*, a measurement of the risk that the member’s transactions pose to NSCC) in order to more strategically group U.S. broker-dealer Members into tiers, with each tier being assigned a specific minimum capital requirement.¹⁸

Additionally, NSCC states that U.S. broker-dealer members with lower Excess Net Capital tend to present greater relative risk to NSCC based on NSCC’s analysis of the current average VaR margin requirement of each member divided by the current excess net capital of each member (“VaR/ENC”), with this analysis done for each member within NSCC.¹⁹ Specifically, that analysis shows that members with excess net capital of less than \$5 million have an average VaR/ENC of 15 percent, which moved to 13 percent for members with excess net capital of \$5–10 million, to 10 percent for members with excess net capital of \$10–50 million, to 3 percent for members with excess net capital of \$50–100 million, to 7 percent for members with excess net capital of

⁶ Securities Exchange Act Release No. 94494 (March 23, 2022), 87 FR 18444 (March 30, 2022) (SR–NSCC–2021–016).

⁷ Securities Exchange Act Release No. 94168 (June 23, 2022), 87 FR 38792 (June 29, 2022) (SR–NSCC–2021–016).

⁸ Comments are available at <https://www.sec.gov/comments/sr-nsc-2021-016/srnsc2021016.htm>. The Commission received comments on April 22–23, 2022, that address market conduct generally. However, additional discussion is unnecessary because the comment letters do not bear on the Proposed Rule Change.

⁹ Capitalized terms not defined herein are defined in NSCC’s Rules & Procedures (“Rules”), available at https://www.dtcc.com/~media/Files/Downloads/legal/rules/nsc_rules.pdf.

¹⁰ NSCC states that these capital requirements have not been updated in over 20 years. See Notice of Filing, *supra* note 3, at 74185.

¹¹ NSCC proposes to define “Excess Net Capital” as the net capital greater than the minimum required, as calculated in accordance with the broker-dealer’s regulatory and/or statutory requirements.

¹² See Notice of Filing, *supra* note 3, at 74189.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ NSCC states, as background, that, in 2013, it considered increasing the fixed minimum capital requirements to much higher amounts, which was never proposed based on member feedback

objecting that such requirements would be too high, rigid, and burdensome. See *id.* at 74186.

¹⁶ A member’s VaR Tier is based on its volatility charge, which is one of the major components of its margin requirement and which is calculated daily and collected at the start of each business day. To calculate the volatility charge, NSCC uses a VaR model, which provides an estimate of the maximum loss in a portfolio assuming a 3 day time horizon and 99% confidence interval. See *id.* at 74189.

¹⁷ See *id.* at 74196.

¹⁸ See *id.*

¹⁹ See Letter from Michael Leibrock, Managing Director, Counterparty Credit Risk Management, DTCC, at 2–3 (March 10, 2022) (“NSCC Response Letter”).

\$100–500 million, and, finally, to 2 percent for members with excess net capital greater than \$500 million.²⁰

NSCC also performed the same analysis to compare U.S. broker-dealer members' VaR to their Excess Net Capital under the proposed new minimum capital requirements, to understand the impact on this relationship that the new minimum capital requirements would have. Based on this analysis, NSCC states that if the proposed increase in Excess Net Capital requirements had been applied, then the average VaR/ENC ratio declines to 7 percent for members with excess net capital less than \$5 million, and 9 percent for members with excess net capital of \$5–10 million, which aligns more closely to members with greater excess net capital.²¹ Thus, the analysis demonstrates that the risk to NSCC, as measured through the VaR/ENC ratio, decreases and allows the risk to be more consistent across all NSCC members.²² NSCC relied upon these analyses, in conjunction with its analysis of the impact on its current membership, to identify the proposed VaR tiers and the corresponding minimum capital requirements, which it believes are reasonable.

As part of the tiered approach, a member's daily volatility component may exceed its then-current VaR Tier four times over a rolling 12-month period.²³ Upon the fifth instance, the

member would be moved to the next-greatest VaR Tier.²⁴ The member would then have 60 calendar days from that date to meet the higher required minimum Excess Net Capital for that VaR Tier and would remain in that greater VaR Tier for no less than one continuous year from the date of the move before being eligible to move to a lesser VaR Tier. NSCC states that U.S. broker-dealer members could move between tiers based on sustained changes to their daily volatility component, thus allowing them to have control over the tier in which they are placed and, in turn, the capital they need to maintain.²⁵

Newly admitted members would be placed into the applicable middle VaR Tier in the table above, unless NSCC determines, based on information provided by or concerning the member's anticipated trading activity, that the member should be placed into the greatest VaR Tier. The new member would remain in the initial tier for the first 12 months of membership before being eligible to move to the lower VaR Tier.

NSCC states that, based on its historical experience with the daily volatility components of newly admitted Members including such Members' own projected trading activity,²⁶ it would be appropriate to place newly admitted Members into the applicable middle VaR Tier in the table above for the first 12 months of membership unless NSCC has determined that the Member's anticipated VaR Tier based on its anticipated trading activity would be the greatest VaR Tier.²⁷

U.S. Bank and Trust Company Members: For members who are U.S. banks or U.S. trust companies who are also banks,²⁸ NSCC proposes to (1) change the capital measure from equity capital to common equity tier 1 capital

(“CET1 Capital”),²⁹ (2) raise the minimum capital requirements from \$50 million in equity capital to \$500 million in CET1 Capital, and (3) require such members to be well capitalized (“Well Capitalized”).³⁰ Under the proposal, a member may satisfy these requirements if the member's parent holding company maintains the minimum capital requirements and guarantees the member's obligations to NSCC. The proposal would align NSCC's capital requirements with banking regulators' changes to regulatory capital requirements over the past several years, which have standardized and harmonized the calculation and measurement of bank capital and leverage throughout the world.³¹ Consistent with these changes by banking regulators, NSCC states that it believes that the appropriate capital measure for members that are U.S. banks and trust companies should be CET1 Capital and that NSCC's capital requirements for Members should be enhanced to be consistent with these increased regulatory capital requirements.³² NSCC further states that it believes the proposed capital requirement for banks better measures the capital available to bank members to absorb losses arising out of their clearance and settlement activities at NSCC or otherwise, and would help NSCC more effectively manage and mitigate the credit risks posed by its members while providing fair and open access to membership at NSCC.³³

Additionally, NSCC states that requiring U.S. banks and trust companies to be Well Capitalized ensures that Members are well capitalized while also allowing CET1 Capital to be relative to either the risk-weighted assets or average total assets of the bank or trust company.³⁴ NSCC

²⁹ NSCC proposes to define “CET1 Capital” as an entity's common equity tier 1 capital, calculated in accordance with such entity's regulatory and/or statutory requirements.

