

Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,¹⁵ which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange previously filed a proposed rule change to adopt Nasdaq Rule 5750 to permit the listing and trading of Proxy Portfolio Shares.¹⁶ As discussed above, under the current rule, a series of Proxy Portfolio Shares must create or redeem shares in return for the Proxy Basket and/or cash. The Exchange is now proposing to amend Nasdaq Rule 5750 to allow a series of Proxy Portfolio Shares to create or redeem shares in return for a Custom Basket, which is a portfolio of securities that is different from the Proxy Basket, to the extent consistent with an issuer's exemptive relief under the 1940 Act.¹⁷ For the reasons discussed below, the Commission finds that the proposed amendments to Nasdaq Rule 5750 to provide for the use of Custom Baskets for Proxy Portfolio Shares, to the extent permitted by an issuer's exemptive relief under the 1940 Act, are consistent

proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ See Securities Exchange Act Release No. 89110 (June 22, 2020), 85 FR 38461 (June 26, 2020) (SR-NASDAQ-2020-032) (Notice of Filing and Immediate Effectiveness to Adopt Nasdaq Rule 5750 to List and Trade Proxy Portfolio Shares) ("2020 Notice"). At the time, the Exchange stated that the proposed rule change to adopt new Nasdaq Rule 5750 was substantially similar to a proposed rule change by Cboe BZX Exchange, Inc. ("BZX") to adopt BZX Rule 14.11(m) that the Commission had recently approved. See *id.* at 38461 (citing Securities Exchange Act Release No. 88887 (May 15, 2020), 85 FR 30990 (May 21, 2020) (SR-CboeBZX-2019-107) ("2020 Order"). The Exchange must file a separate proposed rule change pursuant to Section 19(b) of the Exchange Act for each series of Proxy Portfolio Shares. See Nasdaq Rule 5750(b)(1).

¹⁷ In the 2020 Notice, the Exchange identified several applications for exemptive relief and subsequent orders granting certain exemptive relief under the 1940 Act and stated that it believed that each associated series of shares would qualify as Proxy Portfolio Shares under proposed Nasdaq Rule 5750. See 2020 Notice, *supra* note 16, 85 FR at 38461 n.3. The Commission has since granted exemptive relief under the 1940 Act to certain series of shares that the Exchange had identified as qualifying as Proxy Portfolio Shares to permit the creation or redemption of shares using a Custom Basket that includes instruments that are not included, or included with different weightings, in the fund's equivalent to a Proxy Basket. See, e.g., Fidelity Beach Street Trust, *et al.*, Investment Company Act Release No. 34350 (August 5, 2021).

with Section 6(b)(5) of the Exchange Act.

The Commission believes that the proposed changes to Nasdaq Rules 5750(b)(5) and (6) are consistent with the Exchange Act and are reasonably designed to help prevent fraudulent and manipulative acts and practices. The Commission notes that, because Proxy Portfolio Shares do not publicly disclose on a daily basis information about the holdings of the Fund Portfolio, it is vital that key information relating to Proxy Portfolio Shares, including information relating to Custom Baskets, be kept confidential prior to its public disclosure and not be subject to misuse.¹⁸ Accordingly, the Commission believes that the Exchange's proposal to amend Nasdaq Rules 5750(b)(5) and (6)¹⁹ to apply the current "fire wall" and other requirements contained therein to those that have access to information concerning, or make decisions pertaining to, the composition of and/or changes to the Custom Baskets, in addition to the existing requirements relating to the Fund Portfolio and the Proxy Basket, is designed to prevent fraud and manipulation with respect to Proxy Portfolio Shares.

The Commission also believes that the proposed amendments to the initial and continued listing requirements for Proxy Portfolio Shares are adequate to ensure transparency of information relating to Custom Baskets utilized by a fund and to ensure that such information is available to the rest of the market participants at the same time. Specifically, prior to the opening of trading on each business day, the Investment Company will make publicly available on its website the composition of any Custom Basket transacted on the previous business day, except a Custom Basket that differs from the applicable Proxy Basket only with respect to cash.²⁰ In addition, prior to the initial listing of the Proxy Portfolio Shares, the Exchange will be required to obtain a representation from the issuer of each series of Proxy Portfolio Shares that the issuer and any person acting on behalf of the series of Proxy Portfolio Shares will comply with Regulation FD, including with respect to any Custom Basket.²¹ These measures help to

¹⁸ See 2020 Order, *supra* note 16, 85 FR at 31002-03.

