SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–97516; File No. S7–10–23]

RIN 3235–AN19

Covered Clearing Agency Resilience and Recovery and Wind-Down Plans

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is proposing to amend certain portions of the Covered Clearing Agency Standards under the Securities Exchange Act of 1934 (''Exchange Act'') to strengthen the existing rules regarding margin with respect to intraday margin and the use of substantive inputs to a covered clearing agency's risk-based margin system. The Commission is also proposing a new rule to establish requirements for the contents of a covered clearing agency's recovery and wind-down plan.

DATES: Comments should be received on or before July 17, 2023.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.htm*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–10–23 on the subject line.

Paper Comments

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

All submissions should refer to File Number S7–10–23. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (*https://www.sec.gov/rules/proposed.shtml*). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's Public Reference Room. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Elizabeth L. Fitzgerald, Assistant Director, Jesse Capelle, Special Counsel, Office of Clearance and Settlement at (202) 551–5710, Division of Trading and Markets, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–7010.

Table of Contents

I. Introduction
II. Regulatory Framework
A. The Covered Clearing Agency Standards
B. Statutory Requirements for Covered Clearing Agencies as Self-Regulatory Organizations
C. Title II of the Dodd-Frank Act
III. Proposal
A. Amendments Regarding Risk Management
1. Proposed Changes to Rule 17Ad–22(e)(6)
2. Discussion
3. Request for Comment
D. Contents of Recovery and Wind-Down Plans
1. Proposed Rule 17Ad–26
2. Discussion
4. Request for Comment
IV. Economic Analysis
A. Introduction
B. Economic Baseline
1. Description of Market
2. Overview of the Existing Regulatory Framework
3. Current Recovery and Wind-Down Plans
4. Current Risk-Based Margin
E. Consideration of Benefits and Costs as well as the Effects on Efficiency, Competition, and Capital Formation
1. Proposed Rule 17Ad–26
2. Amendments to Rule 17Ad–22(e)(6)
3. Efficiency, Competition, and Capital Formation
F. Reasonable Alternatives to the Proposed Rule and Amendments
1. Establish Precise Triggers for Implementation of RWPs Across Covered Clearing Agencies
2. Establish Specific Scenarios and Analyses
3. Establish Specific Rules, Policies, Procedures, Tools, and Resources
4. Require the Identification of Interconnections and Interdependencies
5. Establish a Specific Monitoring Frequency for Intraday Margin Calls
6. Adopt Only Certain Elements of Proposed Rule 17Ad–26
7. Focus Intraday Margin Requirements on a Subset of Covered Clearing Agencies
G. Request for Comment
V. Paperwork Reduction Act
A. Proposed Amendment to Rule 17Ad–22(e)(6)
B. Proposed Rule 17Ad–26
H. Request for Comment
VI. Small Business Regulatory Enforcement Fairness Act
VII. Regulatory Flexibility Act Certification
VIII. Statutory Authority

I. Introduction

Section 17A of the Exchange Act directs the Commission to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions and provides the Commission with the authority to regulate those entities critical to the clearance and settlement process.[1] The enactment of the Payment, Clearing, and Settlement Supervision Act (''Clearing Supervision Act'') in Title VIII of the Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') reaffirmed the importance of the national system for clearance and settlement.[2] Specifically, Congress found that the ''proper functioning of the financial markets is dependent upon safe and efficient arrangements for the clearing and settlement of payments, securities, and other financial transactions.'' [3]

In recognition of the importance of clearance and settlement to the securities markets, the Commission adopted 17 CFR 240.17Ad–22(e) (''Rule 17Ad–22(e)''), which sets forth standards for covered clearing agencies registered with the Commission.[4] These standards address all aspects of a covered clearing agency's operations, including financial risk management, operational risk, default management, governance, and participation requirements.[5] In this release, the Commission is proposing changes to augment and strengthen the requirements of these rules, referred to as the Covered Clearing Agency Standards, in three ways.[6]

[1] *See* 15 U.S.C. 78q–1(a)(2)(A).

[2] *See* 12 U.S.C. 5461–5472.

[3] *See* 12 U.S.C. 5461(a)(1).

[4] A covered clearing agency is a registered clearing agency that provides the services of a central counterparty or a central securities depository. 17 CFR 240.17Ad–22(a)(5).

[5] *See* section II.A *infra* (providing more information on the Covered Clearing Agency Standards).

[6] In addition, the Commission is proposing to amend the CFR section designation for 17 CFR 240.17Ad–22 to replace the uppercase letter with the corresponding lowercase letter. Accordingly, 17 CFR 240.17Ad–22 is proposed to be redesignated as 17 CFR 240.17ad–22.

First, the Commission is proposing changes with respect to the Covered Clearing Agency Standards regarding the intraday collection of margin set forth in 17 CFR 240.17Ad–22(e)(6)(ii) (''Rule 17Ad–22(e)(6)(ii)''). This proposal would build upon and strengthen the existing requirement that a covered clearing agency have policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, among other things, includes the authority and operational capacity to make intraday margin calls in defined circumstances. Specifically, the proposed amendments to this rule would require that the covered clearing agency have policies and procedures to establish a risk-based margin system that includes the authority and operational capacity to monitor intraday exposure on an ongoing basis and to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility.

Second, the proposal would amend and expand the requirements of 17 CFR 240.17Ad–22(e)(6)(iv) (''Rule 17Ad–22(e)(6)(iv)'') to provide that a covered clearing agency have policies and procedures that would apply in the event that the covered clearing agency relies on substantive inputs from third parties to calculate margin using a risk-based margin system and, specifically, when such inputs are not readily available or reliable. This proposal would require that the procedures used in such circumstances must include substantive inputs from an alternate source or, if it does not use an alternate source, the use of an alternate risk-based margin system that does not similarly rely on the unavailable or unreliable substantive inputs.

Finally, the Commission is proposing to prescribe requirements for the contents of a covered clearing agency's recovery and orderly wind-down plan (''RWP''). At the time that it adopted the Covered Clearing Agency Standards in 2016, the Commission required in 17 CFR 240.17Ad–22(e)(3)(ii) (''Rule 17Ad–27(e)(3)(ii)'') that a covered clearing agency's policies and procedures include an RWP, but the Commission declined to include requirements for the content of the RWP, stating that, given the nature of recovery and resolution planning, such plans are likely to closely reflect the specific characteristics of the covered clearing agency, including its ownership, organizational, and operational structures, as well as the size, systemic importance, global reach, and/or the risks inherent in the products it clears.[7] The Commission continues to believe that an RWP should closely reflect the specific characteristics of the covered clearing agency. However, at this time, based on its supervisory experience considering the RWPs of the covered clearing agencies, the Commission believes that there are certain elements that must be included in each covered clearing agency's plan, to ensure that the plan is fit for purpose and provides sufficient identification of how a covered clearing agency would operate in a recovery and how it would achieve an orderly wind-down. Accordingly, the Commission is proposing a new rule at 17 CFR 240.17ad–26 (''Rule 17ad–26''), which would identify certain elements that a covered clearing agency would be required to include in an RWP and would also include definitions of recovery and orderly wind-down, which would identify the objective that these plans are designed to meet. As discussed further in sections III.B and IV.B *infra,* many of these elements are already contained in existing covered clearing agencies' RWPs, while other elements would be new to all or most of the existing RWPs. The Commission believes that the elements identified in new Rule 17ad–26 would accomplish three objectives. First, the rule would bolster existing plans by requiring certain new elements be included. Second, for the elements that are already contained in existing RWPs, the rule would codify these elements and ensure that the plans are required to continue to include these elements in their RWPs. Finally, the rule would ensure that the RWPs of any new covered clearing agencies would contain all of these elements.

However, with respect to changes to RWPs and to risk management rules more generally, the Commission would need to approve any proposed rule changes and, in filings for which an advance notice is required, not object to any such notice, as discussed further in section II.B *infra.* The Commission believes that this process should ensure that it is able to consider such changes and their consistency with the Exchange Act and the rules and regulations thereunder.

[7] Standards for Covered Clearing Agencies Adopting Release, Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786, 70808–09 (Oct. 13, 2016) (''CCA Standards Adopting Release'').

II. Regulatory Framework

A. The Covered Clearing Agency Standards

In 1975, Congress added section 17A to the Exchange Act as part of the Securities Acts Amendments of 1975, which, as noted in section I *supra,* directed the Commission to facilitate the establishment of: (i) a national system for the prompt and accurate clearance and settlement of securities transactions (other than exempt securities which typically includes U.S. Treasury securities, except as discussed further below), and (ii) linked or coordinated facilities for clearance and settlement of securities transactions.[8] In so doing, Congress made several findings related to the importance of the clearance and settlement of securities transactions and the relationship of clearance and settlement of securities transactions to the protection of investors. Specifically, Congress found that the prompt and accurate clearance and settlement of securities transactions are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors.[9] In facilitating the establishment of the national clearance and settlement system, the Commission must have due regard for the public interest, the protection of investors, the safeguarding of securities and funds, and maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents.[10]

The Commission's ability to achieve these goals is based upon the regulation of clearing agencies registered with the Commission.[11] Specifically, section 17A of the Exchange Act provides the Commission with authority to adopt rules as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act (including for the prompt and accurate clearance and settlement of securities transactions) and prohibits a clearing agency from engaging in any activity in

[8] *See* 15 U.S.C. 78q–1; Report of the Senate Committee on Banking, Housing & Urban Affairs, S. Rep. No. 94–75, at 4 (1975) (stating the Committee's belief that ''the banking and security industries must move quickly toward the establishment of a fully integrated national system for the prompt and accurate processing and settlement of securities transactions'').

[9] *See* 15 U.S.C. 78q–1(a)(1)(A); *see also* 15 U.S.C. 78q–1(B), (C), and (D) (setting forth additional findings related to the national system of clearance and settlement).

[10] *See* 15 U.S.C. 78q–1(a)(2)(A).

[11] Under the Exchange Act and the regulations thereunder, any entity performing the functions of a clearing agency must register with the Commission or seek an exemption from registration. 15 U.S.C. 78q–1(b)(1); *see also* 17 CFR 240.17Ad–22(a)(5) (defining covered clearing agency).

contravention of such rules and regulations.[12]

The Commission has exercised its broad authority to prescribe requirements for the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds. Most recently, the Commission promulgated the Covered Clearing Agency Standards.[13] These standards require covered clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to, as applicable, meet certain minimum standards regarding, among other things, operations, governance, and risk management.[14]

One of the Covered Clearing Agency Standards concerns the maintaining of a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency.[15] As part of maintaining a sound risk management framework, a covered clearing agency is required to include plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[16] At that time, the Commission stated that it understands that when a financial company becomes non-viable as a going concern or insolvent, recovery refers to actions taken that allow the financial company to sustain its critical operations and services; by contrast, resolution, or wind-down, refers to the transferring of a financial company's critical operations and services to an alternate entity.[17]

At the time of adoption of the Covered Clearing Agency Standards, the Commission declined to articulate requirements for all RWPs.[18] Rather, the Commission stated that, given the nature of recovery and resolution planning, such plans are likely to closely reflect the specific characteristics of the covered clearing agency, including its ownership, organizational, and operational structures, as well as the size, systemic importance, global reach, and/or the risks inherent in the products it clears. While the Commission declined to articulate requirements, it did provide guidance for covered clearing agencies in developing RWPs. In the Covered Clearing Agency Standards Adopting Release, the Commission stated that a covered clearing agency generally should consider whether: (i) it can identify scenarios that may potentially prevent it from being able to provide its critical services as a going concern and assess the effectiveness of a full range of options for recovery or orderly wind-down; (ii) it has prepared appropriate plans for its recovery or orderly wind-down based on the results of that assessment; and (iii) it has provided relevant authorities with the information needed for purposes of recovery and resolution planning.[19] The Commission also stated in the CCA Standards Adopting Release that, with respect to recovery tools, a covered clearing agency generally should consider the following when developing its recovery tools: (i) whether the set of recovery tools comprehensively addresses how the covered clearing agency would continue to provide critical services in all relevant scenarios; (ii) the extent to which each tool is reliable, timely, and has a strong legal basis; (iii) whether the tools are transparent and designed to allow those who would bear losses and liquidity shortfalls to measure, manage, and control their potential losses and liquidity shortfalls; (iv) whether the tools create appropriate incentives for the covered clearing agency's owners, direct and indirect participants, and other relevant stakeholders; and (v) whether the tools are designed to minimize the negative impact on direct and indirect participants and the financial system more broadly.[20]

Relatedly, the Covered Clearing Agency Standards also address the financial resources necessary for a covered clearing agency's recovery or orderly wind-down. Specifically, 17 CFR 240.17Ad–22(e)(15) requires written policies and procedures reasonably designed to, among other things, hold sufficient liquid net assets funded by equity to cover potential general business losses so that the covered clearing agency can continue operations and services as a going concern if those losses materialize.[21] This requirement encompasses: (i) determining the amount of liquid net assets funded by equity based upon the covered clearing agency's general business risk profile and the length of time required to achieve a recovery or orderly wind-down, as appropriate, of its critical operations and services if such action is taken; (ii) holding liquid net assets funded by equity equal to the greater of either (x) six months of the covered clearing agency's current operating expenses, or (y) the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of the covered clearing agency, as contemplated by the RWPs established under current Rule 17Ad–22(e)(3)(ii),[22] and (iii) maintaining a viable plan, approved by the board of directors and updated at least annually, for raising additional equity should its equity fall close to or below the amount required under paragraph (ii).[23] With respect to the policies and procedures related to maintaining a viable plan for raising additional equity, the Commission stated that a viable plan generally should enable the covered clearing agency to hold sufficient liquid net assets to achieve recovery or orderly wind-down.[24]

Another of the Covered Clearing Agency Standards sets forth requirements for written policies and procedures reasonably designed to, among other things, establish a risk-based margin system to cover the covered clearing agency's credit

[12] *See* 15 U.S.C. 78q–1(d)(1); *see also* 15 U.S.C. 78q–1(b)(2) (referring to the Commission's ability to adopt rules with respect to the application of section 17A).

[13] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70839.

[14] *See generally* 17 CFR 240.17Ad–22(e). A covered clearing agency is a registered clearing agency that provides the services of a central counterparty or a central securities depository. 17 CFR 240.17Ad–22(a)(5).

[15] *See* 17 CFR 240.17Ad–22(e)(3).

[16] *See* 17 CFR 240.17Ad–22(e)(3)(ii).

[17] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70808 n.251. In this release, the Commission is proposing definitions of ''recovery'' and ''orderly wind-down'' that would apply to the RWPs addressed by this release. *See infra* section III.B.2.a.

[18] *Id.* at 70808.

[19] *Id.* at 70810. As discussed in section III.B *infra,* the Commission is proposing to codify elements in proposed Rule 17ad–26 that are consistent with this guidance, with the exception of the guidance related to ''resolution planning.'' With respect to the guidance related to providing relevant authorities with the information needed for purposes of recovery and resolution planning, the Commission continues to support and reiterates this prior guidance. *See infra* section III.B.2.

[20] *Id.* The Commission is also proposing to codify the first section of this guidance in proposed Rule 17ad–26(a)(5). *See* section III.B.2.c *infra.* With respect to the remaining items of this guidance, the Commission continues to support and reiterates this prior guidance in section III.B.2.d *infra.*

[21] 17 CFR 240.17Ad–22(e)(15).

[22] This amount shall be in addition to resources held to cover participant defaults or other risks covered under the credit risk standard in 17 CFR 240.17Ad–22(b)(3) or 17Ad–22(e)(4)(i) through (iii), as applicable, and the liquidity risk standard in 17 CFR 240.17Ad–22(e)(7)(i) and (ii), and it shall be of high quality and sufficiently liquid to allow the covered clearing agency to meet its current and projected operating expenses under a range of scenarios, including in adverse market conditions. 17 CFR 240.17Ad–22(e)(15)(ii)(A) and (B).

[23] 17 CFR 240.17Ad–22(e)(15)(i), (ii), and (iii).