³⁰ NSCC proposes to incorporate the definition of “Well Capitalized” as that term is defined by the Federal Deposit Insurance Corporation in its capital adequacy rules and regulations. See 12 CFR 324.403(b)(1).

³¹ See Notice of Filing, *supra* note 3, at 74190. NSCC further states that it believes these enhanced capital requirements better measure the capital available to members to absorb losses arising out of their clearance and settlement activities at NSCC or otherwise and would help NSCC more effectively manage and mitigate the credit risks posed by its members while providing fair and open access to membership at NSCC. See *id.* at 74194.

³² See *id.*

³³ See *id.* NSCC also provided, in the confidential information submitted as part of this proposed rule change, an analysis of U.S. banks' capital to determine the appropriate level of capital requirement.

³⁴ See *id.*

²⁰ See *id.*

²¹ See *id.* In addition, as part of the Proposed Rule Change, NSCC filed Exhibit 3—NSCC Impact Studies, which provided analysis on the rationale for and impact of the proposal. Pursuant to 17 CFR 240.24b–2, NSCC requested confidential treatment of Exhibit 3. The confidential information provided more granular support for this analysis, and it includes a detailed analysis of the impact of each proposed minimum capital requirement on the current membership of NSCC, by category, looking at the members' current VaR over the preceding twelve months as compared to their capital levels. NSCC performed this analysis on a member-by-member basis, using each member's actual historical VaR data (based on their particular activity at NSCC) and ENC levels, and provided that member-level information to the Commission, both to identify which members would be impacted by the proposal and to show the differences in VaR/ENC ratio for each member under both the current and proposed minimum capital requirements.

²² In addition, NSCC stated that it analyzed stress testing results, which showed that broker-dealer members with smaller capital bases are exposed to the risk of losses exceeding their current Excess Net Capital requirements under a stressed scenario. Notice, *supra* note 3, at 74196. NSCC also included the stress testing results as part of the confidential Exhibit 3 referenced in note 21 *supra*.

²³ The VaR Tiers were designed to capture the VaR Tier that each member falls into approximately 99% of the time. See *supra* note 15. Given there are approximately 252 trading days per year, the firm would fall below the 99% if it exceeded its current VaR Tier on more than two trading days in a rolling 12 month period. See Notice of Filing, *supra* note 3, at 74197.

²⁴ However, if the member's daily volatility component also exceeded such next-greatest VaR Tier five times during the preceding 12-month period, the member would be moved to the greatest VaR Tier.

²⁵ See Notice of Filing, *supra* note 3, at 74197.

²⁶ For example, if the proposed VaR Tiers had been in effect for the past two years (but newly admitted Members were not automatically placed in at least the middle VaR Tier), only one U.S. broker-dealer applicant would have belonged in the lowest VaR Tier at admittance, but that firm then had trading activity that placed it in the middle VaR Tier in the first month and the highest VaR Tier in the second month of membership. See *id.* at 74190. NSCC provided more granular support for this analysis on a confidential basis. See *supra* notes 19–21.

²⁷ See Notice of Filing, *supra* note 3, at 74190.

²⁸ For U.S. trust companies who are not banks, NSCC is not changing its existing capital requirement of \$10 million.

further states that expressly tying the definition of Well Capitalized to the FDIC's definition of "well capitalized" will ensure that the proposed requirement keeps pace with future changes to regulatory capital requirements.³⁵

Non-U.S. Broker-Dealer and Bank Members

Currently, a Member who is a non-U.S. broker-dealer or bank is subject to a multiplier that requires such Member to maintain capital of either 1.5, 5, or 7 times its otherwise-applicable capital requirements.³⁶

Non-U.S. Broker-Dealers: NSCC proposes to require non-U.S. broker-dealer members to maintain a minimum of \$25 million in total equity capital. NSCC states the multiplier was designed to account for the less transparent nature of accounting standards other than U.S. GAAP.³⁷ However, given that accounting standards have converged over the years, NSCC no longer believes the multiplier is necessary and its retirement would be a welcomed simplification for both NSCC and its members.³⁸

Additionally, NSCC states its approach to managing credit risk is multifaceted, which includes requirements of operational capability in addition to financial responsibility.³⁹ Based on its experience, NSCC believes the flat equity capital requirement is warranted for non-U.S. broker-dealers based on the added jurisdictional and regulatory risks, while still allowing for fair and open access to NSCC membership.⁴⁰

Non-U.S. Banks: Like U.S. bank members, NSCC proposes that non-U.S. bank members maintain at least \$500 million in CET1 Capital. NSCC proposes additional requirements for non-U.S. bank members as follows: (1) comply with the greater of (i) the member's home country minimum capital and ratio requirements, or (ii) the minimum capital and ratio standards promulgated by the Basel Committee on Banking Supervision,⁴¹ (2) provide an attestation

for itself, its parent bank, and its parent bank holding company detailing the minimum capital requirements and capital ratios required by their home country regulator,⁴² and (3) notify NSCC of (i) any breach of its minimum capital and ratio requirements within two Business Days, or (ii) any changes to its requirements within 15 calendar days. Like U.S. bank members, NSCC proposes that a non-U.S. bank member may satisfy these requirements if the member's parent holding company maintains the minimum capital and other requirements and guarantees the member's obligations to NSCC.

Other Types of Members

Currently, an entity applying to be a Member other than a Registered Broker-Dealer, bank or trust company is required to satisfy such minimum standards of financial responsibility as determined by NSCC. NSCC proposes to adopt more specific standards for different member types.

Securities Exchanges: Currently, NSCC does not provide a capital requirement standard for national securities exchanges. NSCC proposes to require that a Member that is a national securities exchange registered under the Exchange Act and/or a non-U.S. securities exchange or multilateral trading facility must have and maintain at all times at least \$100 million in equity capital. There are only a few exchanges that are members of NSCC. These exchanges became members many years ago to address a processing structure that is no longer in place at NSCC.⁴³ An exchange does not need to be a member of NSCC to submit trades of NSCC members for clearance and settlement, and NSCC does not anticipate that any other exchanges would seek to become members.⁴⁴ NSCC is proposing these new capital requirements to address the potential credit risk posed by the current exchange members due to the systemic importance of these members and the need to hold these members to a

regulators' changes to regulatory capital requirements over the past several years, which have standardized and harmonized the calculation and measurement of bank capital and leverage throughout the world. *See* Notice of Filing, *supra* note 3, at 74190. *See also supra* note 30. NSCC proposes tying its minimum requirement to the requirements promulgated by the Basel Committee on Banking Supervision to ensure that its non-U.S. bank members meet minimum international standards where their home country requirements may be more lenient.