¹⁹ See *supra* Section II, describing proposed Nasdaq Rules 5750(b)(5) and (6).

²⁰ See proposed Nasdaq Rule 5750(d)(2)(A)(ii).

²¹ See proposed Nasdaq Rule 5750(d)(1)(B)(iii). The Commission notes that a fund's use of, or conversations with authorized participants about, Creation Baskets that would result in selective disclosure of nonpublic information would

mitigate concerns that certain information regarding the funds will be available only to select market participants and thereby helps to prevent fraud and manipulation.

The Commission notes that, as set forth in the definition of "Custom Basket," a series of Proxy Portfolio Shares may only utilize Custom Baskets to the extent consistent with the exemptive relief issued pursuant to the 1940 Act applicable to such series.²² The Commission further notes that all series of Proxy Portfolio Shares will continue to be subject to the existing rules and procedures that govern the listing and trading of Proxy Portfolio Shares and the trading of equity securities on the Exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act²³ that the proposed rule change (SR-NASDAQ-2021-065), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93278; File No. SR-NSCC-2021-007]

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving the Proposed Rule Change Relating to Confidential Information, Market Disruption Events, and Other Changes

October 8, 2021.

I. Introduction

On June 25, 2021, National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR-NSCC-2021-007 (the "Proposed Rule Change") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder² to amend NSCC's

effectively be limited by the fund's obligation to comply with Regulation FD. See, e.g., Fidelity Beach Street Trust, *et al.*, Investment Company Act Release No. 34326 (July 9, 2021).

²² See proposed Nasdaq Rule 5750(c)(6).

²³ 15 U.S.C. 78s(b)(2).

²⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

rules relating to confidentiality requirements, Market Disruption Events, and procedures for disconnecting a participant from NSCC's network, among other changes.³ The Proposed Rule Change was published for comment in the **Federal Register** on July 13, 2021.⁴ The Commission received comments that it has considered with respect to the Proposed Rule Change.⁵ For the reasons discussed below, the Commission is approving the Proposed Rule Change.

II. Description of the Proposed Rule Change

Pursuant to the Proposed Rule Change, NSCC is proposing three main changes to its Rules & Procedures ("Rules"):⁶ (1) Standardizing the confidentiality requirement applicable to NSCC with respect to its participants' information and adding confidentiality requirement applicable to participants with respect to NSCC's information, (2) updating its Market Disruption and Force Majeure Rule ("Force Majeure Rule") to authorize two additional officers to determine that a Market Disruption Event has occurred, and (3) adding a new rule setting forth the procedures under which NSCC would be able to disconnect a participant from its network in certain circumstances ("Systems Disconnect Rule"). The Commission provides relevant background and describes each of these proposed changes in greater detail below.

A. Background

NSCC provides clearance, settlement, risk management, central counterparty services, and a guarantee of completion for virtually all broker-to-broker trades involving equity securities, corporate and municipal debt securities,

American depository receipts, exchange traded funds, and unit investment trusts. In light of NSCC's critical role in the marketplace, NSCC was designated a Systemically Important Financial Market Utility ("SIFMU") under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.⁷ Due to NSCC's unique position in the marketplace, a failure or a disruption to NSCC could, among other things, significantly disrupt settlement of securities transactions cleared by NSCC and increase the risk of substantial liquidity problems spreading among financial institutions or markets, and thereby threaten the stability of the financial system in the United States.⁸

NSCC participants connect to NSCC's systems, either directly through the Securely Managed and Reliable Technology ("SMART") network or through a third party service provider or service bureau.⁹ NSCC's parent company, The Depository Trust & Clearing Corporation ("DTCC") manages the SMART network, which connects a nationwide complex of networks, processing centers, and control facilities.¹⁰

B. Proposed Changes

1. Confidentiality Requirements

Confidentiality Requirements Applicable to NSCC: NSCC collects confidential information from its participants to assess whether each participant meets NSCC's membership requirements either to gain or continue access to NSCC's clearance and settlement services.¹¹ In turn, NSCC is required to maintain the confidentiality of any information furnished by its participants. Currently, NSCC's Rules

oblige NSCC to hold participants' information in the same degree of confidence as may be required by law or the rules and regulations (hereinafter collectively, "regulations") of the appropriate regulatory body having jurisdiction over the participant.¹²