[24] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70836.

exposures to its participants if the covered clearing agency provides central counterparty services.[25] At a minimum, such a system, among other things, must mark participant positions to market and collect margin, including variation margin or equivalent charges if relevant, at least daily and include the authority and operational capacity to make intraday margin calls in defined circumstances.[26] The Commission stated that defined circumstances would generally include margin calls on both a scheduled and unscheduled basis.[27]

In addition, a covered clearing agency's risk-based margin system has to use reliable sources of timely price data and use procedures and sound valuation models for addressing circumstances in which pricing data are not readily available or reliable.[28] The Commission stated that in selecting price data sources, a covered clearing agency generally should consider the ability of the provider to provide data in a variety of market conditions, including periods of market stress, and not select data sources based on their cost alone to ensure that such price data sources are reliable.[29]

B. Statutory Requirements for Covered Clearing Agencies as Self-Regulatory Organizations

A covered clearing agency is, by definition, a registered clearing agency, meaning that it is a self-regulatory organization (''SRO'') for purposes of the Exchange Act.[30] Therefore, as a SRO, a covered clearing agency is required to file with the Commission any proposed rule or proposed change in its rules, including additions or deletions from its rules.[31] The Commission has specified the format and process for filing such proposed rule changes in Form 19b–4, which is intended to elicit information necessary for the public to provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder.[32]

The Commission publishes all proposed rule changes for comment.[33] Proposed rule changes are generally required to be approved by the Commission prior to going into effect; however, certain types of proposed rule changes take effect upon filing with the Commission.[34] When considering whether to approve or disapprove a proposed rule change, the Commission shall approve the proposed rule change if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the particular type of SRO.[35] The rule filing process provides transparency to market participants and the public about new initiatives and changes to governance, operations, and risk management at the clearing agency.

In addition, clearing agencies registered with the Commission are financial market utilities, as defined in section 803(6) of the Dodd-Frank Act.[36] A clearing agency that has been designated by the Financial Stability Oversight Council as systemically important or likely to become systemically important, and for which the Commission is the Supervisory Authority (''designated clearing agency''), is required to file 60-days advance notice with the Commission of changes to rules, procedures, and operations that could materially affect the nature or level of risk presented by the designated clearing agency (''advance notice'').[37] Such an advance notice also requires consultation with the Board of Governors of the Federal Reserve System (''Board of Governors'').[38] The Clearing Supervision Act authorizes the Commission to object to changes proposed in such an advance notice, which would prevent the clearing agency from implementing its proposed change(s).[39]

The covered clearing agencies' obligations as SROs and, as applicable, designated clearing agencies, are important when considering the types of changes that the Commission is proposing. If the covered clearing agency has to make changes to its rules to align with any of the proposed rules, if adopted, the covered clearing agency would be obligated to consider whether any proposed rule change and/or advance notice is necessary. For example, the Commission previously has stated that recovery and wind-down plans, and material changes thereto, would constitute a proposed rule change under section 19(b) of the Exchange Act and, for designated clearing agencies, an advance notice under the Clearing Supervision Act because such plans and material changes thereto would constitute changes to a stated policy, practice, or interpretation of the covered clearing agency and, for designated clearing agencies, a proposed change to its operations that could materially affect the nature or level of risk presented by the designated clearing agency.[40]

Indeed, covered clearing agencies have submitted RWPs, and material changes thereto, for public comment and Commission review pursuant to the proposed rule change and advance

[25] *See* 17 CFR 240.17Ad–22(e)(6).

[26] *See* 17 CFR 240.17Ad–22(e)(6)(ii).

[27] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70818.

[28] *See* 17 CFR 240.17Ad–22(e)(6)(iv).

[29] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70819.

[30] 17 CFR 240.17Ad–22(a)(5) (defining a covered clearing agency); 15 U.S.C. 78c(a)(26) (defining an SRO to include a registered clearing agency).

[31] An SRO must submit proposed rule changes to the Commission for review and approval pursuant to Rule 19b–4 under the Exchange Act. A stated policy, practice, or interpretation of an SRO, such as its written policies and procedures, would generally be deemed to be a proposed rule change. *See* 15 U.S.C. 78s(b)(1); 17 CFR 240.19b–4.

[32] *See* Form 19b–4, General Instruction B. The Form 19b–4 specifies the contents that must be included in a proposed rule change filing, including, among other items, a statement of purpose for the proposed rule change, which describes the reasons for adopting the proposed rule change, any problems the proposed rule change is intended to address, the manner in which the proposed rule change will operate to resolve those problems, the manner in which the proposed rule change will affect various persons (*e.g.,* brokers, dealers, issuers, and investors), and any significant problems known to the SRO that persons affected are likely to have in complying with the proposed rule change. *Id.* at Form 19b–4 Information section 3. The SRO must also include in its proposed rule change the complete text of the proposed rule. *Id.* at Form 19b–4 Information section 1. The SRO may request confidential treatment of any portion of its filing, *see* 17 CFR 240.24b–2, but it would still have to comply with the requirements of Form 19b–4 with respect to describing the contents of the proposed rule change for public comment.

[33] *See* 15 U.S.C. 78s(b)(1).

[34] *See* 15 U.S.C. 78s(b)(3)(A) (setting forth the types of proposed rule changes that take effect upon filing with the Commission). The Commission may temporarily suspend those rule changes within 60 days of filing and institute proceedings to determine whether to approve or disapprove the rule changes. 15 U.S.C. 78s(b)(3)(C).

[35] 15 U.S.C. 78s(b)(1)(C)(i). On the other hand, the Commission shall disapprove a proposed rule change if it cannot make such a finding. 15 U.S.C. 78s(b)(1)(C)(ii).

[36] *See* 12 U.S.C. 5462(6).

[37] The Dodd-Frank Act defines a ''designated clearing entity'' as a designated financial market utility that is either a derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) or a clearing agency registered with the Securities and Exchange Commission under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1). *See* 12 U.S.C. 5462(3). The Commission is the Supervisory Agency, as defined in 12 U.S.C. 5462(8), for four designated clearing agencies (the Depository Trust Company, the National Securities Clearing Corporation, the Fixed Income Clearing Corporation, and the Options Clearing Corporation). *See* 12 U.S.C. 5465(e)(1)(A). The Commission published a final rule concerning the filing of advance notices for designated clearing agencies in 2012. *See* 17 CFR 240.19b–4(n); Exchange Act Release No. 34–67286 (June 28, 2012), 77 FR 41602 (July 13, 2012).

[38] *See* 12 U.S.C. 5465(e)(1)(B).

[39] *See* 12 U.S.C. 5465(e)(1)(E) and (F).

[40] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70809.

notice processes, as appropriate.[41] The Commission continues to believe that such RWPs, and material changes thereto, would constitute a proposed rule change under section 19(b) of the Exchange Act and, for designated clearing agencies, an advance notice under the Clearing Supervision Act because such plans and material changes thereto would constitute changes to a stated policy, practice, or interpretation of the covered clearing agency and, for designated clearing agencies, a proposed change to its operations that could materially affect the nature or level of risk presented by the designated clearing agency.

C. Title II of the Dodd-Frank Act

Title II of the Dodd-Frank Act establishes a process for the appointment of the Federal Deposit Insurance Corporation (''FDIC'') as receiver of a failing financial company if, among other things, its failure would otherwise have serious adverse effects on financial stability in the United States.[42] This Title II authority would relate to covered clearing agencies, to the extent that they are determined, pursuant to the process described in this section, to be covered financial companies for purposes of the statute, meaning that the FDIC could be appointed as a receiver for a covered clearing agency.

Under this process, certain specified Federal regulatory authorities must recommend to the Secretary of the Treasury (the ''Secretary'') that the Secretary appoint the FDIC as receiver of the company. For most entities, including covered clearing agencies, the recommending agencies would be the Board of Governors and the FDIC.[43] Upon receipt of such recommendations, the Secretary must make certain determinations to implement Title II's orderly liquidation authority. Specifically, the Secretary shall take action to appoint the FDIC as receiver, if the Secretary (in consultation with the President) determines generally that, *inter alia,* the company is a financial company in default or in danger of default; the failure of the company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States; and no viable private sector alternative is available to prevent the default.[44]

Notably for this proposal, a covered clearing agency would be subject to this sort of orderly liquidation if two conditions are met. First, it must be considered to be a financial company, which includes any company that is incorporated or organized under any provision of Federal law or the laws of any State and is predominately engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto.[45] Second, pursuant to the process described above, the Secretary would have to determine to implement an orderly liquidation authority.[46] If both those conditions occur, then the covered clearing agency would be considered a ''covered financial company.'' [47] In that case, the FDIC would serve as the receiver for the covered clearing agency.[48]

Once appointed as the resolution authority, the FDIC essentially ''steps into the shoes'' of the financial company and is able to use any powers and resources available to the financial company.[49] The FDIC as the resolution authority is responsible for the operations of the financial company, including, among other things, taking over the assets of and operating the financial company, collecting all obligations and money owed to the financial company, and performing all functions of the financial company in the financial company's name.[50] In addition, the FDIC shall liquidate and wind-up the financial company's affairs, including taking steps to realize upon the company's assets, as appropriate (*e.g.,* through the sale of assets or the transfer of assets to a bridge company).[51] A covered clearing agency's RWP would be helpful to the FDIC if it were to serve as the resolution authority for a covered clearing agency. Such a plan could provide insights, allowing the resolution authority (*i.e.,* the FDIC) to obtain an understanding of the covered clearing agency's critical services, how it provides such services, and how it would be able to continue providing such services in the event of a recovery or an orderly wind-down.

III. Proposal

The Commission is proposing amendments to existing rules and an additional rule under section 17A of the Exchange Act. Specifically, the Commission is proposing to amend Rule 17Ad–22(e)(6)(ii) with respect to intraday margin, to require that a covered clearing agency's risk-based margin system monitors intraday exposures on an ongoing basis and includes the authority and operational capacity to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility. Second, the Commission is proposing to amend Rule 17Ad–22(e)(6)(iv) with respect to the use of sources of information in a covered clearing agency's risk-based margin system, to require policies and procedures reasonably designed to have

[41] *See, e.g.,* Securities Exchange Act Release Nos. 91429 (Mar. 29, 2021), 86 FR 17421 (Apr. 2, 2021) (SR–DTC–2021–004); 83972 (Aug. 28, 2018), 83 FR 44964 (Sept. 4, 2018) (SR–DTC–2017–021); 83953 (Aug. 27, 2018), 83 FR 44381 (Aug. 30, 2018) (SR–DTC–2017–803); 91430 (Mar. 29, 2021), 86 FR 17432 (Apr. 2, 2021) (SR–FICC–2021–002); 83973 (Aug. 28, 2018), 83 FR 44942 (Sept. 4, 2018) (SR–FICC–2017–021); 83954 (Aug. 27, 2018), 83 FR 44361 (Aug. 30, 2018) (SR–FICC–2017–805); 94983 (May 25, 2022), 87 FR 33223 (June 1, 2022) (SR–ICC–2022–004); 91806 (May 10, 2021), 86 FR 26561 (May 14, 2021) (SR–ICC–2021–005) (''ICC 2021 Order''); 79750 (Jan. 6, 2017), 82 FR 3831 (Jan. 12, 2017) (SR–ICC–2016–013) (''ICC 2017 Notice and Order''); 86364 (July 12, 2019), 84 FR 34455 (July 18, 2019) (SR–ICEEU–2019–013) (''ICEEU 2019 Order''; 84498 (Oct. 29, 2018), 83 FR 55219 (Nov. 2, 2018) (SR–ICEEU–2018–014); 83651 (July 17, 2018), 83 FR 34891 (July 23, 2018) (SR–ICEEU–2017–016 and SR–ICEEU–2017–017); 88578 (Apr. 7, 2020), 85 FR 20561 (Apr. 13, 2020) (SR–LCH SA–2020–001); 87720 (Dec. 11, 2019), 84 FR 68989 (Dec. 11, 2019) (SR–LCH SA–2019–008); 83451 (June 15, 2018), 83 FR 28886 (June 21, 2018) (SR–LCH SA–2017–012 and SR–LCH SA–2017–013); 91428 (Mar. 29, 2021), 86 FR 17440 (Apr. 2, 2021) (SR–NSCC–2021–004); 83974 (Aug. 28, 2018), 83 FR 44988 (Sept. 4, 2018), (SR–NSCC–2017–017); 83955 (Aug. 27, 2018), 83 FR 44340 (Aug. 30, 2018) (SR–NSCC–2017–805); 90712 (Dec. 17, 2020), 85 FR 84050 (Dec. 23, 2020) (SR–OCC–2020–013); 90701 (Dec. 17, 2020), 85 FR 83662 (Dec. 22, 2020) (SR–OCC–2020–806); 83918 (Aug. 23, 2018), 83 FR 44091 (Aug. 29, 2018) (SR–OCC–2017–021); 83928 (Aug. 23, 2018), 83 FR 44109 (Aug. 29, 2018) (SR–OCC–2017–810).

[42] *See* 12 U.S.C. 5383.

[43] *See* 12 U.S.C. 5383(a)(1)(A). By contrast, if the entity is a broker or dealer, the recommending agencies would be the Board of Governors and the Commission. *See* 12 U.S.C. 5383(a)(1)(B).

[44] *See* 12 U.S.C. 5383(b).

[45] *See* 12 U.S.C. 5381(11)(A) and (B)(iii). Activities that are financial in nature include, but are not limited to, lending, exchanging, transferring, investing for others, or safeguarding money or securities. 12 U.S.C. 1843(k)(4).

[46] *See* 12 U.S.C. 5383(b).

[47] *See* 12 U.S.C. 5381(a)(8).

[48] Title II refers to the FDIC as the receiver in an orderly liquidation. More generally, the orderly liquidation process is often referred to as resolution. *See* Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy, 78 FR 76614, 76615 (Dec. 18, 2013) (referring generally to the orderly liquidation process as resolution). Existing guidance by standard-setting bodies generally refers to the governmental entity conducting a resolution as the resolution authority. *See, e.g.,* Financial Stability Board, Key Attributes of Effective Resolution Regimes, section 2.1 (2014). For purposes of this release, the Commission uses the more general term ''resolution authority'' to encompass the role of the FDIC as a receiver in an orderly liquidation.

[49] Specifically, the FDIC as receiver serves as the successor to the financial company, holding all rights, titles, powers, and privileges of the financial company and its assets, and of any stockholder, member, officer, or director of such company, and it takes title to the books, records, and assets of any previous receiver or other legal custodian of such covered financial company. *See* 12 U.S.C. 5390(a)(1)(A).

[50] 12 U.S.C. 5390(a)(1)(B).

[51] 12 U.S.C. 5390(a)(1)(D).

a covered clearing agency use reliable sources for both price data, as the current rule requires, and other substantive inputs to its risk-based margin system and to require that the covered clearing agency use procedures for when such inputs and price data are not available or reliable. Finally, the Commission is proposing new Rule 17ad–26 that would require a covered clearing agency to include nine specific elements in its RWP. Each of these proposed rules is discussed further below.

A. Amendments Regarding Risk Management

1. Proposed Changes to Rule 17Ad–22(e)(6)

The Commission is proposing to amend Rule 17Ad–22(e)(6)(ii) to strengthen its requirements: first, by further requiring that a covered clearing agency have policies and procedures reasonably designed to monitor intraday exposures on an ongoing basis; and second, by providing additional specificity to the circumstances in which a covered clearing agency should have policies and procedures to collect intraday margin. Specifically, as proposed, Rule 17ad–22(e)(6)(ii) would require a covered clearing agency that provides central counterparty services to establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, marks participant positions to market and collects margin, including variation margin or equivalent charges if relevant, at least daily, monitors intraday exposures on an ongoing basis, and includes the authority and operational capacity to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility.

The Commission is also proposing to amend Rule 17Ad–22(e)(6)(iv) to strengthen its requirements: first, by expanding the scope of the rule to apply to both price data and other substantive inputs to a covered clearing agency's risk-based margin system; second, by further specifying the level to which the covered clearing agency's procedures must perform when price data or other substantive inputs are not available or reliable; and third, by providing that the procedures used when price data or other inputs are not available or reliable should include alternate sources or an alternate risk-based margin system.