⁴² NSCC also proposes to require non-U.S. bank members to periodically provide new attestations on at least an annual basis and upon request by NSCC.

⁴³ NSCC Response Letter, *supra* note 19, at 6.

⁴⁴ *See id.*

consistent, high standard to ensure that they have sufficient capital to fulfill their systemically important role.⁴⁵

Index Receipt Agent: Currently, NSCC does not provide a capital requirement standard for Index Receipt Agents, which are exchange-traded funds agents that serve a number of functions in the create/redeem process. NSCC proposes to require that a broker-dealer member that is acting as an Index Receipt Agent must have and maintain at all times minimum Excess Net Capital of \$100 million. NSCC states that this aspect of the proposal would reflect the systemic risk presented by the potential failure of an Index Receipt Agent. The failure of an Index Receipt Agent could present systemic risk because such failure could potentially result in disruptions at exchange-traded funds for which the Index Receipt Agent acts. As a result of this systemic risk, NSCC proposes to require Members acting as Index Receipt Agents to hold a moderately sized capital base to support this business function.

All Other Members: For all other members, NSCC proposes that the Member must maintain compliance with its home country's minimum financial requirements. NSCC also proposes that it may, based on the information provided or concerning the Member, assign an additional minimum financial requirement to the Member, which it will determine based on how closely it resembles another membership type and its risk profile.⁴⁶

ii. Limited Members

Limited Members are authorized to use only certain specified NSCC services, as compared to Members who may generally access all NSCC services.⁴⁷ Currently, a Limited Member that is a Mutual Fund/Insurance Services Member and/or Fund Member that is a U.S. bank or trust company is required to have a Tier 1 risk based capital ("RBC") ratio of 6% or greater.⁴⁸ Additionally, Settling Bank Only Members are currently subject to standards of financial responsibility that NSCC may promulgate.⁴⁹

NSCC proposes that these types of members must maintain a Tier 1 RBC

⁴⁵ *See* Notice of Filing, *supra* note 3, at 74192.

⁴⁶ Under the proposal, NSCC would be obligated to promptly notify and discuss any additional minimum financial requirement with the member applicant or member.

⁴⁷ *See* Section 2 of Rule 2 of the Rules, *supra* note 7.

⁴⁸ *See* Sections 2.B.2 and 3.B.2 of Addendum B of the Rules, *supra* note 7.

⁴⁹ *See* Section 7.B of Addendum B of the Rules, *supra* note 7.

³⁵ *See id.*

³⁶ The applicable multiplier is based on which generally accepted accounting standards ("GAAP") the non-U.S. Member uses to prepare its financial statements, when not prepared in accordance with U.S. GAAP. *See* Addendum O of the Rules, *supra* note 7.

³⁷ *See id.* at 74191.

³⁸ *See id.* at 74191.

³⁹ NSCC Response Letter, *supra* note 19, at 2.

⁴⁰ *See* Notice of Filing, *supra* note 3, at 74195.

⁴¹ *See* Basel Committee on Banking Supervision, The Basel Framework, available at https://www.bis.org/basel_framework/index.htm?export=pdf. NSCC states that the proposal will align NSCC's capital requirements with banking

ratio (“Tier 1 RBC Ratio”)⁵⁰ equal to or greater than the Tier 1 RBC Ratio that would be required for such members to be Well Capitalized. NSCC proposes to have the definition of Well Capitalized expressly tied to the FDIC’s definition of “well capitalized.”⁵¹ NSCC states that by tying its definition of “Well Capitalized” to that of the FDIC’s definition, NSCC will ensure that the proposed requirement will keep pace with future changes to banking regulators’ regulatory capital requirements.⁵²

iii. Implementation Timeframe

NSCC proposes to implement the proposed changes to its membership capital requirements one year after the Commission’s approval of the Proposed Rule Change.⁵³ During the one-year period, NSCC would periodically provide members with an estimate of their capital requirements based on the proposal.⁵⁴

B. Changes to NSCC’s Watch List and Enhanced Surveillance List

NSCC currently uses two credit risk monitoring systems: a Watch List and a separate list of members subject to enhanced surveillance (“enhanced surveillance list”). The current Watch List includes members that have either (1) receive a heightened credit risk rating based on NSCC’s Credit Risk Rating Matrix (“CRRM”),⁵⁵ or (2) been deemed to pose a heightened credit risk to NSCC or other members.⁵⁶ NSCC may require a member placed on the Watch List to post additional collateral above the member’s margin calculated

pursuant to NSCC’s margin methodology.⁵⁷ Members on the Watch List are also subject to more thorough monitoring by NSCC of its financial condition and operational capability.⁵⁸

NSCC also maintains a separate enhanced surveillance list, which includes members who are subject to a more thorough monitoring of its financial condition and operational capability based on NSCC’s determination that the member poses heightened credit risks, which may include members already on or soon to be on the Watch List.⁵⁹ Members on the enhanced surveillance list are reported to NSCC’s management committees, are regularly reviewed by NSCC senior management, and may be required to make more frequent financial disclosures to NSCC.⁶⁰

NSCC believes that maintaining two separate lists has confused various NSCC stakeholders,⁶¹ so NSCC proposes to remove references to an enhanced surveillance list from its Rules.⁶² NSCC also proposes to remove members with a CRRM rating of five from being automatically included on the Watch List. NSCC states that members with a CRRM rating of five represent the largest single CRRM rating category, but NSCC does not believe all such members present heightened credit concerns.⁶³ NSCC would still retain the authority to place a member with a CRRM rating of five on the Watch List or otherwise if NSCC deems the member poses a heightened risk to NSCC. NSCC believes that these procedures would allow it to appropriately monitor the credit risks presented to it by its members and that the enhanced surveillance list is not necessary because members on the enhanced surveillance list are subject to the same potential consequences as members placed on the Watch List.⁶⁴

C. Other Changes

NSCC proposes to (1) revise or add headings and sub-headings as appropriate, (2) revise defined terms and add appropriate defined terms to facilitate the proposed changes, (3) rearrange and consolidate paragraphs to promote readability, (4) fix typographical and other errors, and (5) make specified other changes in order to improve clarity and the accessibility and transparency of the Rules.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act⁶⁵ provides that the Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization. After careful review of the Proposed Rule Change and consideration of the comments on the proposal, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to NSCC. In particular, the Commission finds that the Proposed Rule Change is consistent with Sections 17A(b)(3)(F) and (b)(3)(I) of the Act,⁶⁶ and Rules 17A–22(e)(4) and (e)(18) thereunder,⁶⁷ for the reasons described below.