NSCC states that its current Rules create ambiguity because NSCC's obligations depend on each participant's regulatory requirements, which could lead to unequal treatment of participants and conflicts of law with NSCC's regulatory requirements or with respect to a participant who is subject to multiple jurisdictions' regulations.¹³ NSCC also states that applying different standards creates operational burdens because NSCC must track the regulations applicable to each of its participants and must maintain the confidentiality of each participant's information to the same degree as required by the applicable regulations.¹⁴

In order to clarify its confidentiality requirements and to enhance its operational efficiency, NSCC proposes to revise its Rules to establish a standard, which will require NSCC to hold participant confidential information to the same degree as NSCC's regulatory requirements that relate to the confidentiality of records, and to remove the references to each participant's particular regulatory obligations. NSCC represents that the proposed change would provide participants with similar protections because NSCC believes its regulatory requirements are comparable to the regulations applicable to its participants and, therefore, would not result in changes to NSCC's current practices or the protection offered to its participants' confidential information.¹⁵

Confidentiality Requirements Applicable to Participants: NSCC's Rules do not include obligations for its participants to protect confidential information furnished by NSCC or its affiliates.¹⁶ However, NSCC states that, in connection with the development of cyber and information security programs pursuant to applicable participant regulatory requirements, NSCC and DTCC have received an increasing number of requests from

³ See Notice of Filing, *infra* note 4, at 86 FR 36815.

⁴ See Securities Exchange Act Release No. 92334 (June 25, 2021), 86 FR 36815 (July 13, 2021) (File No. SR-NSCC-2021-007) ("Notice of Filing").

⁵ Specifically, the Commission received comments on a proposed rule change filed by NSCC's affiliate, the Depository Trust Company, regarding parallel changes to DTCC's Rules. See Securities Exchange Act Release No. 92342 (June 25, 2021), 86 FR 36833 (July 13, 2021) (File No. SR-DTC-2021-011). The comment letters are available on the Commission's website at <https://www.sec.gov/comments/sr-dtc-2021-011/srdtc2021011.htm>. Because the comments address issues that also appear in this Proposed Rule Change, the Commission has considered it in connection with NSCC's proposal as well. Several comments generally supported the Proposed Rule Change, and the Commission considers the additional comments in its analysis at Section III *infra*.

⁶ Capitalized terms not defined herein are defined in the Rules, available at https://dtcc.com/-/media/Files/Downloads/legal/rules/nscc_rules.pdf.

⁷ 12 U.S.C. 5465(e)(1); Financial Stability Oversight Counsel 2012 Annual Report, Appendix A ("FSOC 2012 Report"), available at <http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf>.

⁸ See FSOC 2012 Report, *supra* note 7.

⁹ See Securities Exchange Act Release No. 87696 (December 9, 2019), 84 FR 68243 (December 13, 2019) (File No. SR-NSCC-2019-003) (describing the DTCC SMART network).

¹⁰ DTCC provides a set of core business processes for NSCC and DTCC's other subsidiaries, including the technology systems and networks, that provide connectivity between NSCC and its participants and that provide NSCC with the ability to provide its services as required under the Rules. Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which it is generally DTCC that provides services to NSCC and DTCC's other subsidiaries.

¹¹ See Rule 2A, *supra* note 6 (establishing NSCC's right to require applicants to furnish information to become Members or Limited Members of NSCC); and Rule 15, *supra* note 4 (establishing NSCC's right to require participants to furnish information relating to assurances of financial responsibility and operational capability).

¹² See Section 1.C. of Rule 2A and Section 3 of Rule 15, *supra* note 6.

¹³ See Notice of Filing, *supra* note 4, at 36816.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ NSCC states that, historically, it has generally not provided, nor been requested to provide, information that contains confidential or proprietary information of NSCC or its affiliates to its participants except for information necessary for participants to connect to DTCC Systems, which is typically protected under intellectual property laws. See *id.*

participants for confidential information, such as information regarding DTCC's network operations, data security practices, and legal settlements.¹⁷ Additionally, NSCC states that participants may request NSCC or DTCC to disclose confidential information regarding its cyber threat indicators, sources of cyber threat information, or other information and actions taken following a cyber incident relating to a participant, NSCC, or DTCC.¹⁸