2. Discussion

a. Amendments to Rule 17Ad–22(e)(6)(ii)

As discussed above, when considering the adoption of Rule 17Ad–22(e)(6)(ii) in 2014, the Commission stated that requiring covered clearing agencies to have the authority and operational capacity to make intraday margin calls in defined circumstances would ''benefit covered clearing agencies by covering settlement risk created by intraday price movements.'' [52] Thus, the current rule requires that covered clearing agencies have the authority and operational capacity to make intraday margin calls. Importantly, the Commission understands that the ''operational capacity'' to make intraday margin calls includes the ability to monitor intraday exposure; otherwise, it would be impossible for a covered clearing agency to make appropriate intraday margin calls if it were not monitoring its intraday exposure. Therefore, under the current rule, covered clearing agencies have some ability to monitor for intraday exposure and make intraday margin calls,[53] but there currently are no requirements to monitor for intraday exposure or regarding what frequency at which to monitor intraday exposures.

The Commission is now proposing to amend Rule 17Ad–22(e)(6)(ii) to incorporate a requirement of intraday monitoring and to require that such monitoring is done on an ongoing basis. The Commission continues to believe that it is essential that a covered clearing agency monitor its intraday exposure because the covered clearing agency faces a risk that its exposure to its participants can change rapidly as a result of intraday changes in prices, positions, or both. Moreover, the Commission believes that requiring that such monitoring occur on an ongoing basis will contribute to ensuring that the covered clearing agency is sufficiently informed and situated to take appropriate actions to manage any intraday exposure that arises.[54]

Therefore, the Commission is proposing to amend Rule 17Ad–22(e)(6)(ii) to require that a covered clearing agency's written policies and procedures be reasonably designed to ensure that such monitoring occurs on an ongoing basis.

The Commission is not prescribing a particular time period or frequency that would constitute an ongoing basis because the Commission believes that the covered clearing agency should be able to tailor its monitoring to the particular products cleared and markets served. The Commission believes that this requirement to monitor intraday exposure on an ongoing basis should allow flexibility to determine what monitoring frequency is appropriate to the particular market. For example, more frequent monitoring may be necessary for a covered clearing agency that operates in markets where intraday trading may be more prevalent or where intraday exposures may tend to be larger because of specific features, such as the settlement process. Being able to monitor, on an ongoing basis, any decrease in the margin coverage as compared to the changes in intraday credit exposures in its participants' portfolios should help the covered clearing agency ensure that it is able to collect margin sufficient to cover its participants' exposures. A covered clearing agency generally should consider whether its intraday monitoring considers how participants' exposures would affect all risks faced by the covered clearing agency, including those that may already be contemplated by variation margin, initial margin, or add-on charges.

Currently, Rule 17ad–22(e)(6)(ii) refers only to the covered clearing agency's ability to collect intraday margin ''in defined circumstances.'' The proposed amendment to Rule 17Ad–22(e)(6)(ii) would amend this to require covered clearing agencies to have policies and procedures to establish a risk-based margin system with the ability to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility. The Commission believes that this proposed requirement would build upon and expand the current rule's requirement that provides

[52] Standards for Covered Clearing Agencies Standards Proposing Release, Exchange Act Release No. 71699 (Mar. 12, 2014), 79 FR 29507, 29529 (May 22, 2014) (''CCA Standards Proposing Release''). The Commission adopted Rule 17Ad–22(e)(6)(ii) in substantially the form it was proposed. *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70786.

[53] *See* section IV.B.4.a *infra.*

[54] *See* CPMI–IOSCO, Resilience of central counterparties (CCPs): Further guidance on the PFMI, paragraph 5.2.2 (July 2017), *available at* (discussing how a CCP addresses intraday exposure in its margin system and stating that ''a CCP faces the risk that its exposure to its participants can change rapidly as a result of intraday changes in prices, positions, or both; *ie* adverse price movements, as well as participants building larger positions through new trading (and settlement of maturing trades). For the purposes of addressing these and other forms of risk that may arise intraday, a CCP should address and monitor on an ongoing basis how such risks affect all components of its margin system, including initial margin, variation margin and add-on charges.'').

for the authority and operational capacity to make intraday margin calls in defined circumstances [55] by identifying particular instances in which a covered clearing agency needs to have policies and procedures to collect margin, such as the breach of specific risk thresholds or in times of elevated volatility, while continuing to provide flexibility to covered clearing agencies to make intraday margin calls as frequently as circumstances warrant. Moreover, as the Commission stated when adopting the Covered Clearing Agency Standards, this proposed amendment would continue to reflect that intraday margin calls should be able to be made on both a scheduled and unscheduled basis,[56] but would also provide more specificity as to what constitutes the appropriate scheduled and unscheduled bases.

The Commission believes that the proposed requirement for a covered clearing agency to have the authority and operational capacity to make intraday margin calls when the markets served display elevated volatility should ensure that the covered clearing agency develops policies and procedures to determine when it considers volatility to be elevated above typical levels, and potentially necessitating the collection of additional margin, in a manner specific to the products cleared and markets served. The Commission also believes that the proposed requirement for a covered clearing agency to have the authority and operational capacity to make intraday margin calls when specific risk thresholds are breached should ensure that the covered clearing agency considers *ex ante* the degree of exposure that necessitates additional margin to take into account new cleared positions and current market prices, in a manner specific to the products cleared and market served. Further, the Commission also believes that the requirement to specify thresholds that would trigger intraday margin calls, if breached, could improve participants' ability to understand when they may be subject to additional margin calls and, therefore, to be able to prepare accordingly to provide additional financial resources in anticipation of additional margin calls. In addition, specifying that a covered clearing agency should have the authority and operational capacity to make intraday margin calls in times of elevated volatility also makes clear to participants when they may be subject to additional margin calls and recognizes that intraday exposures may occur more frequently in volatile markets.

b. Amendments to Rule 17Ad–22(e)(6)(iv)

Currently, Rule 17Ad–22(e)(6)(iv) requires the establishment of a risk-based margin system that uses reliable sources of timely price data and uses procedures and sound valuation models for addressing circumstances in which pricing data are not readily available or reliable. When it proposed Rule 17Ad–22(e)(6)(iv), the Commission stated that a covered clearing agency should use reliable sources of timely price data because its margin system needs such data to operate with a high degree of accuracy and reliability, given the risks that the covered clearing agency's size, operation, and importance pose to the U.S. securities markets.[57] The Commission also recognized that, in some situations, price data may not be available or reliable, such as in instances where third party data providers experience lapses in service or where limited liquidity otherwise makes price discovery difficult, and that establishing appropriate procedures and sound valuation models is a useful step a covered clearing agency can take to help protect itself in such situations.[58]

Based on its experience with the Covered Clearing Agency Standards since their adoption in 2016, including its review and understanding of the covered clearing agencies' margin methodologies and, specifically, whether the methodologies rely on substantive inputs other than price data, the Commission believes that it is appropriate to expand the scope of this rule beyond price data to encompass other substantive inputs to a covered clearing agency's risk-based margin system.[59] As discussed in more detail in section IV.B.4.b *infra,* covered clearing agencies generally use risk-based margin systems to calculate margin. Covered clearing agencies' use of other substantive inputs, beyond price data (which is already addressed in current Rule 17Ad–22(e)(6)(iv)), from other entities as part of the risk-based margin system varies, and some do not rely on such substantive inputs. These types of inputs could include, for example, portfolio size, volatility, and sensitivity to various risk factors that are likely to influence security prices;[60] other examples of substantive inputs include duration and convexity, as well as the results of margin models run by third parties. Similarly, the procedures used when such substantive inputs are not available vary. The Commission believes that certain covered clearing agencies would need to develop additional procedures, or refine existing procedures, that would apply when the specific substantive inputs used by a covered clearing agency are not readily available or reliable, in order to ensure that the covered clearing agency can continue to meet its requirements under Rule 17Ad–22(e)(6).

In some instances, a covered clearing agency relies on third parties for these inputs. For similar reasons as the Commission discussed when proposing Rule 17Ad–22(e)(6)(iv), there is a need to use reliable sources for such inputs. The unavailability or unreliability of an input to a margin system, for example, if a third party provider does not perform, could potentially affect the covered clearing agency's ability to calculate margin. Currently, the Commission's rules do not address how a covered clearing agency plans for circumstances in which a substantive input to its risk-based margin system is not readily available or reliable. This proposed amendment to Rule 17ad–22(e)(6)(iv) would require that the covered clearing agency addresses such circumstances and develops appropriate procedures, for those covered clearing agencies that use such substantive inputs. Establishing procedures for when such substantive inputs from third parties are not available or reliable should, in turn, help ensure that the covered clearing agency can continue to calculate and collect margin commensurate with, the risks and particular attributes of each relevant product, portfolio, and market, as required under Rule 17Ad–22(e)(6)(i), in such circumstances.

The Commission is therefore proposing to amend Rule 17Ad–22(e)(6)(iv) to expand its scope beyond

[55] Currently, Rule 17Ad–22(e)(6)(ii) does not define what constitutes ''defined circumstances.''

[56] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70818.

[57] CCA Standards Proposing Release, *supra* note 52, 79 FR at 29529.

[58] *Id.*

[59] Despite some organizational changes to the rule to accommodate the proposal, Rule 17Ad–22(e)(6)(iv), as it relates to pricing data, is not being amended in this proposal, except with respect to the proposed new requirement to ensure that any procedures used when pricing data is not readily available or reliable must ensure that the covered clearing agency continues to meet its requirements under Rule 17Ad–22(e)(6). However, the Commission is proposing to standardize references to such data in the rule, which currently refers to both price and pricing data, to refer only to price data. The Commission previously used the two words interchangeably in Rule 17Ad–22(e)(6)(ii).

[60] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70855. Other portions of the Covered Clearing Agency Standards reference a model's inputs, along with parameters and assumptions, as part of a covered clearing agency's sensitivity analysis, which is required by current Rule 17Ad–22(e)(6)(vi).

price data to encompass other substantive inputs to its risk-based margin system and to impose requirements on a covered clearing agency to have procedures when such substantive inputs are not readily available or reliable. For purposes of this rule, the Commission believes that ''substantive'' refers to any inputs used by the covered clearing agency that are necessary for the risk-based margin system to calculate margin, and it is meant to distinguish from other potential inputs that may not be consequential to the calculation of margin, which would not be encompassed by this proposed rule. The Commission is not requiring that covered clearing agencies use such substantive inputs, but establishing requirements in the event that they do use such substantive inputs.

Further, the Commission is proposing to impose a new requirement that would further elaborate on the procedures necessary when price data is not available and that would also apply to substantive inputs to a covered clearing agency's risk-based margin system. Currently, the rule requires that the covered clearing agency use procedures and sound valuation models only when price data is not readily available or reliable. The proposed amendment would, with respect to both price data and other substantive inputs, require that such procedures should address circumstances in which price data *or* substantive inputs are not readily available or reliable, in order to ensure that the covered clearing agency be able to meet its requirements under Rule 17Ad–22(e)(6) and cover its credit exposures to its participants. The Commission believes that specifying the level to which these backup procedures should perform, that is, that the procedures should ensure that the covered clearing agency can continue to meet its requirements under Rule 17Ad–22(e)(6), should help ensure that covered clearing agencies adopt sufficiently robust procedures.

The Commission also proposes to further specify that the procedures for when the price data or substantive inputs are not readily available or reliable shall include the use of price data or substantive inputs from an alternate source or the use of an alternate risk-based margin system that does not similarly rely on the same unavailable or unreliable substantive input. With respect to the use of an alternate source, such an alternate source generally should meet the same level of reliability of the primary source, whether that alternate is sourced from an external provider or created internally. With respect to policies and procedures for the use of an alternate risk-based margin system if the covered clearing agency does not use an alternate source, this potential alternate risk-based margin system needs to be an alternate margin model that does not rely on the same data source that is unavailable or unreliable, to ensure that the covered clearing agency can continue to meet its requirements under Rule 17Ad–22(e)(6). Any alternative risk-based margin system would be subject to the requirements of 17 CFR 240.17Ad–22(e)(6)(vi) and (vii), with respect to monitoring, review, testing, and verification, and model validation.

With respect to both, a covered clearing agency generally should consider its reliance on any third party sources for purposes of its risk-based margin system and consider whether an alternate system or source of data or other inputs that is internal to the covered clearing agency, and does not rely upon any third party provider, would be appropriate, given the importance of calculating margin for a covered clearing agency to cover its exposure to its participants.[61]

3. Request for Comment

The Commission is requesting comment on all aspects of the proposed amendments to Rule 17Ad–22(e)(6). The Commission also solicits comment on the particular questions set forth below, and encourages commenters to submit any relevant data or analysis in connection with their answers.

1. Should Rule 17Ad–22(e)(6) be amended to require that covered clearing agencies have policies and procedures reasonably designed to monitor intraday exposures and to require that monitoring to occur on an ongoing basis? Do commenters have views on what constitutes an ongoing basis, and does it differ for products cleared or markets served by a covered clearing agency? For example, would an ongoing basis in the equity market be different than in the security-based swaps market?

2. Should Rule 17Ad–22(e)(6) be amended to require that covered clearing agencies have policies and procedures reasonably designed to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility?

3. Should the Commission prescribe particular risk thresholds for intraday margin calls? If so, what should those thresholds be and what is the basis for those thresholds, and should the threshold applicable to particular asset classes (*e.g.,* equities, fixed income, options, etc.) be determined jointly or separately?

4. Should the Commission identify additional circumstances that may warrant intraday margin calls beyond when the products cleared or markets served display elevated volatility? If so, what should those circumstances be?

5. Do commenters believe that certain participants of covered clearing agencies, including, for example, participants with less capital or using smaller settlement banks, could face operational challenges or pricing disadvantages, if proposed Rule 17Ad–22(e)(6)(ii) were to result in more frequent margin calls?

6. Should Rule 17Ad–22(e)(6)(iv) be amended to expand its scope to encompass other substantive inputs to a covered clearing agency's risk-based margin system? Should the Commission identify any particular types of substantive inputs or further specify what types of inputs should be included within the scope of the rule?

7. Should Rule 17Ad–22(e)(6)(iv) be amended to state that the procedures used when price data or other substantive inputs are not readily available or reliable should ensure that the covered clearing agency can continue to meet its obligations under Rule 17Ad–22(e)(6)?

8. Should Rule 17Ad–22(e)(6)(iv) be amended to further describe that the procedures used by a covered clearing agency when price data or other substantive inputs are not readily available or reliable shall include the use of price data or substantive inputs from an alternate source or the use of an alternate risk-based margin system?

9. Do commenters have views on whether the Commission should require that any alternate source should be independent of third party providers, that is, within the sole control of the covered clearing agency?

B. Contents of Recovery and Wind-Down Plans

1. Proposed Rule 17ad–26

Proposed Rule 17ad–26(a) would require that a covered clearing agency's recovery and wind-down plan, the existence of which is required in current Rule 17Ad–22(e)(3)(ii), shall: (1) identify and describe the covered clearing agency's critical payment, clearing, and settlement services and address how the covered clearing agency would continue to provide such critical services in the event of recovery

[61] 17 CFR 240.17Ad–22(e)(6).

and during an orderly wind-down, including the identification of the staffing necessary to support such critical services and analysis of how such staffing would continue in the event of a recovery and during an orderly wind-down; (2) identify and describe any service providers upon which the covered clearing agency relies to provide its critical payment, clearing, and settlement services identified in paragraph (1), specify to what critical services such service providers are relevant, and address how the covered clearing agency would ensure that service providers would continue to provide such critical services in the event of a recovery and during an orderly wind-down, including consideration of contractual obligations with such service providers and whether those obligations are subject to alteration or termination as a result of initiation of the recovery and orderly wind-down plan; (3) identify and describe scenarios that may potentially prevent the covered clearing agency from being able to provide its critical payment, clearing, and settlement services as a going concern, including scenarios arising from uncovered credit losses, uncovered liquidity shortfalls, or general business losses; (4) identify and describe criteria that could trigger the implementation of the recovery and orderly wind-down plan and the process that the covered clearing agency uses to monitor and determine whether the criteria have been met, including the governance arrangements applicable to such process; (5) identify and describe the rules, policies, procedures, and any other tools the covered clearing agency would use in a recovery or orderly wind-down; (6) address how the rules, policies, procedures, and any other tools or resources identified in paragraph (5) would ensure timely implementation of the recovery and orderly wind-down plans; (7) include procedures for informing the Commission as soon as practicable when the covered clearing agency is considering initiating a recovery or orderly wind-down; (8) include procedures for testing the covered clearing agency's ability to implement the recovery and wind-down plans at least every twelve months, including by requiring the covered clearing agency's participants and, when practicable, other stakeholders to participate in the testing of its plans, providing for reporting the results of the testing to the covered clearing agency's board of directors and senior management, and specifying the procedures for, as appropriate, amending the plans to address the results of the testing; and (9) include procedures for review of the plans by the board of directors at least every twelve months or following material changes to the system or environment in which the covered clearing agency operates that would significantly affect the viability or execution of the plans, with such review informed, as appropriate by the covered clearing agency's testing of the plans as required in the prior section of the proposed rule. Proposed Rule 17ad–26(b) would provide definitions of ''affiliate,'' ''recovery,'' ''orderly wind-down,'' and ''service provider'' for purposes of this rule.