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, 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 protect investors and the public interest; and are not designed to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency.⁶⁸ Based on its review of the record, the Commission finds that the proposal is consistent with Section 17A(b)(3)(F) of the Act.⁶⁹

⁶⁵ 15 U.S.C. 78s(b)(2)(C).

⁶⁶ 15 U.S.C. 78q–1(b)(3)(F) and (b)(3)(I).

⁶⁷ 17 CFR 240.17A–22(e)(4) and (e)(18).

⁶⁸ 15 U.S.C. 78q–1(b)(3)(F).

⁶⁹ One commenter argues, in part, that the proposal to increase NSCC’s membership capital requirements violates the requirement under Section 17A(b)(3)(F) of the Act to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.

⁵⁰ NSCC proposes to define “Tier 1 RBC Ratio” as the ratio of an entity’s tier 1 capital to its total-risk weighted assets, calculated in accordance with such entity’s regulatory and/or statutory requirements. NSCC is not proposing changes to its capital requirements for U.S. trust companies that do not calculate its Tier 1 risk-based capital ratio, which is currently \$2 million in equity capital. See Sections 2.B.2 and 3.B.2 of Addendum B of the Rules, *supra* note 7.

⁵¹ See *supra* note 29.

⁵² See Notice of Filing, *supra* note 3, at 74192.

⁵³ The changes to NSCC’s Watch List and enhanced surveillance list discussed in Section II.B below will not be subject to the one year delayed implementation.

⁵⁴ See Notice of Filing, *supra* note 3, at 74193.

⁵⁵ NSCC members generally are subject to the CRRM, in which each member is rated on a scale of one to seven with seven reflecting the highest credit risk posed to NSCC. Members who receive a CRRM rating of five to seven are currently, automatically placed on the Watch List. See Rule 1 and Section 4(b) of Rule 2B of the Rules, *supra* note 7.

⁵⁶ See Rule 1 and Sections 4(b)(ii) and (c) of Rule 2B of the Rules, *supra* note 7. In making its determination, NSCC may consider any information NSCC obtains through continuously monitoring its members for compliance with its membership requirements. See Section 4(d) of Rule 2B of the Rules, *supra* note 7.

⁵⁷ See Section 4(e) of Rule 2B and Procedure XV of the Rules, *supra* note 7.

⁵⁸ See Section 4(f) of Rule 2B of the Rules, *supra* note 7.

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See Notice of Filing, *supra* note 3, at 74193.

⁶² For any members currently on the enhanced surveillance list that are not also on the Watch List, NSCC will add these members to the Watch List. See *id.* at 74193. NSCC also proposes to clarify in its Rules that members on the Watch List are reported to NSCC’s management committees and regularly reviewed by NSCC’s senior management.

⁶³ See *id.* at 74193. NSCC states that the majority of members with a CRRM rating of 5 are either rated “investment grade” by external rating agencies or, in the absence of external ratings, NSCC believes are equivalent to investment grade, as many of these members are primary dealers and large foreign banks. See *id.*

⁶⁴ See *id.* at 74188, 74193.

i. Prompt and Accurate Clearance and Settlement and Safeguarding of Securities and Funds

The Commission believes that the proposal is designed to promote the prompt and accurate clearance and settlement of securities transactions, and assure the safeguarding of securities and funds which are in the custody or control of NSCC. The Commission believes that membership standards at covered clearing agencies should seek to limit the potential for member defaults and, as a result, losses to non-defaulting members in the event of a member default. As the Commission stated when adopting the Covered Clearing Agency Standards, using risk-based criteria helps to protect investors by limiting the participants of a covered clearing agency to those for which the covered clearing agency has assessed the likelihood of default.⁷⁰ More specifically, the Commission believes that membership standards related to minimum capital requirements serve as one tool in limiting this default risk by ensuring that members have sufficient capital to meet its obligations and to absorb losses.

Covered clearing agencies employ membership standards as the first line of defense in their risk management, ensuring that its members, among other things, hold sufficient financial resources to meet the obligations that they may incur as a member of the covered clearing agency. These requirements are separate from the collection of margin, which addresses the risk of the cleared transactions. Instead, capital requirements seek to ensure that NSCC has sufficiently addressed the member's counterparty credit risk, that is, that the member has sufficient financial resources both to meet its margin requirements or potential loss allocation in the event of a member default; these requirements are not a substitute for margin.

The Commission believes that NSCC's proposal to increase its minimum capital requirements for its members, as described above in Section II.A, is designed to strengthen its risk management practices. For example, NSCC proposes to increase the

⁶⁹ See Comment from Robert McBey, Chief Executive Officer, Wilson-Davis Co., Inc. (February 3, 2022) ("Wilson Letter"), *supra* note 8, at 6–7. See also 17 U.S.C. 78q–1(b)(3)(F). NSCC is not changing the process in which it clears and settles securities transactions submitted by its members, and, therefore, these requirements are not affected by this Proposed Rule Change.

⁷⁰ See Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786, 70839 (October 13, 2016) (S7–03–14) ("Covered Clearing Agency Standards").

minimum capital requirements for U.S. broker dealer members based on the member's VaR Tier. The Commission believes that members with a higher VaR as compared to their excess net capital may pose more credit risk to NSCC, and therefore that the revised minimum capital requirements are appropriate to address this risk. Specifically, the Commission reviewed and analyzed confidential impact data NSCC provided to the Commission as part of the Proposed Rule Change regarding the VaR/ENC ratio, including the impact that the proposed minimum capital requirements would have on that ratio.⁷¹ The Commission agrees with NSCC's analysis of that data that these minimum requirements result in VaR/ENC ratios that are more consistent across NSCC's membership, meaning that the risk posed to NSCC by members would decrease, and based, in part, on that analysis, and taking into account the other factors discussed further below, the Commission believes that the proposed minimum capital requirements are a reasonable method of addressing NSCC's need to manage the risks posed by its members,⁷² as a balance between strengthened capital requirements and the impact on NSCC's members, which, as discussed further below, is limited to a very small subset of the members.⁷³ For most other members, the changes would increase the minimum capital requirements and ensure that members, such as U.S. and foreign bank members, would continue to hold sufficient financial resources consistent with those requirements and their applicable regulatory obligations, although they would not actually increase the amounts held as the members generally meet the new requirements already based on their current capital.

The Commission also considered other factors as support for its determination that these proposed minimum capital requirements are reasonable. The Commission understands that NSCC has not revised these requirements in over 20 years. During that time, the Commission recognizes that there have been significant changes to the financial markets, such as new risks arising from cyber threats and online trading technologies, and heightened operational risk due to a more sophisticated and complex business environment. In addition, the Commission understands that NSCC

⁷¹ See *supra* note 21 for a detailed description of the confidential impact study.