To facilitate information sharing by NSCC while protecting the confidentiality of proprietary and confidential information NSCC shares with its participants, NSCC proposes to add participant confidentiality requirements to its Rules. The new provisions will require participants to maintain the confidentiality of information furnished by NSCC through proper safeguards to prevent disclosure of such confidential information, except as necessary to perform its obligations under NSCC's Rules or as otherwise required by applicable law. NSCC proposes that participants be required to maintain the confidentiality of this information to the same extent and using the same means the participant uses to protect its own confidential information, but no less than a reasonable standard of care. NSCC's proposal will also entitle NSCC or DTCC to seek any temporary or permanent injunctive or other equitable relief in addition to any monetary damages under the Rules if a participant breaches its confidentiality requirements. Additionally, NSCC's proposal will entitle NSCC to impose other disciplinary proceedings or restrictions on access to services for a participant's failure to comply with its confidentiality requirements, consistent with the existing tools available to NSCC regarding a participant's failure to comply with its Rules.

2. Market Disruption Event

NSCC's Rules contain provisions that identify the events or circumstances that NSCC would consider to be 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.¹⁹

¹⁷ See Notice of Filing, *supra* note 4, at 36817. See also, *supra* discussion in Section II.A (Background) relating to DTCC Systems.

¹⁸ See Notice of Filing, *supra* note 4, at 36817.

¹⁹ See Rule 60, *supra* note 6. See also Securities Exchange Act Release Nos. 83955 (August 27, 2018), 83 FR 44340 (August 30, 2018) (File No. SR-

Upon the declaration of a Market Disruption Event, NSCC's Rules provide NSCC with tools to address such an event, such as suspending any or all services and taking, or requiring participants to take, any actions NSCC considers appropriate to facilitate the continuation of NSCC's services.²⁰

Currently, NSCC's Board of Directors may declare a Market Disruption Event and may take any actions authorized by NSCC's Rules to address the event.²¹ However, NSCC's Rules also authorize certain officers to make an interim declaration of a Market Disruption Event, to allow NSCC to prevent delays in addressing a Market Disruption Event if the Board of Directors is unable to convene.²² In the event of such an interim declaration, the Board of Directors must ratify, modify, or rescind the officer's determination as soon as practicable.²³ Currently, the officers authorized to make such determination are the Chief Executive Officer, Chief Financial Officer, Group Chief Risk Officer, and General Counsel.²⁴

NSCC proposes to add two additional officers of NSCC, the Chief Information Officer and the Head of Clearing Agency Services, to the list of authorized officers that could make such an interim determination if the Board of Directors is unable to convene. NSCC states these two officers, like the other officers currently provided in the Rules, maintain senior executive level positions at NSCC, oversee divisions of NSCC, and hold positions at NSCC that would provide them a necessary global view into NSCC's operations and systems to enable them to determine the existence of a Market Disruption Event.²⁵ NSCC states adding these two additional officers would facilitate NSCC's ability to implement its emergency procedures in the event of a Market Disruption Event.²⁶

3. Systems Disconnect Rule

As mentioned above in Section II.A (Background), NSCC's participants connect to NSCC's systems, either through the DTCC-managed SMART network or through other electronic means, such as through a third party service provider or service bureau. NSCC's Rules do not address NSCC's ability to disconnect a participant

NSCC-2017-805); 83974 (August 28, 2018), 83 FR 44988 (September 4, 2018) (File No. SR-NSCC-2017-017).

²⁰ See Rule 60, *supra* note 6.

²¹ See Section 2 of Rule 60, *id.*

²² See *id.*

²³ See *id.*

²⁴ See *id.*

²⁵ See Notice of Filing, *supra* note 4, at 36817.

²⁶ See *id.*

whose network connection risks harming NSCC's systems. NSCC's proposal will establish procedures under which NSCC would be able to disconnect a participant from its network due to the risk of an imminent threat to NSCC, participants, or other market participants.²⁷

NSCC's proposal will address NSCC's authority to take certain actions upon the occurrence, and during the pendency, of a Major Event. A "Major Event" will be defined as the happening of one or more "Systems Disruptions" reasonably likely to have a significant impact on NSCC's operations, including "DTCC Systems,"²⁸ that affect the business, operations, safeguarding of securities or funds, or physical functions of NSCC, its participants, or other market participants. "Systems Disruption" will, in turn, be defined as the unavailability, failure, malfunction, overload, or restriction (whether partial or total) of a DTCC Systems Participant's systems that disrupts or degrades the normal operation of such DTCC Systems Participant's systems; or anything that impacts or alters the normal communication or the files that are received, or information transmitted, to or from the DTCC Systems.