2. Discussion

As discussed in section II.A *supra,* when the Commission adopted Rule 17Ad–22(e)(3)(ii), it did not establish requirements for specific elements to include in such RWPs. Since that time, however, the Commission has reviewed and approved RWPs for each of the seven covered clearing agencies, as well as periodic updates to those plans.[62] In so doing, the Commission has continued to develop its understanding of what are the essential elements of RWPs.[63]

In addition, the Commission has continued to participate in the development of guidance by international standard setting bodies in the areas of recovery and resolution of financial market infrastructures, which would include covered clearing agencies. The Committee on Payments and Market Infrastructure and the International Organization of Securities Commissions (together, ''CPMI–IOSCO'') published a report entitled *Recovery of financial market infrastructures,* which sets forth a policy statement on both the recovery planning process and the content of recovery plans.[64] With respect to resolution planning, the Financial Stability Board (''FSB'') published a policy statement regarding resolution and resolution planning for central counterparties.[65] To accommodate the development of effective RWPs while this guidance was being developed, and in recognition of the need to further develop an understanding of effective recovery and resolution strategies for different types of market infrastructure, the Commission extended the compliance date for Rule 17Ad–22(e)(3)(ii) to allow the affected clearing agencies to consider this emerging guidance before submitting their RWPs for review and approval.[66] Additional guidance has since followed, and work on the recovery and resolution of clearing agencies continues.[67]

Other U.S. authorities have established and had the opportunity to administer requirements for certain specific elements to be included in the RWPs of the financial market utilities they supervise. For example, Regulation HH, issued by the Board of Governors, was amended in 2014 to identify seven elements that must be addressed or be included in recovery and wind-down plans.[68] These elements are substantially similar to those proposed in Rule 17ad–26. Similarly, the CFTC's regulatory framework includes specific requirements for RWPs as applied to clearing entities within its authority.[69]

[62] *See infra* note 41.

[63] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70809.

[64] *See* CPMI–IOSCO, Recovery of financial market infrastructures (July 2017), *https://www.bis.org/cpmi/publ/d162.pdf* (''CPMI–IOSCO Recovery Guidance''). The guidance covers a number of topics: first, recovery planning, including the importance of recovery planning, the relationship between risk management, recovery, and resolution, the process of recovery planning, the content of recovery plans, and the role of the authorities in recovery; second, general considerations with respect to recovery tools, including risk categories and failure scenarios that may require the use of recovery tools, characteristics of recovery tools, and considerations for allocating losses and liquidity shortfalls; and third, specific recovery tools, including tools to allocate uncovered losses caused by participant default, tools to address uncovered liquidity shortfalls, tools to replenish financial resources, tools to re-establish a matched book following participant default, and tools to address losses not caused by participant default.

[65] *See* Guidance on CCP Resolution and Resolution Planning (July 5, 2017), *https://www.fsb.org/wp-content/uploads/P050717-1.pdf;* Guidance on Central Counterparty Resolution and Resolution Planning: Consultative Document (Feb. 1, 2017), *https://www.fsb.org/wp-content/uploads/Guidance-on-Central-Counterparty-Resolution-and-Resolution-Planning.pdf.*

[66] *See* Securities Exchange Act Release No. 80978 (Apr. 5, 2017), 82 FR 17300 (Apr. 10, 2017) (granting a temporary exemption to covered clearing agencies from compliance with Rule 17Ad–22(e)(3)(ii) among other requirements); *see also* Letter from Michael C. Bodson, President and Chief Executive Officer, DTCC (Feb. 15, 2017), *https://www.sec.gov/comments/s7-03-14/s70314-1594398-132354.pdf.*

[67] *See, e.g.,* FSB, CPMI–IOSCO, Central Counterparty Financial Resources for Recovery and Resolution (Mar. 10, 2022), *https://www.fsb.org/wp-content/uploads/P090322.pdf.*

[68] 12 CFR 234.3(a)(3)(iii); *see also* Final Rule, Financial Market Utilities, Docket No. R–1477 (Oct. 28, 2014), 79 FR 65543 (Nov. 5, 2014).

[69] *See* Derivatives Clearing Organizations and International Standards, 78 FR 72476 (Dec. 2, 2013) (adopting 17 CFR 39.39(b) and (c)). For example, 17 CFR 39.39(c)(1) states that the plans shall identify scenarios that may potentially prevent a derivatives clearing organization from being able to meet its obligations, provide its critical operations and services as a going concern, and assess the effectiveness of a full range of options for recovery or orderly wind-down. CFTC staff also released a memorandum with additional guidance for affected entities on the subjects and analysis that should be included in a viable RWP, as well as questions that affected entities should consider in evaluation tools for inclusion and designing proposed rule changes

Based on this supervisory experience, including its review and approval of the RWPs for the covered clearing agencies, the Commission believes it is now appropriate to specify elements for inclusion in a covered clearing agency's RWP by proposing Rule 17ad–26. The Commission has observed that the covered clearing agencies have, to a great degree, converged in terms of the types of elements that are included in each plan. As discussed in more detail in section IV.B.3 *infra* and in the discussion of each particular element below, the current RWPs contain or address many of the elements being proposed for inclusion, but the current plans do not contain all the elements that would be required under the proposed rule. Therefore, the Commission believes that codifying these nine elements, and the related definitions, will help ensure that RWPs continue to be effective at planning for and managing a range of recovery and orderly wind-down scenarios that could risk transmitting systemic risk through the U.S. securities markets and the broader financial system, by accomplishing three objectives. First, the rule would bolster existing plans by requiring certain new elements be included. Second, for the elements that are already contained in existing RWPs, the rule would codify these elements and ensure that the plans are required to continue to include these elements in their RWPs, and any future changes to the RWPs would be subject to Commission review for consistency with these requirements, as discussed in section II.B *supra.* Finally, the rule would ensure that the RWPs of any new covered clearing agencies would contain all of these elements.

When adopting the Covered Clearing Agency Standards, the Commission stated that a covered clearing agency generally should have policies and procedures to provide the relevant resolution authorities with information needed for the purposes of resolution planning, including its recovery and wind-down plan.[70] The Commission also explained that it works with the FDIC and other resolution authorities, as appropriate, to help ensure the development of effective resolution strategies for covered clearing agencies, and that providing the Commission and the FDIC information for resolution planning would promote the ongoing development of these resolution strategies.[71] The Commission continues to believe that this is the case, and that the ongoing development of these strategies will be further promoted by specifically requiring that RWPs contain certain elements and ensuring that RWPs address these specified elements.

The Commission believes that codifying these items as part of recovery and wind-down plans would help assist relevant resolution authorities develop and improve resolution plans for covered clearing agencies in resolution. For example, by ensuring that these items are included in RWPs, a resolution authority will have a more comprehensive understanding of what the covered clearing agencies' critical payment, clearing, and settlement services are, as well as what providers support such services, thereby allowing a resolution authority to connect, or ''map,'' the various providers to the critical services to ensure continuity of clearance and settlement by a covered clearing agency in resolution.

a. Proposed Definitions

The Commission believes that definitions of the terms ''recovery'' and ''orderly wind-down'' would provide covered clearing agencies, as well as market participants, a precise description of the meaning of these terms, which are not currently defined in the Commission's rules and are often used together, and somewhat interchangeably, by market participants. Further, these definitions would help covered clearing agencies understand the precise goal for which their RWPs should be reasonably designed to meet. The Commission believes that the RWPs generally should set forth the covered clearing agency's viable strategy for ensuring that they address how a covered clearing agency would achieve a recovery or orderly wind-down, using the tools and resources available under its rules and procedures.

Current Rule 17Ad–22(e)(3)(ii) and proposed Rule 17ad–26 both refer to plans for recovery *and* orderly wind-down, and, therefore, a covered clearing agency should prepare plans for both recovery and orderly wind-down. Providing separate definitions specifies that these are two distinct events, both of which a covered clearing agency should include in its recovery and wind-down planning. Simply including a plan for what a covered clearing agency would do in recovery is not sufficient, and a plan for one event does not serve as a substitute for the other. For example, there may be circumstances in which a covered clearing agency attempts to recover but the recovery effort eventually fails. As part of its planning, a covered clearing agency generally should identify and maintain the relevant supporting information necessary to support its RWP.

Moreover, because these definitions refer to actions of a covered clearing agency only, as opposed to any other entity, neither a recovery plan nor an orderly wind-down plan should be based on assumptions of government intervention or support.

Proposed Rule 17ad–26(b) would define ''recovery'' to mean the actions of a covered clearing agency, consistent with its rules, procedures, and other ex ante contractual arrangements, to address any uncovered loss, liquidity shortfall, or capital inadequacy, whether arising from participant default or other causes (such as business, operational, or other structural weaknesses), including actions to replenish any depleted prefunded financial resources and liquidity arrangements, as necessary to maintain the covered clearing agency's viability as a going concern and to continue its provision of critical services. The Commission believes that this proposed definition is generally consistent with its previous understanding of recovery, as set forth in the CCA Standards Adopting Release, in that this proposed definition also focuses on the actions of the covered clearing agency that are beyond its typical business operations and refers to situations in which the covered clearing agency's ability to serve as a going concern is in question, that is, it goes beyond the covered clearing agency's ''business as usual'' operations.[72]

Proposed Rule 17ad–26(b) would define ''orderly wind-down'' to mean the actions of a covered clearing agency to effect the permanent cessation, sale, or transfer of one or more of its critical services in a manner that would not increase the risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system. The Commission believes that this

to support the inclusion of particular tools in such plans. *See* Memorandum from Jeffrey M. Bandman, Acting Director, Division of Clearing and Risk, CFTC Letter No. 16–61 (July 21, 2016), *https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/16-61.pdf.*

[70] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70810.

[71] *Id.*

[72] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70808, n. 251 (when addressing comments regarding recovery and wind-down plans, stating the Commission's general understanding that: (i) when a financial company becomes non-viable as a going concern or insolvent, recovery refers to actions taken that allow the financial company to sustain its critical operations and services; (ii) resolution (or wind-down), by contrast, refers to the transferring of the financial company's critical operations and services to an alternate entity.).

definition would clarify that an orderly wind-down is distinct from a resolution in that orderly wind-down continues to rest within the control of the covered clearing agency while resolution would involve a governmental entity as the resolution authority, such as the FDIC as a receiver. The Commission further believes that this proposed definition would identify the specific goals of an orderly wind-down, in that the actions of a covered clearing agency should not increase the risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system, and that it would serve as a final and binding solution to whatever circumstance necessitated the wind-down, that is, not a temporary stopgap measure. This distinguishes an orderly wind-down from winding down the covered clearing agency as quickly as possible.

To be orderly, a wind-down generally should include a covered clearing agency providing notice to allow participants to transition to alternative arrangements in an orderly manner, as well as maintaining the operation of critical services. Moreover, for a wind-down involving the sale or transfer of all or a portion of the covered clearing agency to be orderly, the covered clearing agency generally should consider the separability of the parts of the covered clearing agency and whether there are certain portions of the covered clearing agency's business that could be sold or transferred as separate businesses.

b. Critical Services

Proposed Rule 17ad–26(a)(1) would require each covered clearing agency's RWP to identify and describe the covered clearing agency's critical payment, clearing, and settlement services and address how the covered clearing agency would continue to provide such critical services in the event of recovery and during an orderly wind-down, including the identification of the staffing necessary to support such critical services and analysis of how such staffing would continue in the event of a recovery and during an orderly wind-down.

The Commission believes that, regardless of the products cleared or markets served, the necessary first step in effective recovery and wind-down planning must be identifying and describing the critical services that are provided to market participants, as required under this proposed rule. As stated above, market participants rely on the services of covered clearing agencies to facilitate payment, clearing, and settlement for the U.S. securities markets. The Commission believes that identifying and describing the critical services in an RWP should ensure that the covered clearing agency focuses its recovery and wind-down plans on its ability to continue to provide those services on an ongoing basis, even under stress. Covered clearing agencies already identify and describe their critical services in the existing RWPs, as well as the criteria used to determine what services are critical. However, covered clearing agencies generally do not provide specific information as to the staffing necessary to support a recovery or orderly wind-down.

When identifying what is a critical payment, clearing, or settlement service, the Commission believes that the covered clearing agency generally should consider the impact that any interruption to particular services would have on the covered clearing agency's participants and the smooth functioning of the markets that it serves, as well as whether the service is available from any substitute provider. In this proposed rule, the Commission believes that ''critical'' would refer to the importance of the service to the covered clearing agency's participants, and to the proper functioning of the markets that the covered clearing agency services. The inability of a covered clearing agency to provide these services would have implications with respect to financial stability. The failure to provide these critical services would likely have a material negative impact on participants or third parties, give rise to contagion, and undermine general confidence in the markets served.

The Commission believes that, after identifying the critical services, the next step of effective recovery and wind-down planning is to address how the covered clearing agency would continue to provide such critical services in the event of recovery and during an orderly wind-down, as required under proposed Rule 17ad–26(a)(1). This requirement should continue to ensure that a covered clearing agency has developed policies and procedures to continue providing its critical services in the event of a recovery or orderly wind-down. Further, by addressing how to continue providing such services, the recovery plan should also allow the covered clearing agency to evaluate how to ensure the orderly transfer of those services to a new or an existing entity as part of a wind-down, in the event that recovery is unsuccessful.

In addition, the Commission believes that the consideration of how the covered clearing agency would continue to provide its identified critical services must include the identification of the staffing necessary to support such critical services and analysis of how such staffing would continue in the event of a recovery and during an orderly wind-down, in order to ensure that the necessary personnel are available to continue operating the covered clearing agency. The Commission believes that this aspect of the proposal generally should include identification of key business units and/or employees who may be necessary to implement and execute the critical services identified in the RWP. As part of this process, the covered clearing agency generally should consider how it would retain the services of any personnel who are essential to the execution of the plans, including whether they are or should be subject to employment agreements and an analysis of the terms of employment agreements (*e.g.,* whether such agreements would allow the employee to continue working in the event that ownership of the covered clearing agency were to transfer in the event of a recovery or orderly wind-down). In addition, the covered clearing agency generally may consider, as part of this process, any ''key person risk'' that exists within its organization and how it would address such risk in its RWP.