⁷² See *supra* notes 19–21.

⁷³ See *supra* note 83.

considered several factors, including inflation and the capital requirements of other financial market infrastructures, and the Commission agrees that these factors support the reasonableness of the proposed minimum capital requirements.⁷⁴ For example, the value of the current \$500,000 minimum capital standard at the point in time when established twenty years ago is far less today in inflation-adjusted terms.⁷⁵ Further, the Commission believes that the consistency between the proposed requirements and those of other financial market infrastructures tends to indicate that such requirements should address the obligations attendant to participating in a financial market infrastructure like NSCC, *i.e.*, that they are tailored to ensure that a member can meet its requirements to NSCC in the event of, for example, a loss allocation or an intraday margin call. Finally, based on its supervisory experience, the Commission understands that trading volume, in terms of both number of transactions and notional value, have increased significantly across the NSCC membership during that time period.⁷⁶ The Commission believes that this significant increase in trading volumes represents additional risk for NSCC and supports the need for the proposed minimum capital requirements. Taken together, the Commission believes that these factors support its determination regarding the reasonableness of the proposed minimum capital requirements, as they would allow NSCC to ensure that its members have capital sufficient to address the risks posed by their activities in addition to the margin for particular transactions.

Through these changes, NSCC should be able to ensure members have sufficient capital to meet their obligations and to absorb losses, which could further limit the potential for a member default. In turn, limiting the potential for a member default should promote the prompt and accurate

⁷⁴ See Notice, *supra* note 3, at 74186. (citing, *e.g.*, The Options Clearing Corporation, OCC Rules, Rule 301(a), available at <https://www.theocc.com/Company-Information/Documents-and-Archives/ByLaws-and-Rules> (requiring broker-dealers to have initial net capital of not less than \$2,500,000); Chicago Mercantile Exchange Inc., CME Rulebook, Rule 970.A.1, available at <https://www.cmegroup.com/rulebook/CME/I/9/9.pdf> (requiring clearing members to maintain capital of at least \$5 million, with banks required to maintain minimum tier 1 capital of at least \$5 billion).

⁷⁵ See, *e.g.*, <https://data.bls.gov/cgi-bin/cpicalc.pl>.

⁷⁶ See, *e.g.*, DTCC Annual Reports, available at <https://www.dtcc.com/about/annual-report>, and CPMI-IOSCO Quantitative Disclosures for NSCC, section 23.1 (setting forth daily average volumes by asset class and average notional value), available at <https://www.dtcc.com/legal/policy-and-compliance>.

clearance and settlement of securities transactions.

In addition, NSCC's proposed minimum capital requirements would thereby further limit potential losses to non-defaulting members in the event of a member default,⁷⁷ which helps assure the safeguarding of securities and funds which are in the custody or control of NSCC.

Additionally, the Commission believes NSCC's proposal to streamline its credit risk monitoring systems into one Watch List, as described above in Section II.B., would eliminate existing confusion and should enhance NSCC's efficiency in monitoring its members' credit risk by focusing on only those members that present heightened credit risk. Similarly, the Commission believes NSCC's proposal to make clarifying and transparency changes, as described above in Section II.C., would remove ambiguity and ensure NSCC's Rules are clear and accurate, which would help ensure NSCC's members understand its obligations to NSCC and NSCC's clearance and settlement activities. Therefore, the Commission believes these changes should promote the prompt and accurate clearance and settlement of securities transactions.

ii. Protection of Investors and the Public Interest

The Commission believes that NSCC's proposal to increase the capital requirements applicable to its members would protect investors and the public interest. As discussed above in Section III.A.1, the Commission believes the proposal is designed to strengthen NSCC's risk management practices. Because a defaulting member could place stresses on NSCC with respect to NSCC's ability to meet its clearance and settlement obligations upon which the broader financial system relies, it is important that NSCC has strong membership requirements to ensure that its members are able to meet their obligations. By reducing the risk of a member default and any subsequent allocation of losses, the proposal should help to protect investors and the public interest by helping to ensure that investors' securities transactions are cleared and settled promptly and accurately and to assure the safeguarding of securities and funds which are in NSCC's custody or control.

⁷⁷ Under NSCC's rules, when a member defaults, NSCC may allocate losses to non-defaulting losses in the event that the defaulting member's own margin and other resources at NSCC, as well as NSCC's corporate contribution, are not sufficient to cover the loss. See section 4 of Rule 4 of NSCC's Rules, *supra* note 7. If members hold capital sufficient to allow them to meet their obligations to NSCC, such losses are less likely to occur.

One commenter argues that the Proposed Rule Change contravenes the protection of investors and the public interest because smaller firms may be unable to meet these membership requirements, thereby harming the ability of investors and small businesses that access the markets through these smaller firms.⁷⁸ The Commission disagrees. First, the Commission believes that the improved risk management at NSCC is consistent with protecting investors and the public interest. Second, the Commission disagrees that the potential inability of a very small subset of NSCC's membership to meet the proposed membership requirements would necessarily mean that investors and small businesses would not be able to access the markets and raise capital, through other brokers or market participants. Most smaller broker-dealer members of NSCC would, in fact, meet the proposed membership requirements, as well as other broker-dealers that serve small investors.

iii. Prohibit Unfair Discrimination

Three commenters argue that the Proposed Rule Change related to increasing the minimum Excess Net Capital requirements for U.S. broker-dealer members is designed to unfairly discriminate against smaller broker-dealers.⁷⁹ These commenters generally state that the proposal disproportionately impacts smaller broker-dealers and, therefore, is intended to deny these smaller broker-dealers' membership at NSCC.⁸⁰ The Commission disagrees with this view.

First, NSCC's proposal to increase its minimum capital requirements would apply to all members and is not limited to small U.S. broker-dealers.⁸¹ The impact of the proposal on U.S. broker-dealers is determined by the risks that

⁷⁸ See Wilson Letter, *supra* note 8, at 7–8 (stating that “[i]f the only firms that service retail investors and main street businesses are unable to meet NSCC’s ever escalating capital requirements, investors holding microcap stock will be unable to liquidate their investments, and small businesses will be unable to raise money, contribute to the U.S. economy, and provide jobs to fellow Americans.”).

⁷⁹ See *id.* at 8–9; Comment from Aaron D. Lebenta, Parsons Behle Leibrock, P.C., Counsel for Alpine Securities Corporation (January 19, 2022) (“Alpine Letter”), *supra* note 8, at 1–2 and 5–6; and Comment from Patrick Zakhary, Esq., Seyffina and Zakhary, P.C. (February 7, 2022) (“Zakhary Letter”), *supra* note 8, at 1.