NSCC's proposal would also provide governance procedures applicable to NSCC's determination whether, and how, to implement the provisions of the Systems Disconnect Rule. The same officers with delegated authority under the Force Majeure Rule may make a determination that a Major Event has occurred. As discussed in Section II.B.2 (Market Disruption Event) above, NSCC states these officers maintain senior executive level positions at NSCC, oversee divisions of NSCC, and hold positions at NSCC that would provide them a necessary global view into NSCC's operations and systems to enable them to determine the existence of a Market Disruption Event, which would also enable them to determine the existence of a Major Event.

However, the proposed process for declaring a Major Event, by contrast, would start with a designated officer, whereas, for a Market Disruption Event, the officer would make an interim determination only if the Board of Directors were unable to timely convene. NSCC states it designed the

²⁷ See Notice of Filing, *supra* note 4, at 36817.

²⁸ "DTCC Systems" will be defined as the systems, equipment and technology networks of DTCC, NSCC and/or their Affiliates, whether owned, leased, or licensed, software, devices, IP addresses or other addresses or accounts used in connection with providing the services set forth in the Rules, or used to transact business or to manage the connection with NSCC.

process in this way to improve its ability to respond quickly, efficiently, and effectively to a Major Event that arises abruptly.²⁹ Following this determination, any management committee including all of the officers authorized to determine a Major Event would convene, and NSCC would convene a Board of Directors meeting as soon as practicable thereafter, and in any event within five Business Days following such determination, to ratify, modify, or rescind the Officer Major Event Action.³⁰

In addition, the proposed rule will require participants to notify NSCC immediately upon becoming aware of a Major Event, and, likewise, will require NSCC to notify its participants promptly of any action NSCC takes or intends to take with respect to a Major Event.³¹ Finally, the proposal will address certain miscellaneous related matters including: (i) A limitation of liability for any failure or delay in performance, in whole or in part of NSCC's obligations under the Rules, arising out of or related to a Major Event, (ii) a statement that NSCC's power to take any action pursuant to the Systems Disconnect Rule also includes the power to repeal, rescind, revoke, amend or vary such action, (iii) a statement that NSCC's powers pursuant to the Systems Disconnect Rule shall be in addition to, and not in derogation of, authority granted elsewhere in the Rules to take action as specified therein, (iv) a requirement that participants shall keep any confidential information provided to them by NSCC in connection with a Major Event confidential, and (v) a statement that in the event of any conflict between the provisions of the Systems Disconnect Rule and any other Rules or Procedures, the provisions of the Systems Disconnect Rule would prevail.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act³² directs the Commission to 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 the rules and regulations thereunder applicable to such organization. After careful consideration, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Act and the rules and regulations applicable to NSCC. In particular, the

Commission finds that the Proposed Rule Change is consistent with Section 17A(b)(3)(F)³³ of the Act and Rules 17Ad-22(e)(1),³⁴ (e)(2),³⁵ and (e)(17)(i)³⁶ thereunder.

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

Section 17A(b)(3)(F)³⁷ of the Exchange Act requires, in part, that the rules of a clearing agency, such as NSCC, be designed, in part, to promote the prompt and accurate clearance and settlement of securities transactions and 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. The Commission finds that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act³⁸ for the reasons discussed below.

As described above in Section II.B.1 (Confidentiality Requirements), NSCC proposes to revise its Rules to establish a standard relating to NSCC's obligation to maintain the confidentiality of information it collects from participants to assess each participant's compliance with NSCC's membership requirements. The Commission believes such a uniform standard will help NSCC meet its obligations and will help each participant better understand NSCC's obligations for maintaining the confidential information it shares with NSCC, which, in turn, may facilitate the sharing of such information and improve NSCC's ability to evaluate its participants' eligibility to access NSCC's clearance and settlement services.

Also, as described above in Section II.B.1 (Confidentiality Requirements), NSCC proposes to add participant confidentiality requirements to its Rules to ensure participants maintain the confidentiality of information NSCC shares, which participants may then use to determine whether to participate in NSCC's clearance and settlement services by understanding NSCC system requirements and NSCC system safeguards. The Commission believes participant confidentiality requirements will help each participant better understand its rights and obligations for maintaining the confidential information NSCC shares, which, in turn, may facilitate participant compliance. Therefore, the Commission believes the proposed changes to NSCC and participant confidentiality

requirements are consistent with promoting the prompt and accurate clearance and settlement of securities transactions by NSCC.