Finally, the Commission believes that this proposed requirement regarding the identification and description of critical services should also assist a resolution authority, as discussed in section II.C *supra,* with resolution planning. A key obligation of a resolution authority is to ensure the continued provision of an entity's critical services, to avoid harm to the broader market.[73] Understanding what those critical services are, and the covered clearing agency's strategy for ensuring that such critical services

[73] *See, e.g.,* Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy, 78 FR 76614, 76615 (Dec. 18, 2013) (''In resolving a failed or failing SIFI . . . the FDIC seeks to preserve financial stability by maintaining the critical services, operations and funding mechanisms conducted throughout the company's operating subsidiaries.''); 12 U.S.C. 5384(a) (stating that the purpose of the FDIC's orderly liquidation authority is to provide the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard). *See also* Financial Stability Board, Key Attributes of Effective Resolution Regimes, Annex 1.1 (2014) (identifying as the objective of CCP resolution the pursuit of financial stability and ensuring the continuity of critical CCP functions in all jurisdictions where those functions are critical); Financial Stability Board, Guidance on Central Counterparty Resolution and Resolution Planning, section 1.2 (July 2017).

continue to be provided, therefore is essential for resolution planning.

i. Interaction With Other Commission Rules

The Commission acknowledges that there likely will be some connection between what a covered clearing agency identifies as its critical services for purposes of inclusion in its recovery and wind-down plan and what it identifies as Critical SCI systems for purposes of Regulation Systems Compliance Integrity (''Regulation SCI''). Regulation SCI is designed to strengthen the infrastructure of the U.S. securities markets, reduce the occurrence of systems issues in those markets, improve their resiliency when technological issues arise, and implement an updated and formalized regulatory framework, thereby helping to ensure more effective Commission oversight of such systems.[74] However, inclusion in a covered clearing agency's recovery plan as a critical service would have no impact on a covered clearing agency's obligations under Regulation SCI. This proposed rule is designed to improve and strengthen a covered clearing agency's recovery and wind-down plan, whereas Regulation SCI is focused on, among other things, strengthening the infrastructure of the U.S. securities markets and improving its resilience when technological issues arise.

The key market participants that are currently subject to Regulation SCI are called ''SCI entities'' and encompass certain SROs, including registered clearing agencies.[75] Regulation SCI is designed to apply to the automated systems important to the functioning of the U.S. securities markets and requires SCI entities to, among other things, establish, maintain, and enforce written policies and procedures reasonably designed to ensure that their key automated systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets, and that such systems operate in accordance with the Exchange Act and the rules and regulations thereunder and the entities' rules and governing documents, as applicable.[76]

Regulation SCI applies to the systems of, or operated by or on behalf of, SCI entities, that directly support any one of six core securities market functions—trading, clearance and settlement, order routing, market data, market regulation, and market surveillance (''SCI systems'').[77] Regulation SCI also identifies a subset of SCI systems defined as ''Critical SCI systems,'' which are those systems whose functions are critical to the operation of the markets, including those that represent single points of failure, and are therefore subject to certain heightened requirements.[78] Specifically, Critical SCI systems means, any SCI systems of, or operated by or on behalf of, an SCI entity that directly support functionality relating to, among other things, clearance and settlement systems of clearing agencies.[79]

When discussing the inclusion of clearance and settlement systems of clearing agencies as a Critical SCI system, the Commission stated that the clearance and settlement of securities is fundamental to securities market activity.[80] The Commission identified a variety of services that clearing agencies perform to help ensure that trades settle on time and at the agreed upon terms, including comparing transaction information (or reporting to members the results of exchange comparison operations), calculating settlement obligations (including net settlement), collecting margin (such as initial and variation margin), and serving as a depository to hold securities as certificates or in dematerialized form to facilitate automated settlement.[81]

As stated above in section III.B.2.b, a covered clearing agency's critical services, for purposes of inclusion in an RWP, would encompass its critical payment, clearing, and settlement services. Thus, those services could be supported by the covered clearing agency's Critical SCI systems, as defined in Regulation SCI.

c. Identification of Service Providers

Proposed Rule 17ad–26(a)(2) would require each covered clearing agency's RWP to identify and describe any service providers upon which the covered clearing agency relies to provide its critical payment, clearing, and settlement services, identifying to what critical services such third parties are relevant, and address how the covered clearing agency would ensure that such service providers would continue to provide such critical services in the event of recovery and during an orderly wind-down. In addition, the Commission is proposing to define in proposed Rule 17ad–26(b) the term ''service provider'' as any person, including an affiliate or a third party, that is contractually obligated to the covered clearing agency in any way related to the provision of critical services, as identified by the covered clearing agency in proposed Rule 17ad–26(a)(1), discussed in section III.B.2.b *infra.* This definition includes both ''external'' third-party service providers, such as technology or data providers, and those ''internal'' service providers that may be affiliated with the covered clearing agency, such as when a covered clearing agency is part of a holding company and receives certain services pursuant to agreements with that holding company. The Commission also proposes to define ''affiliate'' in proposed Rule 17ad–26(b) to mean a person that directly or indirectly controls, is controlled by, or is under common control with the covered clearing agency. It would include a holding company that owns the covered clearing agency.

Based on its supervisory experience, the Commission has observed that covered clearing agencies have used services provided by service providers to help ensure the prompt and accurate clearance and settlement of securities transactions. Service providers may be affiliates or third party entities and can perform a wide variety of functions, such as providers of technology, data, or other services. For service providers that are necessary for the covered clearing agency to provide its core payment, clearing, and settlement services, the failure of the service provider to perform its obligations could pose significant operational risks and have substantial effects on the ability of the covered clearing agency to perform its risk management function and facilitate prompt and accurate clearance and settlement. In a recovery or orderly wind-down, the continued performance of a service provider of its function would remain essential.

The Commission is therefore proposing to require that an RWP specifically identify and describe such service providers, to ensure that the RWP considers what providers are necessary for the covered clearing agency to continue providing its critical services. This requirement would

[74] Securities Exchange Act Release No. 73639 (Nov. 19, 2014), 79 FR 72252, 72253, 72256 (Dec. 5, 2014) (''Regulation SCI Adopting Release'').

[75] As stated above, *see* note 30, a covered clearing agency is a registered clearing agency and therefore is subject to Regulation SCI. *See* 17 CFR 242.1000 (defining SCI entity and SCI self-regulatory organization).

[76] *See* 17 CFR 242.1001.

[77] *See* 17 CFR.242.1000 (defining SCI systems).

[78] *See* 17 CFR 242.1000 (defining Critical SCI systems) and 1001(a)(2)(iv) (imposing heightened requirements); *see also* Regulation SCI Adopting Release, *supra* note 74, at 72277.

[79] 17 CFR 242.1000(a) (defining Critical SCI systems).

[80] Regulation SCI Adopting Release, *supra* note 74, at 72278.

[81] *Id.*

ensure that the covered clearing agency has identified which service providers relate to which critical services. This identification must include both affiliated service providers and non-affiliated service providers. The covered clearing agency also generally should consider whether there are any interdependencies or interconnections amongst its service providers, that is, whether a service provider supporting critical services also provides other, unrelated services to the covered clearing agency. Regardless of the nature of the service provider, it is essential that an RWP identify such providers to ensure that the covered clearing agency understands the relationships that it should maintain to continue providing its critical services.[82]

In addition, the Commission is proposing to require that an RWP address how the covered clearing agency would ensure that service providers could continue to perform in the event of a recovery or during an orderly wind-down, including consideration of contractual obligations with such service providers and whether those obligations are subject to alteration or termination as a result of initiation of the recovery and orderly wind-down plan. This requirement would ensure that the covered clearing agency has considered the nature of its contractual obligations with the identified service providers (such as contracts, arrangements, agreements, and licenses) and whether the service providers could be contractually obligated to perform in a recovery or orderly wind-down. Generally, this should include consideration of whether a service provider's contractual relationship with the covered clearing agency would be affected by a recovery or orderly wind-down.[83] Currently, the RWPs often identify some set of service providers, but the Commission believes that the identified sets may not, for all covered clearing agencies, be sufficient to align with this rule, if adopted, because the covered clearing agencies do not uniformly ensure that they have addressed all such service providers and instead identify some different subset thereof. Moreover, the RWPs generally do not address how the covered clearing agency would ensure that such service providers would continue to provide such critical services in the event of recovery and during an orderly wind-down, including consideration of the contractual obligations with such service providers.

More generally, the Commission believes that the requirement to identify and describe any critical service providers and address how the covered clearing agency would ensure that such service providers would be legally obligated to perform in a recovery or during an orderly wind-down should help regulatory planning in the event of a resolution. To create an actionable resolution plan that would allow a resolution authority to ensure the continued provision of the covered clearing agency's critical services and, accordingly, to avoid market interruption or any potential financial instability, the resolution authority would need to be able to identify the critical services, as well as the scope and nature of underlying service providers. Further, the requirement that the plan address the continued provision of services in the event of a recovery or during an orderly wind-down should also help a resolution authority, in that it should enable a better understanding of the terms and conditions of the relationship between the covered clearing agency and the service provider.

d. Scenarios

Having identified its critical services, proposed Rule 17ad–26(a)(3) would then require an RWP to identify and describe scenarios that may potentially prevent a covered clearing agency from being able to provide its critical services as a going concern, including scenarios arising from uncovered credit losses (as described in Rule 17Ad–22(e)(4)(viii)), uncovered liquidity shortfalls (as described in Rule 17Ad–22(e)(7)(viii)), and general business losses (as described in Rule 17Ad–22(e)(15)).[84] These scenarios are consistent with the current requirement in Rule 17Ad–22(e)(3)(ii). Identification and description of scenarios is essential to evaluating what is necessary to achieve a recovery of the clearing agency and, in the event that recovery fails, ensuring the orderly wind-down of the clearing agency and transfer of critical services to a new entity. Identifying the scenarios enables a covered clearing agency to make the reasonable and appropriate preparations to achieve a recovery or, in the event that recovery fails, avoid a disorderly wind-down arising from those scenarios that could transmit risk through the U.S. securities markets and the broader financial system.

Because the covered clearing agencies should contemplate the inability to provide services as a going concern, these scenarios would necessarily go beyond those contemplated in business as usual circumstances, business continuity planning, crisis management, or failure management. That is, unlike those types of scenarios, recovery and wind-down planning scenarios would involve shocks that could potentially

[82] The Commission proposed Rule 17Ad–25(i), which would establish policy and procedure requirements for clearing agency boards of directors to oversee relationships with service providers for critical services to, among other things, confirm and document that risks related to relationships with service providers for critical services are managed in a manner consistent with its risk management framework, review senior management's monitoring of relationships with service providers for critical services, and review and approve plans for entering into third-party relationships where the engagement entails being a service provider for critical services to the registered clearing agency. *See* Clearing Agency Governance and Conflicts of Interest Proposing Release, Exchange Act Release No. 34–95431 (Aug. 8, 2022), 87 FR 51812, 51836 (Aug. 23, 2022). In addition, the Commission proposed a new subparagraph (ix) under Rule 1001(a)(2) of Regulation SCI regarding third party provider management, which would require that SCI entities have a third party provider management program that includes: initial and periodic review of contracts with such third party providers for consistency with the SCI entity's obligations under Regulation SCI; and a risk-based assessment of each third party provider's criticality to the SCI entity, including analyses of third party provider concentration, of key dependencies if the third party provider's functionality, support, or service were to become unavailable or materially impaired, and of any potential security, including cybersecurity, risks posed. Proposing Release, Regulation Systems Compliance and Integrity, Exchange Act Release No. 97143 (Mar. 15, 2023), 88 FR 23146 (Apr. 14, 2023). Although this aspect of proposed rule 17ad–26 also relates to third party providers and/or service providers, the Commission does not believe that these proposed rules have any substantive overlap. This proposed rule would require that a covered clearing agency identify certain service providers for purposes of its recovery and wind-down plan. The Commission encourages commenters to review the proposals with respect to clearing agency governance and Regulation SCI to determine whether they might affect their comments on this proposing release. Further, the Commission recognizes that the CA Governance Proposal includes a proposed defined term for ''service providers for critical services,'' which would mean any person that is contractually obligated to the registered clearing agency for the purpose of supporting clearance and settlement functionality or any other purposes material to the business of the registered clearing agency. In this release, the Commission is proposing to define ''service provider'' as any person that is contractually obligated to the covered clearing agency in any way related to the provision of critical services, as identified by the covered clearing agency in proposed Rule 17ad–26(a)(1). *See* section III.B.a *supra.*

[83] For example, the covered clearing agency should consider whether its contractual relationships with such providers would transfer to a new entity in the event of the creation of a new entity or the sale or transfer of the business in an orderly wind-down.

[84] Rule 17Ad–22(e)(3)(ii) refers to identifies several specific bases for recovery and orderly wind-down that should be covered by the plans: credit losses, liquidity shortfalls, and losses from general business risk. Proposed rule 17ad–26(a)(3) would reference those same bases and include cross-references to where those bases are addressed in the Covered Clearing Agency Standards.

cause the covered clearing agency to become insolvent and cease operations.

When identifying scenarios, the covered clearing agency generally should consider the various risks to which it is exposed, which will vary across different covered clearing agencies serving different markets. The proposed rule would require that the covered clearing agency consider scenarios arising from uncovered credit losses, uncovered liquidity shortfalls, and general business losses. This set of scenarios would therefore include scenarios arising from the default of a participant and also those arising from events not related to a participant default, such as a general business loss. Other potential scenarios that are not related to a participant default could include the realization of investment or custody losses, the failure of a third party, such as a settlement bank, to perform a critical function for the covered clearing agency, or scenarios caused by an SCI event or other significant operational disruption, such as a significant cybersecurity incident. In addition, a covered clearing agency that is part of a larger organization may be exposed to risks arising from other entities within the organization. Put more generally, the identified scenarios take into account various risks to which the covered clearing agency is exposed that may potentially prevent the covered clearing agency from being able to provide its critical services, which will vary across different types of covered clearing agencies (*i.e.,* a central counterparty versus a central securities depository) and even across covered clearing agencies of the same type.

The Commission believes that the identified scenarios generally should be structured such that the underlying assumptions ensure that the scenarios are sufficiently severe, such that they would result in the need for a recovery or orderly wind-down. These scenarios generally should include both idiosyncratic and system-wide stress scenarios, taking into account the possibility of contagion in a stress event and of simultaneous crises in several significant markets. Although all covered clearing agencies generally consider at a high level what circumstances may cause them to enter recovery or wind-down (*e.g.,* whether a recovery or wind-down would arise from the default of a participant or from issues unrelated to a participant default), the RWPs do not all identify particular scenarios the covered clearing agencies have considered when developing the RWP or contain detailed analyses of each particular scenario.

Each scenario generally should be analyzed individually in the recovery plan, with the analysis including: a description of the scenario; the events that are likely to trigger the scenario; the covered clearing agency's process for monitoring such events; the market conditions, operational and financial issues, and other relevant circumstances that are likely to result from the scenario; the potential financial and operational impact of the scenario on the covered clearing agency and its participants, internal and external service providers, and relevant affiliated companies, both in an orderly and stressed market (*e.g.,* where markets are unavailable or there are limited solvent counterparties); and the specific steps that the covered clearing agency would expect to take if the scenario occurs or appears likely to occur, including, without limitation, any governance or other procedures that may be necessary to implement the relevant tools or use the relevant resources and to ensure that such implementation occurs in sufficient time to achieve the intended effect.

e. Triggers

Proposed Rule 17ad–26(a)(4) would require a covered clearing agency's RWP to identify and describe the criteria that would trigger the implementation of its RWP and the process that the covered clearing agency uses to monitor and determine whether the criteria have been met, including the governance arrangements applicable to such process. Given that the implementation of a covered clearing agency's RWPs would most likely occur during a period of significant stress at the covered clearing agency or in the market in general, the Commission believes that the covered clearing agency needs to identify in advance what criteria could trigger implementation of its RWP. Such *ex ante* identification of potential triggers can help ensure that a covered clearing agency not only implements its plan pursuant to the established RWP but that, before it implements such plans, it is aware of the triggering events that may necessitate use of the RWP. Thoughtful consideration of triggers can help ensure that the steps taken in anticipation of a potential recovery or wind-down have been planned for and coordinated to minimize the onward transmission of risk to the U.S. financial system. Currently, covered clearing agencies identify triggers in their RWPs but differ with respect to how much they identify the specific monitoring or governance processes for such triggers.

The covered clearing agency generally should consider defining both quantitative and qualitative criteria that would trigger the implementation of part or all of the recovery plan or of an orderly wind-down plan. Moreover, the covered clearing agency generally should consider triggers that would be applicable in circumstances involving the default of its participant(s), as well as those that would be applicable in circumstances not related to the default of a participant or participants. When determining triggers, the covered clearing agency also generally should consider whether the likely timing of a triggering event in the identified scenarios would permit sufficient time for implementation of the RWP.