⁸⁰ See *id.*

⁸¹ The proposed increases would be between 2 and 10 times NSCC's current minimum Excess Net Capital requirements, across all U.S. broker-dealer members. Moreover, the increase is not limited to U.S. broker-dealer members; for example, NSCC also proposes increasing its minimum capital requirement for members that are U.S. banks to 10 times the current requirement.

the member presents to NSCC through the type of clearing activity and the transactions cleared, rather than the member's size. The Commission understands, based on its review and analysis of the record,⁸² that, out of NSCC's 146 members (including bank members, broker-dealer members, etc.), only a few U.S. broker-dealer members would likely be impacted by the proposal (*i.e.*, would need to raise additional capital to meet NSCC's proposed increased capital requirements).⁸³ The vast majority of NSCC's members, including some small U.S. broker-dealers, already meet NSCC's proposed minimum capital requirements. Therefore, the Commission does not believe that NSCC's proposal is intended to exclude smaller broker-dealers from its membership.

Second, the Commission believes that, based on its analysis of the data,⁸⁴ on average broker-dealers with lower Excess Net Capital amounts present higher risk exposures to NSCC relative to their capital levels. The Commission further believes the proposal would more closely align the excess net capital requirements for these broker-dealer members to the broker-dealer members that are required to hold excess net capital above the minimum required, which, as discussed above, means that such broker-dealers would pose less risk to NSCC.⁸⁵

By implementing a tiered approach, as described above in Section II.A.1., the Commission believes NSCC's proposal is designed to increase the minimum Excess Net Capital requirements for its U.S. broker-dealer members in relation to the level of risks those members present to NSCC. The tiered approach should facilitate the continued access by

⁸² Specifically, the Commission reviewed and analyzed confidential impact data NSCC provided to the Commission as part of the Proposed Rule Change. See *supra* notes 19–21.

⁸³ NSCC has 146 members, which consists of 14 bank members and 132 other members, the vast majority of which are broker dealer members. 144 members are based in the United States, while two members are non-U.S. based. See The Depository Trust and Clearing Corporation, CPMI IOSCO Quantitative Disclosure Results 2022 Q1 (“Q1 Quantitative Disclosures”) (June 6, 2022), available at <https://www.dtcc.com/legal/policy-and-compliance>.

⁸⁴ See *supra* notes 19–21. See also, *supra* text accompanying note 71.

⁸⁵ Based on its review of the confidential impact study data, the Commission notes that, if the proposed VaR tiers had been applied to that analysis, then the average VaR/ENC ratio declines to 7 percent for members with excess net capital less than \$5 million, and 9 percent for members with excess net capital of \$5–10 million, which aligns more closely to the class of members with greater excess net capital. See also NSCC Response Letter, *supra* note 19, at 3.

less capitalized firms, while protecting NSCC and its members from losses arising from a member default. Furthermore, by placing newly admitted members in the middle-tier, the proposal should facilitate entry into NSCC membership by less capitalized firms, while allowing NSCC to manage the risk of those members' trading activity which has not yet been established, which will help protect NSCC and its members from the risks of those members defaulting. Therefore, the Commission concludes the proposal does not disproportionately impact smaller broker-dealers.

For the reasons discussed in this Section III.A., the Commission believes that the Proposed Rule Change is consistent with the requirements of Section 17A(b)(3)(F) of the Act.⁸⁶

B. Consistency With Section 17A(b)(3)(I) of the Act

Section 17A(b)(3)(I) of the Act requires that the rules of a clearing agency do not impose any burden on competition not necessary or appropriate in furtherance of the Act.⁸⁷ This provision does not require the Commission to find that a proposed rule change represents the least anticompetitive means of achieving the goal.⁸⁸ Rather, it requires the Commission to balance the competitive considerations against other relevant policy goals of the Act.⁸⁹

The Commission acknowledges the proposal could pose a burden on competition for those broker-dealer members who would be required to raise additional capital to meet the proposed increases in minimum Excess Net Capital requirements. However, the Commission believes that this burden is appropriate. As discussed further below in Section III.D, NSCC is required to have policies and procedures reasonably designed to ensure that it has risk-based, objective, and publicly disclosed criteria for participation. The proposed capital requirements meet this standard.

Several commenters argue that this burden on competition is not necessary or appropriate in furtherance of the Act for two reasons.⁹⁰ First, commenters

argue that NSCC has not provided sufficient evidence that the proposed increases are necessary or appropriate.⁹¹ Second, commenters argue that NSCC's proposed tiered approach is redundant and therefore unnecessary and inappropriate.⁹² The Commission is not persuaded by these arguments.

First, as discussed above in Section III.A.iii., the Commission believes that the proposed capital requirements should help ensure that NSCC provides prompt and accurate clearance and settlement. The record shows that on average broker-dealer members with lower Excess Net Capital amounts present higher risk exposures to NSCC relative to their capital levels.⁹³ Second, the Commission believes that the risk being addressed by capital requirements, and membership requirements more broadly, is separate from the risks that are addressed through the collection of margin on the particular transactions cleared and settled at NSCC. The Commission believes capital requirements are used to help manage counterparty credit risk and, in part, measure a member's ability to meet its future obligations that could help prevent the member's default.⁹⁴ Collateral requirements (*i.e.*, margin), on the other hand, are used to help mitigate losses to NSCC and non-defaulting members resulting from NSCC's closeout of a defaulting member's positions, which is measured by NSCC's market risk exposure to that member's open trading portfolio.⁹⁵ Consequently, the proposal would not be duplicating NSCC's existing risk management practices related to its margin calculations.

On balancing the proposal's competitive considerations, the Commission believes that only a few broker-dealer members will be impacted by the proposal.⁹⁶ Therefore, the Commission believes that the proposal will help strengthen NSCC's credit risk management practices by increasing the minimum Excess Net Capital requirements for broker-dealer members tied to the level of risk these members

competitive in nature because newly admitted broker-dealers will be placed in the middle VaR Tier. *See* STANY Letter, *supra* note 8, at 5. The Commission believes that such proposal is reasonable because a newly admitted member would not have a historical VaR record, which NSCC needs to assign an appropriate VaR Tier.

⁹¹ *See* Alpine Letter, *id.* at 7–8; STANY Letter, *id.* at 4–5; Wilson Letter, *id.* at 4; Monson Letter, *id.* at 2–3; and Zakhary Letter, *supra* note 8, at 1–3.

⁹² *See id.*

⁹³ *See supra* notes 19–21 and accompanying text.