As described above in Section II.B.2 (Market Disruption Event) and Section II.B.3 (Systems Disconnect Rule), risks, threats, and potential vulnerabilities due to a Market Disruption Event or a Major Event could impede NSCC's ability to provide its clearance and settlement services. NSCC proposes to add two officers authorized to make an interim determination that a Market Disruption Event has occurred if the Board of Directors is unable to timely convene. The Commission believes the proposed change will improve NSCC's ability to respond quickly to a Market Disruption Event, which could help NSCC mitigate the impact of such event on NSCC, its participants, and the broader market.

Additionally, as described above in Section II.B.3 (Systems Disconnect Rule), NSCC proposes to add the Systems Disconnect Rule, which will set forth the procedures under which NSCC would be authorized, upon the occurrence of a Major Event (as defined in the proposed rules), to take certain actions, including disconnecting a participant from NSCC's systems, suspending data transmissions between NSCC and the participant, and requiring the participant to take other actions necessary to protect NSCC and its participants. The Commission believes the proposed Systems Disconnect Rule will enable NSCC to respond quickly to a potential cyber threat or other network disruption, which could help NSCC prevent the spread of a participant's systems disruptions to NSCC, its participants, and other market participants that could otherwise cause losses to NSCC or its participants.

One commenter suggests certain revisions to the definition of Major Event so that certain terms in the Systems Disconnect Rule are consistent with the definition of Market Disruption Event in the Force Majeure Rule.³⁹ The Commission disagrees. Consistency between the Systems Disconnect Rule and Force Majeure Rule is not necessary because NSCC designed the Systems Disconnect Rule for a different purpose. Although both rules relate to events that, if left unaddressed, could affect NSCC's ability to provide clearance and settlement services, the Force Majeure Rule is designed to cover events caused by external forces that impact NSCC and its participants, whereas the Systems Disconnect Rule is designed only to

³³ 15 U.S.C. 78q-1(b)(3)(F).

³⁴ 17 CFR 240.17Ad-22(e)(1).

³⁵ 17 CFR 240.17Ad-22(e)(2).

³⁶ 17 CFR 240.17Ad-22(e)(17)(i).

³⁷ 15 U.S.C. 78q-1(b)(3)(F).

³⁸ *Id.*

³⁹ See letter from Anonymous, dated July 28, 2021, *supra* note 5.

²⁹ See Notice of Filing, *supra* note 4, at 36818.

³⁰ See *id.*

³¹ See *id.*

³² 15 U.S.C. 78s(b)(2)(C).

cover disruptions to participant's computer systems or network that could flow through to NSCC systems. Therefore, differences between the two rules do not raise consistency concerns, because of their different purposes.⁴⁰

Therefore, for the reasons described above, the Commission believes the proposed changes relating to a Market Disruption Event or a Major Event will help promote the prompt and accurate clearance and settlement of securities transactions and with assuring NSCC safeguards securities and funds that are in its custody or control or for which it is responsible. Accordingly, the Commission finds that the implementation of the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act.⁴¹

B. Consistency With Rule 17Ad-22(e)(1)

Rule 17Ad-22(e)(1) under the Exchange Act requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for a well-founded, clear, transparent and enforceable legal basis for each aspect of its activities in all relevant jurisdictions.⁴² The Commission finds that the Proposed Rule Change is consistent with Rule 17Ad-22(e)(1) of the Exchange Act⁴³ for the reasons discussed below.

As described above in Sections II.B.1 (Confidentiality Requirements) and II.B.2 (Market Disruption Event), NSCC proposes to establish a consistent standard for its obligation to maintain the confidentiality of information it collects from its participants and to establish participant confidentiality requirements. The Commission believes a consistent standard for NSCC's confidentiality requirements will provide for clear and transparent standard rules for participants, rather than maintaining potentially different confidentiality standards for participants based on the various, unrelated regulatory bodies governing those participants. Additionally, the Commission believes that imposing specific legal standards applicable to

⁴⁰ The commenter also suggests adding language to the end of the Major Event definition to indicate that, to avoid doubt, a Major Event would not include disruptions due to normal market forces. The Commission does not believe that such additional language is necessary because, as discussed above in Section II.B.3 (Systems Disconnect Rule), a Major Event is limited to one or more "Systems Disruption(s)" (as defined in the proposed rule), which is properly limited to disruptions to participant systems or its network connection.

⁴¹ 15 U.S.C. 78q-1(b)(3)(F).

⁴² 17 CFR 240.17Ad-22(e)(1).