There may be circumstances in which the trigger is obvious. For example, when a participant of a covered clearing agency defaults, the recovery plan likely would be triggered when the covered clearing agency has exhausted its pre-funded financial resources, its qualifying liquid resources,[85] or any other liquidity arrangements that it has in place to deal with default-related shortfalls, or when it has become unlikely that the pre-funded financial resources and/or the liquidity arrangements will be sufficient. In other circumstances, the covered clearing agency may have to employ more judgment with respect to how to develop appropriate triggers. For example, a covered clearing agency may need to exercise judgment to determine an appropriate capital level to trigger activation of its RWP in the event of persistent or extraordinary capital losses from general business risks.

The identification of triggers does not mean that such triggers should be self-executing. Instead, the importance of identifying triggers lies in ensuring that a covered clearing agency considers and identifies *ex ante* when it would initiate its RWP. Therefore, the Commission believes that the RWP also must identify and describe the process that the covered clearing agency uses to monitor and determine whether the criteria have been met, including the governance arrangements applicable to such process. Specifying the monitoring process would allow the covered clearing agency to ensure that it has reliable and appropriate processes to analyze the facts and circumstances related to the triggers identified in the RWP. Consistent with its obligations under Rule 17Ad–22(e)(3), the identification of the governance process generally should include clearly defining the responsibilities of board members, senior management, and business units, including with respect to

[85] *See* 17 CFR 240.17Ad–22(a)(14).

escalation within the covered clearing agency, and it also generally should specify whether and to what extent the covered clearing agency may exercise discretion in its monitoring and determination whether the triggering criteria have been met. The Commission believes that including the related governance in the RWP is important to allow the covered clearing agency to use the RWP in a crisis because the RWP would set forth clear and defined roles and avoid potential confusion at the time of the RWP's implementation.

f. Rules, Policies, Procedures, and Tools

Proposed Rule 17ad–26(a)(5) would require a covered clearing agency's RWP to identify and describe the rules, policies, procedures, and any other tools or resources the covered clearing agency would rely upon in a recovery or orderly wind-down. The Commission believes that describing the rules, policies, procedures, and any other tools or resources is essential to a covered clearing agency's RWP. The requirement to describe rules, policies, procedures, and any other tools or resources that may be used in advance for certain situations would provide some level of predictability in such a situation and avoid unexpected actions because it would allow participants to understand the potential of tools or resources that could be used, including whether any of the tools would require participant involvement or resources (such as a cash call).

Generally, the rules, policies, procedures, and any other tools or resources should address shortfalls arising in the stress scenarios identified by the covered clearing agency, whether caused by participant default or by some other event, that are not covered by pre-funded financial resources. They should also address situations where the covered clearing agency does not have sufficient qualifying liquid resources to meet its obligations on time. In addition, the tools should address other losses or liquidity shortfalls, including those arising from general business risks that may or may not develop more slowly than a sudden default or other event.

However, the Commission is not prescribing particular tools, such as tear-up or margin haircutting, that a covered clearing agency would be required to include in its RWP. The Commission believes that this proposed requirement preserves discretion for each covered clearing agency to consider the full range of available recovery tools and select those most appropriate for the circumstances of the covered clearing agency, including the products cleared and the markets served.[86] It would also allow a covered clearing agency to consider the ways in which its ownership structure (such as whether it is a subsidiary of a larger organization, owned by its participants, etc.) could impact its execution of its RWP or use of the tools set forth therein, including through the applicable governance arrangements or because of tools that rely on a parent or affiliated organization.

The current RWPs identify the tools and other resources that the covered clearing agency would use in a recovery or orderly wind-down. Certain of those tools, which may often be referred to as the covered clearing agency's default waterfall,[87] may involve the allocation of losses to its members or, potentially, to other shareholders or creditors of the covered clearing agency, among others, and covered clearing agencies are required to address such loss allocation under the Covered Clearing Agency Standards.[88] As part of their recovery and wind-down planning, the Commission believes that covered clearing agencies generally should consider their loss allocation policies in light of the scenarios identified in response to proposed Rule 17ad–26(a)(3), including the need for any additional tools or loss allocation processes to address different scenarios.

When identifying the tools and other resources that a covered clearing agency may include in a recovery or orderly wind-down plan, the Commission believes that the covered clearing agency generally should consider the following characteristics to evaluate the appropriateness of a tool or tools for a particular recovery scenario or an orderly wind-down, including the sequence in which the tools should be used. First, the set of tools should comprehensively address how the covered clearing agency would continue to provide critical services in all relevant scenarios. Second, the tools should be effective, meaning that they should be reliable, timely, and have a strong legal basis. Being effective generally should mean that the covered clearing agency has a high degree of confidence that it could employ the tool in all relevant circumstances, including a time of stress. Third, the tools generally should be transparent, so as to allow the covered clearing agency's participants and the broader market participants to understand how they would operate and allow those who would bear losses and liquidity shortfalls to measure, manage, and control their potential losses and liquidity shortfalls. Finally, the tools generally should take into account whether the tools create appropriate incentives for the covered clearing agency's owners, direct and indirect participants, and other relevant stakeholders, and they generally should seek to minimize the potential impact that the tools may have on participants and the financial system more broadly.

When analyzing the tools to be included in its RWP, a covered clearing agency generally should consider: (i) a description of the tools that the covered clearing agency would expect to use in each scenario; (ii) the order in which each tool would be expected to be used; (iii) the time frame within which the tool would be used; (iv) the governance and approval processes and arrangements within the covered clearing agency for the use of each of the tools available, including the exercise of any available discretion; (v) the processes to obtain any approvals external to the covered clearing agency (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained; (vi) the steps necessary to implement the tools; (vii) the roles and responsibilities of all parties, including non-defaulting participants; (viii) whether the tool is mandatory or voluntary; and (ix) an assessment of the associated risks from the use of each tool to non-defaulting clearing members and their customers, linked financial market infrastructures, and the financial system more broadly.

g. Timely Implementation

Proposed Rule 17ad–26(a)(6) would require a covered clearing agency's RWP to address how the rules, policies, procedures, and any other tools or resources identified in paragraph (5) would ensure timely implementation of the recovery and orderly wind-down plan. The Commission believes that this is an important element of a covered clearing agency's RWP, that is, to provide, in advance, a level of predictability as to how such measures would be implemented, which is important to participants as discussed in section III.B.e *infra,* and to ensure that the covered clearing agency has a

[86] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70809.

[87] *See* note 150 *infra.*

[88] *See* 17 CFR 240.17Ad–22(e)(4)(viii) (requiring 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 addressing allocation of credit losses the covered clearing agency may face if its collateral and other resources are insufficient to fully cover its credit exposures).

strategy for use of the various tools set forth in the RWP recovery and orderly wind-down plans. As noted earlier, the implementation and use of a covered clearing agency's RWP will likely occur when the covered clearing agency itself, as well as the wider financial markets, are experiencing heightened levels of stress. Requiring that the covered clearing agency address in its RWP how its procedures to ensure timely implementation of an RWP increases the likelihood that actions taken will be predictable and orderly and will occur at an appropriate time to address the circumstances at hand. Currently, the Commission believes that the covered clearing agencies' RWPs address how the covered clearing agencies' procedures would be timely implemented, including by identifying the applicable governance and steps that would need to be taken to use particular tools and/or by discussing the order in which tools would be deployed. A covered clearing agency generally should consider whether its RWP provides for pre-determined escalation processes within the covered clearing agency's senior management and with its board of directors, to ensure careful and timely consideration of the appropriate next steps.

Timely implementation generally should mean that a covered clearing agency is able to deploy the tools identified in its plan as needed and when appropriate, for example, that it has identified the appropriate escalation and approval processes to use a particular tool or resource. In this sense, implementation does not refer to completion of the plan, but merely to putting the plan into practice.

h. Notification to the Commission

Proposed Rule 17ad–26(a)(7) would require a covered clearing agency's RWP to include procedures for informing the Commission as soon as practicable when the covered clearing agency is considering initiating a recovery or orderly wind-down. The systemic risk concerns raised by a recovery or orderly wind-down of a covered clearing agency are significant, and while the Commission already maintains regular contact with each of the covered clearing agencies through its supervisory program, the Commission believes it is critical that notice of potential recovery and wind-down events be provided as soon as practicable.

Providing notice to the Commission can help ensure that the Commission has the opportunity to consider whether a covered clearing agency engages the recovery or wind-down event consistent with its established RWP and the requirements of Commission rules to help mitigate the potential onward transmission of systemic risk and ensure that a wind-down, if necessary, is orderly. This is particularly important with respect to covered clearing agencies which often serve as the sole provider of clearance and settlement services in a particular market and of which several are designated clearing agencies. Currently, many of the covered clearing agencies' RWPs reference notification to the Commission, but often lack detail on the procedures to ensure such notification.

Moreover, providing notice to the Commission would, in turn, help the Commission ensure that it has information that it can share with other relevant authorities, such as the resolution authority, regarding the potential need for resolution. This communication between the Commission and other regulators would be essential in the potential event of a recovery or wind-down so that the other regulators can consider appropriate actions that they may wish to take, such as if the FDIC is appointed as the resolution authority for a covered clearing agency, as discussed in section II.C *supra.* Given its supervisory role with respect to the covered clearing agencies, the Commission is uniquely situated both to obtain and effectively share and communicate this information to other regulatory authorities.

i. Testing

Proposed Rule 17aAd–26(a)(8) would also require that an RWP include procedures for testing the covered clearing agency's ability to implement the recovery and wind-down plans at least every twelve months, including by requiring the covered clearing agency's participants and, when practicable, other stakeholders to participate in the testing of its plans, providing for reporting the results of the testing to the covered clearing agency's board of directors and senior management, and specifying the procedures for, as appropriate, amending the plans to address the results of the testing. The Commission believes that it is important to require testing because including testing should help to ensure that the RWP will be effective in the event of an actual recovery or orderly wind-down. Currently, some covered clearing agencies do not provide for testing their RWPs or test them separately from any testing required under 17 CFR 240.17Ad–22(e)(13) (''Rule 17Ad–22(e)(13)''), while others do incorporate some testing requirements, with varying degrees of specificity about the frequency of and participants in such testing and how to incorporate the results of such testing into the RWPs.

The Commission believes that the testing under this proposed rule likely would be similar in nature to that required under Rule 17Ad–22(e)(13), in that it would simulate how the RWP would perform in crisis situations, including the participation of senior management and the board of directors. Such testing could involve examining how a covered clearing agency's procedures would work in practice, by applying them to a hypothetical scenario that would cause the covered clearing agency to use its RWP. Testing must involve the covered clearing agency's participants and, where practicable, other stakeholders. Such other stakeholders could include, for example, liquidity providers or settlement banks. By specifying that the participation of other stakeholders must occur where practicable, the Commission recognizes that a covered clearing agency may have limited ability to require said participation by all such stakeholders in all circumstances.

Including participants and other stakeholders in such testing should help to ensure that procedures will be practical and effective in the face of a recovery or orderly wind-down. In addition to the relevant employees, participants, and other stakeholders that would be involved in testing RWPs, a covered clearing agency may determine, as appropriate, to include members of its board of directors or similar governing body, and to invite linked clearing agencies, significant indirect participants, providers of credit facilities, and other service providers to participate. The Commission believes including participants and, where practicable, stakeholders in periodic testing is appropriate because a successful recovery or orderly wind-down will require coordination among these parties, particularly during periods of market stress.

The Commission believes that at least every twelve months is an appropriate time period for testing RWPs. Given that many other aspects of a covered clearing agency's risk management are required to be tested at least annually, many of which are likely to be related to or referenced in the covered clearing agency's RWP,[89] the Commission believes that this time period strikes an appropriate balance between the need to test RWPs and the desire to avoid imposing duplicative requirements. A covered clearing agency may choose to

[89] *See, e.g.,* 17 CFR 240.17Ad–22(e)(13)(iii) and (e)(3)(i).

conduct this testing and review of the RWP, to the extent practicable, as part of its annual testing and review of its participant default rules and procedures, in accordance with Rule 17Ad–22(e)(13), or as part of its business continuity testing.

The Commission believes that the RWPs should provide for reporting the results of the testing to the covered clearing agency's board of directors and senior management. This reporting would help ensure that the board of directors and senior management have an understanding of the testing. This understanding, in turn, would then inform senior management in considering whether the testing indicates the need for potential changes to an RWP. This understanding would also inform the board of directors in its review and approval of a covered clearing agency's RWP, which it would be required to do under proposed Rule 17ad–26(a)(9). Finally, the Commission believes that the RWPs should specify the procedures for, as appropriate, amending the plans to address the results of the testing. Such procedures would ensure that the covered clearing agency takes into account the results of the testing and incorporates it into the plan, as appropriate.

j. Periodic Review

Proposed Rule 17ad–26(a)(9) would require the board of directors of a covered clearing agency to review and approve its RWP at least every twelve months or following material changes to the covered clearing agency's operations that would significantly affect the viability or execution of the plans, with such review informed, as appropriate by the covered clearing agency's testing of the plans as required in the prior section of the proposal rule. Because the risks that a covered clearing agency faces and the markets it serves are ever evolving, it is important that a covered clearing agency's RWP accounts for the evolving nature of risks and markets. The Commission understands that covered clearing agencies with RWPs already engage in some level of ongoing review, and the Commission has reviewed changes to RWPs as proposed rule changes under section 19(b) of the Exchange Act.[90] The Commission believes that a covered clearing agency should perform the board of directors level review under proposed Rule 17ad–26 at least once every twelve months. Moreover, the Commission believes that a required review every twelve months represents an appropriate frequency to address any changes in the markets served and products cleared by a covered clearing agency. The Commission further believes that it is also important to revisit an RWP if there is a material change to the covered clearing agency's operations, to ensure that the RWP continues to address the risks that the covered clearing agency faces. The Commission has proposed requiring review and approval of a covered clearing agency's RWP by its board of directors because such requirement is important to ensure that the RWP is considered and addressed at the most senior levels of the governance framework of the covered clearing agency, consistent with the importance of the RWP.

Currently, the existing RWPs generally provide for review and approval by a covered clearing agency's board of directors, but not all the plans provide for a review every twelve months and some do not specifically reference the need to review following material changes to the covered clearing agency's operations. Therefore, the Commission believes that this proposed rule would strengthen the RWPs by ensuring review and approval by the board of directors every twelve months and review following material changes. It would also help ensure that the review and approval by the board of directors is informed, as appropriate, by the results of the covered clearing agency's testing discussed in section III.B.2.j *supra.* The Commission believes that any procedures adopted with respect to the review and approval conducted by the board of directors generally should provide for substantive consideration of the plan and whether it appropriately takes into account the specific characteristics of the covered clearing agency, including its ownership, organizational, and operational structures, as well as the size, systemic importance, global reach, and/or the risks inherent in the products it clears.

Moreover, in the event that a recovery or wind-down process is activated, the Commission believes that it likely would be appropriate to conduct an additional review by the board of directors immediately after the conclusion of the execution of the RWP, even if it is well before the next periodic review. In addition, a covered clearing agency generally should consider the extent to which any new policy statements from a standard setting body, such as CPMI–IOSCO, while not binding, might tend to support updating or revising existing RWPs to ensure that the clearing agency's approach to risk management, recovery, and wind-down are effective at maintaining the core functions of the covered clearing agencies in a recovery or resolution scenario and mitigating the potential for transmitting systemic risk through the financial system.

3. Request for Comment

The Commission requests comment on all aspects of proposed Rule 17ad–26. In particular, the Commission requests comment on the following specific topics:

10. Should the Commission adopt proposed Rule 17ad–26 to prescribe the contents of a covered clearing agency's recovery and wind-down plans?

11. Does proposed Rule 17ad–26 adequately identify and describe the elements that a covered clearing agency would be required to include in its RWP? If other elements should be included, please identify such elements and explain why they should be included. If certain elements should not be included, please identify such elements and explain why they should not be included.