⁹⁴ *See* Covered Clearing Agency Standards, *supra* note 68, at 70859.

⁹⁵ *See id.* at 70855.

⁹⁶ *See supra* text accompanying notes 78–79.

present to NSCC, which is both necessary and appropriate in furtherance of the Act.

Furthermore, to give impacted members time to prepare, NSCC proposes to provide its members a one year implementation period to monitor their risk levels and to comply with the increased capital requirements. In addition, the Commission understands that, in setting the proposed amounts, NSCC considered several benchmarking factors, including inflation, the proposal's historical development indicating member appetite for different methods in setting the minimums, and the capital requirements of other financial market infrastructures, which provided indicators for setting appropriate increases to its minimum capital requirements.⁹⁷ As discussed above in Section III.A.i, the Commission agrees that these factors support the reasonableness of the proposed minimum capital requirements. Based on the totality of the factors, the Commission concludes that the Proposed Rule Change does not impose any burden on competition not necessary or appropriate in furtherance of the Act.

For the reasons stated above, notwithstanding the potential impact on a small number of broker-dealers, the Commission believes that, in light of the potential benefits to investors arising from the Proposed Rule Change and the resulting overall improved counterparty credit risk management at NSCC (*i.e.*, the prompt and accurate clearance and settlement of securities transactions, the safeguarding of securities and funds, and the protection of investors and the public interest as discussed in section III.A.1.iii above), the Proposed Rule Change is consistent with the requirements of Section 17A(b)(3)(I) of the Act.

C. Consistency With Rule 17Ad–22(e)(4)

Rule 17Ad–22(e)(4)(i) under the Act requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.⁹⁸

Increasing membership capital requirements, as described above in Section II.A., would help ensure that

⁹⁷ *See* Notice of Filing, *supra* note 3, at 74186.

⁹⁸ 17 CFR 240.17Ad–22(e)(4)(i).

⁸⁶ 15 U.S.C. 78q–1(b)(3)(F).

⁸⁷ 15 U.S.C. 78q–1(b)(3)(I).

⁸⁸ *See* Bradford National Clearing Corp., 590 F.2d 1085, 1105 (D.C. Cir. 1978).

⁸⁹ *See id.*

⁹⁰ *See* Alpine Letter, *supra* note 8, at 3–8;

Comment from Kimberly Unger, Chief Executive Officer and Managing Director, STANY The Security Traders Association of New York, Inc. (January 27, 2022) (“STANY Letter”), *supra* note 8,

at 2–3; Wilson Letter, *supra* note 8, at 8; Letter from Scott G. Monson, Attorney (February 10, 2022) (“Monson Letter”), *supra* note 8, at 2. In addition, one commenter stated that the proposal is anti-

members maintain sufficient capital to meet their obligations to NSCC, including potential future obligations required to fund its trading activity with NSCC or to absorb losses allocated to it. By ensuring members' ability to meet their financial obligations to NSCC, the proposal, in turn, will help ensure NSCC continues to maintain sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.⁹⁹

Certain commenters argue that NSCC fails to establish evidence that there exists an actual credit exposure to NSCC that the proposed increased Excess Net Capital requirements would cover that is not already covered by NSCC's margin requirements.¹⁰⁰ NSCC responds to these commenters by stating that as a matter of law and regulation, NSCC is required to manage many different risks, including legal, credit, liquidity, operational, general business, investment, and custody, regardless of whether any of the risks materialize into an actual issue.¹⁰¹ While members may not routinely experience issues related to legal, operational, or cyber risks, these issues can arise, possibly without advance warning, and, as such, they are considered a critical part of the ongoing credit risks that members present to NSCC and that NSCC must manage.¹⁰²

In considering these comments, the Commission thoroughly reviewed and considered the Proposed Rule Change, including the supporting exhibits that provided confidential analysis on the impact and rationale for the proposed capital requirements. Based on its review of these materials, the Commission believes that the proposal would, in fact, better enable NSCC to cover its credit exposure to Members and meet the applicable Commission regulatory requirements. Specifically, the Commission has considered the relationship between members' VaR and their excess net capital, which indicates that on average broker-dealers with lower Excess Net Capital amounts present higher risk exposures to NSCC relative to their capital levels, and that, upon application of the proposed

⁹⁹ Four commenters argue that, rather than manage its credit exposure, NSCC should reduce the risk by shortening the settlement cycle. See Alpine Letter, *supra* note 8, at 8–9; STANY Letter, *supra* note 8, at 5; Wilson Letter, *supra* note 8, at 4–6; Zakhary Letter, *supra* note 8, at 2. However, NSCC manages credit risk under the current standard settlement cycle, and the Commission disagrees that it would be feasible for NSCC to unilaterally change the industry standard settlement cycle.

¹⁰⁰ See Wilson Letter, *supra* note 8, at 3; Monson Letter, *supra* note 8, at 3.

¹⁰¹ NSCC Response Letter, *supra* note 19, at 2.

¹⁰² See *id.*

requirements, the risk to NSCC decreases and is more consistent across NSCC's members, as evidenced by the more consistent VaR/ENC levels across NSCC's members under the proposed minimum requirements, while balancing the increased exposure and the impact on members.¹⁰³ Therefore, the Commission believes that the proposal would provide NSCC with stronger risk management with respect to the higher risk exposure and establish risk-based criteria for participation.

Additionally, the proposal to revise the Watch List, as described above in Section II.B, could help NSCC better allocate its resources for monitoring its credit exposures to members, which, in turn, could help NSCC more effectively manage and mitigate its credit exposures to its members. Therefore, the Commission believes the Proposed Rule Change is consistent with Rule 17Ad–22(e)(4)(i) under the Exchange Act.

D. Consistency With Rule 17Ad–22(e)(18)

Rule 17Ad–22(e)(18) under the Act requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to establish objective, risk-based, and publicly disclosed criteria for participation, which permit fair and open access by direct and, where relevant, indirect participants and other financial market utilities, require participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation in the clearing agency, and monitor compliance with such participation requirements on an ongoing basis.¹⁰⁴

As described above in Section II.A., the proposal will increase NSCC's minimum capital requirements for its members. As it relates to U.S. broker-dealer members, the amount of the proposed increase to Excess Net Capital requirements will be based on a tiered approach designed to reflect the level of risk the member presents to NSCC. For non-U.S. broker-dealer members, the proposal will impose a flat equity capital requirement.

Similarly, the proposal will establish membership categories for national securities exchanges and Index Receipt Agents, for purposes of NSCC's minimum capital requirements, and will impose capital requirements based on the analysis of the risk profiles of these entities and their importance to the functioning of the securities markets. By

¹⁰³ See *supra* notes 19–21. See also *supra* text accompanying notes 71–73.