⁴³ *Id.*

both NSCC and its participants to follow will provide for a well-founded legal basis for the sharing and maintaining of confidential information between NSCC and its participants.⁴⁴

Accordingly, the Commission finds that the implementation of the Proposed Rule Change is consistent with Rule 17Ad-22(e)(1) of the Exchange Act.⁴⁵

C. Consistency With Rule 17Ad-22(e)(2)

Rule 17Ad-22(e)(2) under the Exchange Act requires, in part, that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent and that specify clear and direct lines of responsibility.⁴⁶ The Commission finds that the Proposed Rule Change is consistent with Rule 17Ad-22(e)(2) of the Exchange Act⁴⁷ for the reasons discussed below.

The Commission believes NSCC's proposal, as described above in Section II.B.2 (Market Disruption Event), to add two officers authorized to make an interim determination of a Market Disruption Event if the Board of Directors is unable to convene in a timely manner provides for governance arrangements that are clear and transparent and that provide clear and direct lines of responsibility. Likewise, the Commission believes NSCC's proposal to identify the officers authorized to make an interim determination of a Major Event, which will then be ratified, modified, or rescinded by the management committee and the Board of Directors will provide for clear and transparent governance procedures and will specify clear and direct lines of responsibility. Accordingly, the Commission finds that the implementation of the Proposed Rule Change is consistent with Rule 17Ad-22(e)(2) of the Exchange Act.⁴⁸

⁴⁴ One commenter suggests adding an exception for negligence or fraud to the limitation of liability clause in the proposed Systems Disconnect Rule, which the commenter states is customary contractual language. See letter from Anonymous, dated July 28, 2021, *supra* note 5. The Commission notes NSCC has already included similar language in its Rules, which would be applicable to this aspect of the proposal. See Section 2 of Rule 58, *supra* note 6 (providing for NSCC liability to its participants for "gross negligence, willful misconduct, or violations of Federal securities laws for which there is a private right of action" notwithstanding any other provision in the Rules).

⁴⁵ 17 CFR 240.17Ad-22(e)(1).

⁴⁶ 17 CFR 240.17Ad-22(e)(2).

⁴⁷ *Id.*

⁴⁸ *Id.*

D. Consistency With Rule 17Ad-22(e)(17)(i)

Rule 17Ad-22(e)(17)(i) under the Exchange Act requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to manage the covered clearing agency's operational risks by identifying the plausible sources of operational risk, both internal and external, and mitigating their impact through the use of appropriate systems, policies, procedures, and controls.⁴⁹ The Commission finds that the Proposed Rule Change is consistent with Rule 17Ad-22(e)(17)(i) of the Exchange Act⁵⁰ for the reasons discussed below.

The Commission believes NSCC's proposal, as described above in Section II.B.2 (Market Disruption Event), to add two officers authorized to make an interim determination of a Market Disruption Event could help NSCC mitigate the impact of a Market Disruption Event by ensuring NSCC can respond quickly to such event if the Board of Directors were unable to convene in a timely manner. Likewise, the Commission believes the proposed Systems Disconnect Rule, as described in Section II.B.3 above, provides a rules-based process that will enable NSCC to identify potential cyber threats or other network disruptions, which could help NSCC prevent the spread of a participant's systems disruptions to NSCC, its participants, and other market participants that could otherwise cause losses to NSCC or its participants.

One commenter suggests revising the definition of Major Event to be consistent with the definition of Market Disruption Event in the Force Majeure Rule.⁵¹ The commenter further argues the impact to NSCC covered by the definition of Major Event should be limited to "DTCC Systems" (as defined in the proposed rule) to ensure the scope of the proposed rule is limited to technical systems.⁵² The Commission disagrees. As noted above, the purposes of both the Force Majeure Rule and the Systems Disconnect Rule are different. The Force Majeure Rule is designed to cover events external to NSCC and its participants that materially impact, or are likely to materially impact, NSCC's ability to provide its clearance and settlement services. The Systems

⁴⁹ 17 CFR 240.17Ad-22(e)(17)(i).

⁵⁰ *Id.*

⁵¹ Specifically, the commenter suggests deleting reference to "reasonably" and by replacing "significant" with "material" when describing the likelihood and level of impact to NSCC. See letter from Anonymous, dated July 28, 2021, *supra* note 5.