12. Are there any other elements that should be included in a covered clearing agency's RWP to facilitate the planning processes of a resolution authority? If so, please identify such elements and explain how they should help facilitate resolution planning.

13. Should the Commission set more prescriptive requirements with respect to any of the elements of a covered clearing agency's RWP? If so, what should the Commission require, and why?

14. Are there other elements that a covered clearing agency should consider in its RWP that would better align the incentives of various stakeholders and hence facilitate a productive collaboration among them in a recovery and wind-down event?

15. As discussed above, in 2016, CFTC staff issued guidance with respect to the contents of recovery and wind-down planning.[91] Do commenters believe that there are any aspects of that guidance which should be codified in the Commission's proposed Rule 17ad–26? If so, please identify such aspects and explain why they should be included.

16. Should the Commission also require that a covered clearing agency's

[90] *See, e.g.,* Securities Exchange Act Releases No. 91429 (Mar. 29, 2021), 86 FR 17421 (Apr. 2, 2021) (SR–DTC–2021–004); 91430 (Mar. 29, 2021), 86 FR 17432 (Apr. 2, 2021) (SR–FICC–2021–002); 94983 (May 25, 2022), 87 FR 33223 (June 1, 2022) (SR–ICC–2022–004); ICEEU 2019 Order, *supra* note 41, 84 FR 34455; 88578 (Apr. 7, 2020), 85 FR 20561 (Apr. 13, 2020) (SR–LCH SA–2020–001); 91428 (Mar. 29, 2021), 86 FR 17440 (Apr. 2, 2021) (SR–NSCC–2021–004); 90712 (Dec. 17, 2020), 85 FR 84050 (Dec. 23, 2020) (SR–OCC–2020–013).

[91] *See* note 69 *supra.*

RWP set forth a viable strategy for its recovery and/or orderly wind-down, to ensure that a covered clearing agency take into account how the items included in the RWP fit together as a cohesive whole and that the RWP takes into account a covered clearing agency's unique characteristics and circumstances, including ownership and governance structures, effect on direct and indirect participants, membership base, markets served, the risks inherent in products cleared, and risk management needs. Would such a requirement be beneficial, or are these elements already captured by the proposed rule text?

17. With the additional requirements in proposed Rule 17ad–26, would a covered clearing agency retain an appropriate amount of discretion to consider the specific characteristics of the covered clearing agency when creating its RWP?

18. Do commenters agree with the proposed definition of ''service provider'', including the distinction between third parties and affiliates, and the proposed definition of ''affiliate''?

19. Do commenters agree that the RWP should identify and describe the covered clearing agency's critical payment, clearing, and settlement services and address how the covered clearing agency would continue to provide such critical services in the event of a recovery and during an orderly wind-down, including the identification of the staffing necessary to support such critical services and analysis of how such staffing would continue in the event of a recovery and during an orderly wind-down? Should the Commission further define ''staffing'' to specify that it refers to particular positions or offices within the covered clearing agency?

20. Do commenters agree that the RWP should identify and describe a covered clearing agency's critical service providers, specify to which services such service providers are relevant, and address how the covered clearing agency would ensure that such providers can be legally obligated to perform in the event of a recovery or orderly wind-down, including consideration of contractual obligations with such service providers and whether those obligations are subject to alteration or termination as a result of initiation of the recovery and orderly wind-down plan?

21. Do commenters agree that the proposed rule should require that the covered clearing agency identify the scenarios that may potentially prevent the covered clearing agency from being able to provide its critical payment, clearing, and settlement services as a going concern, including uncovered credit losses (as described in paragraph (e)(4)(viii) of 17 CFR 240.17Ad–22), uncovered liquidity shortfalls (as described in paragraph (e)(7)(viii) of 17 CFR 240.17Ad–22), and general business losses (as described in paragraph (e)(15) of 17 CFR 240.17Ad–22)?

22. Should the Commission instead identify particular scenarios that a covered clearing agency has to address in its RWP? If so, should the Commission include any or all of the following scenarios: (i) credit losses or liquidity shortfalls created by single and multiple clearing member defaults; (ii) liquidity shortfall created by a combination of clearing member default and a failure of a liquidity provider to perform; (iii) settlement bank failure; (iv) custodian or depository bank failure; (v) losses resulting from investment risk; (vi) losses from poor business results; (vii) financial effects from cybersecurity events; (viii) fraud (internal, external, and/or actions of criminals or of public enemies); (ix) legal liabilities, including those not specific to the covered clearing agency's business as a covered clearing agency; (x) losses resulting from interconnections and interdependencies among the covered clearing agency and its parent, affiliates, and/or internal or external service providers; (xi) losses resulting from interconnections and interdependencies with other covered clearing agencies; and (xii) losses resulting from issues relating to services that are ancillary to the covered clearing agency's critical services? Should the Commission require consideration of scenarios involving multiple failures (*e.g.,* a member default occurring simultaneously, or nearly so, with a failure of a service provider) that, in the judgment of the covered clearing agency, are particularly relevant to its business? Does this set omit any potential additional scenarios?

23. With respect to scenarios, should the Commission also require that the RWP include an analysis that includes: (i) a description of the scenario; (ii) the events that are likely to trigger the scenario; (iii) the covered clearing agency's process for monitoring for such events; (iv) the market conditions, operational and financial difficulties and other relevant circumstances that are likely to result from the scenario; (v) the potential financial and operational impact of the scenario on the covered clearing agency and on its clearing members, internal and external service providers and relevant affiliated companies, both in an orderly market and in a disorderly market; and (vi) the specific steps the covered clearing agency would expect to take when the scenario occurs, or appears likely to occur, including, without limitation, any governance or other procedures that may be necessary to implement the relevant recovery tools and to ensure that such implementation occurs in sufficient time for the recovery tools to achieve their intended effect?

24. Do commenters believe that the Commission should prescribe any particular tools that a covered clearing agency must include in its RWP, such as a cash call, gains-based haircutting, or full or partial tear-up? If so, please identify such tools and explain why they should be required.

25. Proposed Rule 17ad–26 would also require that the RWP identify triggers but does not prescribe a list of specific triggers. Should the Commission prescribe any particular triggers, whether qualitative or quantitative? For example, should the Commission require that a covered clearing agency should consider using the exhaustion of its prefunded resources as a trigger?

26. Should the Commission prescribe that a covered clearing agency's RWP also identify criteria that could show when recovery is successful and the covered clearing agency would return to normal operations?

27. With respect to the requirement to identify and describe the process that the covered clearing agency uses to monitor and determine whether the criteria that would trigger implementation of the RWP have been met, including the governance arrangements applicable to such process, should the Commission require that the description also include identification of any areas in which the covered clearing agency could exercise discretion?

28. Proposed Rule 17ad–26(a)(5) would require the covered clearing agency to identify and describe the rules, policies, procedures, and any other tools or resources the covered clearing agency would rely upon in a recovery or orderly wind-down to address the scenarios identified in the recovery and wind-down plan. Should the Commission also require that a covered clearing agency's RWP include any or all of the following: (i) a description of the tools that the covered clearing agency would expect to use in each scenario; (ii) the order in which each tool would be expected to be used; (iii) the time frame within which the tool would be used; (iv) the governance and approval processes and arrangements within the covered

clearing agency for the use of each of the tools available, including the exercise of any available discretion; (v) the processes to obtain any approvals external to the covered clearing agency (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained; (vi) the steps necessary to implement the tools; (vii) the roles and responsibilities of all parties, including non-defaulting participants; (viii) whether the tool is mandatory or voluntary; and (ix) an assessment of the associated risks from the use of each tool to non-defaulting clearing members and their customers, linked financial market infrastructures, and the financial system more broadly? Should the Commission require the covered clearing agency to estimate the potential size of the resources that the covered clearing agency would expect to receive from each tool?

29. Proposed Rule 17d–26 would require that the RWP address how the identified tools, procedures, or other resources would ensure timely implementation of the RWP. Do commenters agree with the need to ensure timely implementation? Should the Commission specify that timely implementation means that a covered clearing agency is able to deploy the tools identified in its plan as needed and when appropriate, for example, that it has identified the appropriate escalation and approval processes to use a particular tool or resource?

30. Proposed Rule 17ad–26(a)(7) would require procedures for informing the Commission as soon as practicable when the covered clearing agency is considering initiating a recovery or orderly wind-down. Should the Commission instead or additionally require that the procedures provide for informing the Commission when the triggers set forth in proposed Rule 17ad–26(a)(5) have been met? Should the Commission also require notification to the covered clearing agency's participants and/or other stakeholders in the event of recovery or orderly wind-down, or initiation of the RWP?

31. Should the Commission prescribe a particular form of notice for informing the Commission, consistent with the requirement in proposed Rule 17ad–26(a)(7)? For example, should the Commission require written notice, or would telephonic notice be sufficient?

32. Proposed Rule 17ad–26(a)(8) would require procedures for testing the covered clearing agency's ability to implement the recovery and wind-down plans at least every twelve months, by requiring the covered clearing agency's participants and, when practicable, other stakeholders to participate in the testing of its plans and specifying the procedures for, as appropriate, amending the plans to address the results of the testing. Do commenters agree with this proposed requirement? Should the covered clearing agency be required to mandate that participants participate in testing? Similarly, should the covered clearing agency be required to mandate that other stakeholders participate in testing unless the covered clearing agency determines that it would be impracticable to do so? Should testing be less frequent? For example, should testing occur at least every 24 months?

33. Proposed Rule 17ad–26(a)(9) would require procedures for reviewing and approving a covered clearing agency's RWP by the board of directors at least every twelve months. Should the Commission impose a more, or less, frequent review cycle? And if so, why? Should the Commission require review and approval by the board of directors of an RWP following material changes to the covered clearing agency's operations that would significantly affect the viability or execution of the plans?

IV. Economic Analysis

A. Introduction

The Commission is sensitive to the economic consequences and effects of the proposed rule and amendments, including their benefits and costs.[92] The Commission acknowledges that, since many of these proposals could require a covered clearing agency to adopt new policies and procedures, the economic effects and consequences of these rules include those flowing from the substantive results of those new policies and procedures. Further, section 17A of the Exchange Act directs the Commission to have due regard for the public interest, the protection of investors, the safeguarding of securities and funds, and maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents when using its authority to facilitate the establishment of a national system for clearance and settlement of transactions in securities.[93]

This section addresses the likely economic effects of the proposed rule and amendments, including their anticipated and estimated benefits and costs and their likely effects on efficiency, competition, and capital formation. It is not feasible to quantify many of the benefits and costs. For example, risk management is an area of key concern for all clearing agency stakeholders. Perceptions of risk affect how clearing agencies are operated, and those operations, in turn, affect perceptions of risk. Any change to the policies and procedures about how clearing agencies act in times of crisis affects the behavior of clearing agencies and participants in complex ways not only during a crisis but also before the crisis, and those behavioral changes may affect the likelihood and severity of a crisis. While the Commission has attempted to quantify economic effects where possible, much of the discussion of economic effects is qualitative in nature. The Commission also discusses the potential economic effects of certain alternatives to the approaches recommended in this proposal.

B. Economic Baseline

To consider the effect of the proposed rule and amendments, the Commission first explains the current state of affairs in the market (*i.e.,* the economic baseline). All of the potential benefits and costs from adopting the proposed rule and amendments are changes relative to the economic baseline. The economic baseline in this proposal considers: (1) the current market for covered clearing agency activities, including the number of covered clearing agencies, the distribution of participants across these clearing agencies, and the level of activity these clearing agencies process; (2) the current regulatory framework for covered clearing agencies; (3) the current recovery and wind-down plans of covered clearing agencies; and (4) the current risk-based margin systems of covered clearing agencies.

[92] Under section 3(f) of the Exchange Act, whenever the Commission engages in rulemaking under the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, it must consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). In addition, section 23(a)(2) of the Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. *See* 15 U.S.C. 78w(a)(2).

[93] *See supra* note 10.

1. Description of Market

Of the nine registered clearing agencies, seven are currently in operation.[94] Six provide central counterparty (''CCP'') services [95] and one provides central securities depository (''CSD'') services.[96] National Securities Clearing Corporation (''NSCC''), Fixed Income Clearing Corporation (''FICC''), and Depository Trust Company (''DTC'') are all covered clearing agencies that are subsidiaries of Depository Trust & Clearing Corporation (''DTCC''). NSCC offers clearance and settlement services for equities, corporate and municipal debt, American depositary receipts, exchange traded funds, and unit investment trusts. FICC's Mortgage-Backed Securities Division (''MBSD'') provides clearing, netting, and risk management services for trades in the mortgage-backed securities market. FICC's Government Securities Division (''GSD'') provides clearing, netting, and risk management services for trades in U.S. Government debt, including buy-sell transactions and repurchase agreement transactions. DTC provides end-of-day net settlement for clients, processes corporate actions, provides securities movements for NSCC's net settlements, and it provides settlement for institutional trades.

ICE Clear Credit LLC (''ICC'') and ICE Clear Europe Limited (''ICEEU'') are both covered clearing agencies for credit default swaps (''CDS''), and they are both subsidiaries of Intercontinental Exchange, Inc. (''ICE''). LCH SA is another covered clearing agency that offers clearing for CDS, and it is a France-based subsidiary of LCH Group Holdings Ltd, which, in turn, is majority owned by the London Stock Exchange Group plc. The seventh covered clearing agency, Options Clearing Corporation (''OCC''), offers clearing services for exchange-traded U.S. equity options.

Covered clearing agencies operate under one of two broad ownership models. In one model, the covered clearing agency is member-owned,[97] while in the other model, the covered clearing agency is publicly traded.[98]

Covered clearing agencies currently operate specialized clearing services and face limited competition in their markets. For each of the following asset classes, for example, there is only one covered clearing agency serving as a central counterparty: exchange-traded equity options (OCC), government securities (FICC), mortgage-backed securities (FICC), and equity securities (NSCC). There is also only one covered clearing agency providing central securities depository services (DTC). Covered clearing agency activities exhibit high barriers to entry and economies of scale.[99] These features of the existing markets, and the resulting concentration of clearing and settlement services within a handful of entities, inform the Commission's examination of the effects of the proposed rule and amendments on competition, efficiency, and capital formation, as discussed below. Table 1 summarizes the most recent data on the number of participants at each covered clearing agency.[100]

[94] There are two registered but inactive clearing agencies: Boston Stock Exchange Clearing Corporation (''BSECC'') and Stock Clearing Corporation of Philadelphia (''SCCP''). Neither has provided clearing services in well over a decade. *See* Self-Regulatory Organizations; The Boston Stock Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Articles of Organization and By-Laws, Exchange Act Release No. 63629 (Jan. 3, 2011), 76 FR 1473, 1474 (Jan. 3, 2011) (BSECC ''returned all clearing funds to its members by September 30, 2010, and [] no longer maintains clearing members or has any other clearing operations as of that date. [ ] BSECC [ ] maintain[s] its registration as a clearing agency with the Commission for possible active operations in the future.''); Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Suspension of Certain Provisions Due to Inactivity, Exchange Act Release No. 63268 (Nov. 8, 2010), 75 FR 69730, 69731 (Nov. 15, 2010) (SCCP ''returned all clearing fund deposits by September 30, 2009; [and] as of that date SCCP no longer maintains clearing members or has any other clearing operations. [] SCCP [] maintain[s] its registration as a clearing agency for possible active operations in the future.''). Because they do not provide clearing services, BSECC and SCCP are not included in the economic baseline or the consideration of benefits and costs.

[95] A CCP is a type of registered clearing agency that acts as the buyer to every seller and the seller to every buyer, providing a trade guaranty with respect to transactions submitted for clearing by the CCP's participants. *See* 17 CFR 240.17Ad–22(a)(2); Definition of ''Covered Clearing Agency'', Exchange Act Release No. 88616 (Apr. 9, 2020), 85 FR 28853, 28855 (May 14, 2020) (''CCA Definition Adopting Release''). A CCP may perform a variety of risk management functions to manage the market, credit, and liquidity risks associated with transactions submitted for clearing. For example, CCPs help manage the effects of a participant default by closing out the defaulting participant's open positions and using financial resources available to the CCP to absorb any losses. In this way, the CCP can prevent the onward transmission of financial risk. *See, e.g.,* Shortening the Securities Transaction Settlement Cycle, Exchange Act Release No. 94196 (Feb. 9, 2022), 87 FR 10436, 10448 (Feb. 24, 2022).