¹⁰⁴ 17 CFR 240.17Ad–22(e)(18).

establishing these new categories, NSCC will replace conditional and discretionary minimum capital requirements with objective minimum capital requirements commensurate with the risks these members pose to NSCC.

For both U.S. and non-U.S. bank and trust company members and limited members, the proposal will revise how net capital is defined to incorporate a measurement used by banking regulators, and impose additional financial requirements on non-U.S. bank and trust company members tied to home country regulatory requirements and international standards. The proposal will also establish a category for all other members, which will impose minimum financial requirements tied to that entity's regulatory requirements, which NSCC may increase based on how closely it resembles another membership type and its risk-profile.

First, the proposal to increase minimum capital requirements to NSCC's members will help to ensure each member has and maintains sufficient financial resources to meet obligations arising from its participation in NSCC. Second, the proposal will further establish objective, risk-based, and publicly disclosed criteria for setting the amounts of NSCC's increased capital requirements for its members. The proposed changes will apply to all NSCC members as set forth in NSCC's public-facing Rules.¹⁰⁵ For U.S. broker-dealer members, the tiered approach sets capital requirements to the level of risk the member presents to NSCC and is therefore designed to establish objective and risk-based criteria for U.S. broker-dealers to participate in NSCC.

Certain commenters argue, in various ways, that the proposal's rationale for the increased capital requirements are vague, arbitrary, and specious.¹⁰⁶ The

¹⁰⁵ The Commission also understands that NSCC considered several additional factors, including inflation, historical development of the proposal, and the capital requirements of other financial market infrastructures. See Notice of Filing, *supra* note 3, at 74186; and *supra* note 12. The Commission believes that these factors demonstrate the reasonableness of the proposed minimum capital requirements, as discussed above in Section III.A.i.

¹⁰⁶ See Alpine Letter, *supra* note 8, at 1–2 and 5–6; Wilson Letter, *supra* note 8, at 8–9; Zakhary Letter, *supra* note 8, at 1. Certain commenters argue members that self-clear present more risk to NSCC than members who clear on behalf of others. See STANY Letter, *supra* note 8, at 3; Letter from Charles F Lek, Chief Executive Officer, Lek Securities Corporation (January 19, 2022) (“Lek Letter”), *supra* note 8, at 1–2; Comment from Wendie Wachtel, Chief Operating Officer, Wachtel and Co., Inc. (March 22, 2022) (“Wachtel Letter”), *supra* note 8, at 2. However, the argument is not relevant to the proposal because it is based on an

Commission disagrees. As discussed above, on average broker-dealer members with lower Excess Net Capital amounts present higher risk exposures to NSCC relative to their capital levels.¹⁰⁷ Additionally, the Commission understands that NSCC considered several additional risks faced by its members, both qualitative and quantitative, in determining its proposed capital requirements, which the Commission believes demonstrate the reasonableness of the proposed minimum capital requirements, as discussed above in Section III.A.i.¹⁰⁸ Regarding U.S. and non-U.S. banks and trust companies, the proposal will set the minimum capital requirements based on standards and measures used by banking regulators. Regarding non-U.S. broker-dealers and for all other types of members, the proposal would eliminate conditional and discretionary minimum capital requirements in favor of establishing objective minimum capital requirements. Therefore, the Commission concludes the proposal is reasonably designed to establish objective, risk-based, and publicly disclosed criteria for participation.

For the reasons described above, the Commission finds that the Proposed Rule Change is consistent with Rule 17Ad-22(e)(18) under the Act.¹⁰⁹

IV. Conclusion

On the basis of the foregoing, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act¹¹⁰ and the rules and regulations promulgated thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act¹¹¹ that proposed rule change SR-NSCC-2021-016, be, and hereby is, *approved*.¹¹²

inaccurate assertion that self-clearing includes proprietary trading firms only, while clears on behalf of others refers to agency firms only. Rather, both types of members could be engaged in both proprietary and customer trading.

¹⁰⁷ See *supra* note 54 and accompanying text.

¹⁰⁸ See *supra* note 72. See also Notice of Filing, *supra* note 3, at 74196; and NSCC Response Letter, *supra* note 19, at 2 (noting that while members may not routinely experience issues related to legal, operational, or cyber risks, these issues can arise, possibly without advance warning, and, as such, they are considered a critical part of the ongoing credit risks that members present to NSCC and that NSCC must manage).

¹⁰⁹ *Id.*

¹¹⁰ 15 U.S.C. 78q-1.

¹¹¹ 15 U.S.C. 78s(b)(2).

¹¹² In approving the Proposed Rule Change, the Commission considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹³

J. Matthew DeLesDernier,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-95613; No. SR-NYSE-2022-38]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Section 902.05 of the NYSE Listed Company Manual To Establish a Cap on Listing Fees Billed When a Structured Product Is Issued as a Dividend

August 26, 2022.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on August 22, 2022, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section 902.05 of the NYSE Listed Company Manual (the “Manual”) to establish a cap on listing fees billed when a structured product is issued as a dividend.⁴ The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Section 902.05 of the Manual sets forth initial listing fees and annual fees applicable to structured products listed under Section 703.18, the equity criteria set out in Section 703.19, and Section 703.21, and traded on the equity floor of the Exchange. The term “retail debt securities” refers to debt securities that are listed under the equity criteria set out in Section 703.19 and traded on the equity floor of the Exchange. Subject to certain limitations set forth in the rule, issuers must pay listing fees for structured products at a per share rate using the following tiered fee structure:

- For an issuance up to and including two million shares, the rate is \$0.01475 per share;
- For an issuance over two million shares and up to and including four million shares, the rate is \$0.0074 per share;
- For an issuance over four million shares and up to and including 300 million shares, the rate is \$0.0035 per share;
- For an issuance over 300 million shares, the rate is \$0.0019 per share.

The Exchange now proposes to adopt a cap on listing fees in relation to structured products issued as a dividend. As proposed, listing fees on structured products issued as a dividend would be capped at \$150,000 per issuance. The Exchange notes that the issuer in such cases is not receiving any cash or other consideration and would therefore not be generating any funds out of which it could pay the listing fees, as would be the case if it sold the securities. Therefore, the Exchange believes it is reasonable to apply a lower fee cap than is applied when structured products are sold in a capital raising transaction, as is more usually the case. The Exchange notes that the Manual already contains a similar \$150,000 cap on listing fees for shares of common stock issued in

¹¹³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ The Exchange originally filed to amend the Manual on August 16, 2022 (SR-NYSE-2022-33) and withdrew such filing on August 22, 2022.