⁵² See *id.*

Disconnect Rule, by contrast, is designed to cover a participant's systems or network disruption, which through its connection to NSCC, is reasonably likely to have a significant impact on NSCC's systems. The differences between the rules' purposes support the need for differing standards.⁵³ Furthermore, the Commission notes the reference to "including DTCC Systems" in the proposed definition of Major Event takes into account how NSCC's operations, *i.e.*, its clearance and settlement services, work, in that they utilize DTCC Systems. Consequently, the commenter's proposed revisions are not necessary.⁵⁴

Accordingly, the Commission finds that the implementation of the Proposed Rule Change is consistent with Rule 17Ad-22(e)(17)(i) of the Exchange Act.⁵⁵

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 Act⁵⁶ and the rules and regulations promulgated thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act⁵⁷ that Proposed Rule Change SR-NSCC-2021-007, be, and hereby is, *approved*.⁵⁸

⁵³ The Commission also disagrees with the commenter's suggestion to remove the references to "reasonably" with respect to the likelihood of an event impacting NSCC's operations. The Commission believes that NSCC's assessment of the likelihood of such an impact should be reasonable before taking actions like disconnecting a participant from its systems. In addition, the Commission notes that NSCC's references to "reasonably likely" and "significant impact" in the proposed definition of Major Event are consistent with the Commission's definition of a "Major SCI Event" under Regulation SCI. 17 CFR 242.1000. Likewise, the Commission notes that references in the proposed rule text to "reasonable basis" and "appropriate" is consistent with the obligations related to a Major SCI Event under Regulation SCI. 17 CFR 242.1002.

⁵⁴ Another commenter expressed concern that the proposed Systems Disconnect Rule could be used to benefit the trading activity of certain participants at the detriment of disconnected participants. *See* letter from Jarrod Knudson, dated June 27, 2021, *supra* note 5. The Commission disagrees because the proposed rule, by its terms, would only apply when certain Systems Disruptions occur at a participant that could impact NSCC's operations.

⁵⁵ 17 CFR 240.17Ad-22(e)(17)(i).

⁵⁶ 15 U.S.C. 78q-1.

⁵⁷ 15 U.S.C. 78s(b)(2).

⁵⁸ In approving the Proposed Rule Change, the Commission considered the proposals' 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.⁵⁹

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93269; File No. SR-C2-2021-014]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 5.5(c) and Rule 5.6 in Connection With Time-In-Force Instructions Available for Bulk Messages and To Make a Clarifying Change

October 7, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 24, 2021, Cboe C2 Exchange, Inc. (the "Exchange" or "C2") 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 Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³ and Rule 19b-4(f)(6) thereunder.⁴ 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 the Substance of the Proposed Rule Change

Cboe C2 Exchange, Inc. (the "Exchange" or "C2") proposes to amend Rule 5.5(c) and Rule 5.6 in connection with Time-in-Force instructions available for bulk messages and to make a clarifying change. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/options/regulation/rule_filings/ctwo/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

⁵⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

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 Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange proposes to amend Rule 5.5(c) and Rule 5.6(d) to allow Users to instruct bulk messages with a Time-in-Force of Immediate-or-Cancel ("IOC"). Currently, Users may not designate bulk messages as IOC, which, pursuant to Rule 5.6(d), instructs a limit order to execute in whole or in part as soon as the System receives it. The System cancels and does not post to the Book an IOC order (or unexecuted portion) not executed immediately on the Exchange or another options exchange. A bulk message is a single electronic message a User submits with an M Capacity (*i.e.*, for the account of a Market-Maker) to the Exchange in which the User may enter, modify, or cancel up to an Exchange-specified number of bids and offers. More, specifically, bulk message functionality is available to Market-Makers and permits them to update their electronic quotes in block quantities across series in a class. Rule 5.5(c)(3)(A)(i) currently provides that a bulk message submitted through a dedicated logical port (*i.e.*, a "bulk port") has a Time-in-Force of Day. Pursuant to Rule 5.6(d), the term "Day" means, for an order so designated, an order or quote that, if not executed, expires at the RTH market close. All bulk messages have a Time in Force of DAY, as set forth in Rule 5.5(c).

The Exchange proposes to allow Market-Makers to designate bulk messages as IOC by amending the following: Rule 5.3(c)(3)(A)(i) to provide that a bulk message submitted through a bulk port has a Time-in-Force of Day or IOC; the definition of IOC in Rule 5.6(d) to provide that Users may designate bulk messages as IOC; and the definition of "Day" in Rule 5.6(d) to remove the language that all bulk messages have a Time-in-Force of DAY,