[96] A CSD is a type of registered clearing agency that acts as a depository for handling securities, whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible. Through use of a CSD, securities may be transferred, loaned, or pledged by bookkeeping entry without the physical delivery of certificates. A CSD also may permit or facilitate the settlement of securities transactions more generally. *See* 15 U.S.C. 78c(a)(23)(A); 17 CFR 240.17Ad–22(a)(3); CCA Definition Adopting Release, *supra* note 95, at 28856.

[97] *See, e.g.,* Exchange Act Release No. 52922 (Dec. 7, 2005), 70 FR 74070 (Dec. 14, 2005) (explaining that participants of DTC, FICC, and NSCC that make full use of the services of one or more of these clearing agency subsidiaries of DTCC are required to purchase DTCC common shares).

[98] OCC is owned by certain options exchanges. ICC and ICEEU are both subsidiaries of ICE (a publicly traded company). LCH SA is a subsidiary of LCH Group Holdings, Ltd., which is majority-owned by London Stock Exchange Group plc (a publicly traded company).

[99] *See* Alistair Milne, *Central Securities Depositories and Securities Clearing and Settlement: Business Practice and Public Policy Concerns, in* Analyzing the Economics of Financial Market Infrastructures 334, 335 (Martin Diehl, et al. eds., 2016) *available at https://doi.org/10.4018/978-1-4666-8745-5.ch017* (''Clearing and settlement operations have evolved over time to become remarkably complex. This complexity creates business challenges, especially for management of liquidity, which could potentially have systemic consequences for the wider financial system. This complexity may also increase the barriers to entry that can discourage competition in trade settlement and securities services.'').

[100] Data Membership requirements vary across the covered clearing agencies. For example, the self-clearing minimum net-capital requirement is $500 thousand for NSCC, while OCC's net capital requirement is $2.5 million. Multiple memberships by the same firm are much more common at NSCC than at the other covered clearing agencies.

TABLE 1 [a]—NUMBER OF PARTICIPANTS AT COVERED CLEARING AGENCIES IN MARCH 2023

Covered clearing agency	Number of participants
Subsidiaries of The Depository Trust & Clearing Corporation:	
National Securities Clearing Corporation [b]	3,931
The Depository Trust Company [c]	844
Fixed Income Clearing Corporation (Government Securities Division) [d]	213
Fixed Income Clearing Corporation (Mortgage Backed Securities Division) [e]	140
Subsidiaries of Intercontinental Exchange:	
ICE Clear Credit [f]	29
ICE Clear Europe (CDS Participants Only) [g]	29
Subsidiaries of LCH:	
LCH SA (CDSClear Participants Only) [h]	25
The Options Clearing Corporation [i]	188

[a] Participant statistics were taken from the websites of each of the listed clearing agencies in March 2023.
[b] *See* DTCC, *NSCC Member Directories, available at http://www.dtcc.com/client-center/nscc-directories*.
[c] DTCC, *DTC Member Directories, available at http://www.dtcc.com/client-center/dtc-directories*.
[d] DTCC, *FICC–GOV Member Directories, available at http://www.dtcc.com/client-center/ficc-gov-directories*.
[e] DTCC, *FICC–MBS Member Directories, available at http://www.dtcc.com/client-center/ficc-mbs-directories*.
[f] ICE, *ICE Clear Credit Participants, available at https://www.theice.com/clear-credit/participants*.
[g] ICE, *ICE Clear Europe Membership, available at https://www.theice.com/clear-europe/membership*.
[h] LCH, *LCH SA Membership, available at https://www.lch.com/membership/member-search*.
[i] OCC, *Member Directory, available at http://www.theocc.com/Company-Information/Member-Directory*.

Covered clearing agencies have become an essential part of the infrastructure of the U.S. securities markets due to their role as intermediaries. For example, in 2021 approximately $1.1 trillion (65%) of the notional amount of all single-name CDS transactions in the United States were centrally cleared.[101] The average daily value of equities trades cleared by NSCC in 2021 was $2.0 trillion; at FICC, the total net value of government securities transactions in 2021 was $1,419 trillion and the total net par value for mortgage backed securities in 2021 was $69 trillion; and DTC settled a total of $152 trillion of securities in 2021.[102] In addition, in 2022, OCC cleared 10.32 billion options contracts.[103]

Central clearing benefits the markets by significantly reducing participants' counterparty risk and through more efficient netting of margin requirements. Consequently, central clearing also benefits the financial system as a whole by increasing financial resilience and the ability to monitor and manage risk.[104] The role of a clearing agency in promoting resilience highlights its central importance in the functioning of markets.[105] If a CCP is unable to perform its risk management functions effectively, it can transmit risk throughout the financial system. Similarly, if a CSD is unable to perform its functions, market participants may be unable to settle their transactions, which may transmit risk throughout the financial system.

Disruption to a clearing agency's operations, or failure on the part of a clearing agency to meet its obligations, could serve as a source of contagion, resulting in significant costs not only to the clearing agency itself and its participants but also to other market participants and the broader U.S. financial system.[106] Absent proper risk management, a clearing agency failure could destabilize the financial system. As a result, proper management of the risks associated with central clearing helps ensure the stability of the U.S. securities markets and the broader U.S. financial system.[107]

[101] Data from DTCC's Trade Information Warehouse, compiled by Commission staff.

[102] *See* DTCC, *Annual Report* 9 (2021), *available at https://www.dtcc.com/~/media/files/downloads/about/annual-reports/DTCC-2021-Annual-Report*.

[103] *See* OCC, *Press Release* ''*OCC Clears Record-Setting 10.38 Billion Total Contracts in 2022* (Jan. 4, 2023), *available at https://www.theocc.com/newsroom/press-releases/2023/0103occclearsrecord setting1038billiontotalcontractsin2022*.

[104] *See* Darrell Duffie, *Still the World's Safe Haven? Redesigning the U.S. Treasury Market After the COVID–19 Crisis* 15 (Hutchins Center Working Paper, Paper No. 62, 2020), *available at https://www.brookings.edu/wp-content/uploads/2020/05/wp62_duffie_v2.pdf* (''Central clearing increases the transparency of settlement risk to regulators and market participants, and in particular allows the CCP to identify concentrated positions and crowded trades, adjusting margin requirements accordingly. Central clearing also improves market safety by lowering exposure to settlement failures . . . . As depicted, settlement failures rose less in March [2020] for [U.S. Treasury] trades that were centrally cleared by FICC than for all trades involving primary dealers. A possible explanation is that central clearing reduces 'daisy-chain' failures, which occur when firm A fails to deliver a security to firm B, causing firm B to fail to firm C, and so on.'').

[105] *See generally* Albert J. Menkveld & Guillaume Vuillemey, *The Economics of Central Clearing,* 13 Ann. Rev. Fin. Econ. 153 (2021).

[106] *See generally* Dietrich Domanski, Leonardo Gambacorta, & Cristina Picillo, *Central Clearing: Trends and Current Issues,* BIS Q. Rev. (Dec. 2015), *https://www.bis.org/publ/qtrpdf/r_qt1512g.pdf* (describing links between CCP financial risk management and systemic risk); Darrell Duffie, Ada Li, & Theo Lubke, *Policy Perspectives on OTC Derivatives Market Infrastructure* 9 (Fed. Res. Bank N.Y. Staff Rep., Paper No. 424, 2010), *available at http://www.newyorkfed.org/research/staff_reports/sr424.pdf* (''If a CCP is successful in clearing a large quantity of derivatives trades, the CCP is itself a systemically important financial institution. The failure of a CCP could suddenly expose many major market participants to losses. Any such failure, moreover, is likely to have been triggered by the failure of one or more large clearing agency participants, and therefore to occur during a period of extreme market fragility.''); Craig Pirrong, *The Inefficiency of Clearing Mandates* 11–14, 16–17, 24–26 (Policy Analysis Working Paper, Paper No. 655, 2010), *available at http://www.cato.org/pubs/pas/PA665.pdf* (stating, among other things, that ''CCPs are concentrated points of potential failure that can create their own systemic risks,'' that ''[a]t most, creation of CCPs changes the topology of the network of connections among firms, but it does not eliminate these connections,'' that clearing may lead speculators and hedgers to take larger positions, that a CCP's failure to effectively price counterparty risks may lead to moral hazard and adverse selection problems, that the main effect of clearing would be to ''redistribute losses consequent to a bankruptcy or run,'' and that clearing entities have failed or come under stress in the past, including in connection with the 1987 market break); *see* Glenn Hubbard et al., *Report of the Task Force on Financial Stability,* Brookings Inst., 96 (June 2021), *available at https://www.brookings.edu/wp-content/uploads/2021/06/financial-stability_report.pdf* (''In short, the systemic consequences from a failure of a major CCP, or worse, multiple CCPs, would be severe. Pervasive reforms of derivatives markets following 2008 are, in effect, unfinished business; the systemic risk of CCPs has been exacerbated and left unaddressed.''); Froukelien Wendt, *Central Counterparties: Addressing their Too Important to Fail Nature* (working paper Jan. 2015), *available at https://ssrn.com/abstract=2568596* (retrieved from SSRN Elsevier database) (assessing the potential channels for contagion arising from CCP interconnectedness); Manmohan Singh, *Making OTC Derivatives Safe—A Fresh Look* 5–11 (IMF Working Paper, Paper No. 11/66, 2011), *available at http://www.imf.org/external/pubs/ft/wp/2011/wp1166.pdf* (addressing factors that could lead central counterparties to be ''risk nodes'' that may threaten systemic disruption).

[107] *See* Paolo Saguato, *Financial Regulation, Corporate Governance, and the Hidden Costs of*

2. Overview of the Existing Regulatory Framework

The existing regulatory framework for clearing agencies registered with the Commission includes section 17A of the Exchange Act, the Dodd-Frank Act, and the related rules adopted by the Commission.[108]

Clearing agencies registered with the Commission may also be subject to other domestic or foreign regulation.[109] Specifically, clearing agencies operating in the U.S. may also be subject to regulation by the CFTC (as clearing agencies for futures or swaps) and the Board of Governors (as systemically important financial market utilities or state member banks).[110] Additionally, LCH SA is regulated by l'Autorité des marchés financiers, l'Autorité de Contrôle Prudentiel et de Résolution, and the Banque de France, and it is subject to European Market Infrastructure Regulation (EMIR).[111] ICEEU is regulated by the Bank of England, and it is subject to the UK's incorporation of EMIR into the UK framework.[112]

3. Current Recovery and Wind-Down Plans

As discussed in section II *supra,* each covered clearing agency, as part of a sound risk-management framework, is currently required to include plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses (such plans are referred to as RWPs).[113] The covered clearing agency may have one RWP or may maintain two separate documents, referring to one as the recovery plan and the other as the wind-down plan. Although the Commission did not include specific requirements for RWPs when the rule was adopted, the Commission did offer general guidance about what covered clearing agencies should consider when creating their RWPs.[114] The RWPs are subject to the rule filing requirement of Rule 19b–4, and all seven active covered clearing agencies have submitted their plans and subsequent revisions to the Commission for review, public comment, and approval.[115] Additionally, all of the covered clearing agencies have submitted confidential treatment requests with their RWPs pursuant to 17 CFR 240.24b–2. The Commission has also reviewed these confidential treatment requests and concluded that the redacted material could be withheld from the public under the Freedom of Information Act.[116] Due to the confidential treatment of the RWPs, the current release includes aggregated, anonymized analyses of the RWPs submitted to the Commission by the clearing agencies. Additionally, Form 19b–4, which is public, requires a description of the proposed rule change for public comment.[117] To the extent that information in the baseline has been drawn from public sources, such as the covered clearing agencies' SRO rule filings, we have included attribution accordingly. All seven active covered clearing agencies have approved RWPs in place, and the plans differ in, for example, length, style, emphasis, and specificity.

a. Critical Clearing and Settlement Services

Each RWP currently includes what the covered clearing agency has identified and described as its critical payment, clearing, and settlement services, as well as the criteria that the covered clearing agency employs to make such a determination as to what constitutes critical services.[118] Depending on their operations and the structure of their RWPs, covered clearing agencies currently identify between one and a dozen or more critical services in those RWPs. Currently, no covered clearing agency has analyses in its RWP regarding the staffing levels necessary to support the critical services that they list or how such staffing would continue in the event of a recovery operation or during an orderly wind-down.

b. Service Providers

Each RWP identifies and describes, to varying degrees, certain service providers, including both affiliates and third parties, upon which the associated covered clearing agency relies to provide its critical payment, clearing, and settlement services. Most plans do not explicitly link the identified service providers to the covered clearing agencies' critical services. Some of the RWPs state that they assume critical service providers will continue to perform in the event of a wind-down; at least one RWP states that it analyzes its contractual arrangements with respect to continuing to provide services during a recovery; [119] and at least one RWP

Clearinghouses, 82 Ohio St. L.J. 1071, 1074–75 (2021), *available at https://moritzlaw.osu.edu/sites/default/files/2022-03/18.%20Saguato_v82-6_1071-1140.pdf* (''[T]he decision to centralize risk in clearinghouses made them critical for the stability of the financial system, to the point that they are considered not only too-big-to-fail, but also too-important-to-fail institutions.'').

[108] *See supra* section II.

[109] *See supra* section III.D.2.

[110] *See* 12 U.S.C. 5472, 5469. Currently, ICC, ICEEU, LCH SA, and OCC are also regulated by the CFTC. DTC, FICC, NSCC, ICC, and OCC have been designated systemically important financial market utilities by the Financial Stability Oversight Council (*see infra* note 138 and the accompanying text). DTC is also a state member bank of the Federal Reserve System. The Board of Governors addresses certain recovery and wind-down plans in Regulation HH (*see supra* notes 68 and accompanying text), and the CFTC requires certain derivatives clearing organizations to maintain recovery and wind-down plans through Regulation 39.39(b) and subsequent guidance (*see supra* notes 69 and accompanying text).

[111] *See* LCH, *Company Structure, available at https://www.lch.com/about-us/structure-and-governance/company-structure.*

[112] *See* ICE, *ICEEU Regulation, available at https://www.theice.com/clear-europe/regulation; see also* https://www.fca.org.uk/markets/uk-emir.

[113] *See supra* note 16 and accompanying text.

[114] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70810. *See also supra* section II.A (discussing the guidance).

[115] *See supra* section II generally, including note 32 on Form 19b–4 and note 41 for proposed rule changes.

[116] *See, e.g., https://www.sec.gov/rules/sro/nscc/2018/34-82430-ex5a.pdf* (as an example of the redacted filing materials posted for SR–NSCC–2017–017). *See also supra* notes 32 and 41 and accompanying text.

[117] *See supra* note 32.

[118] *See, e.g.,* Exchange Act Release Nos. 82462 (Jan. 2, 2018), 83 FR 884, 885 (Jan. 8, 2018) (SR–DTC–2017–021) (stating that the RWP provided a description of its services and the criteria to determine which services are considered critical) (''DTC 2017 Notice''); 82431 (Jan. 2, 2018), 83 FR 871, 872 (Jan. 8, 2018) (SR–FICC–2017–021) (stating that the RWP provided a description of its services and the criteria to determine which services are considered critical) (''FICC 2017 Notice''); ICC 2021 Order, supra note 41, 86 FR at 26561 (stating that the ICC recovery plan explains that ICC's sole critical operation is provides credit default swap clearing services); ICEEU 2019 Order, *supra* note 41, 84 FR at 34455 (stating that ICEEU identified its futures and option and credit default swap product clearing services, as well as its treasury and banking services, as critical services); 82316 (Dec. 13, 2017), 82 FR 60246, 60247 (Dec. 19, 2017) (SR–LCH SA–2017–012) (stating that LCH SA performed an assessment on identification of critical functions and shared services in accordance with Financial Stability Board guidance) (''LCH 2017 Notice''); 82430 (Jan. 2, 2018), 83 FR 841, 842 (Jan. 8, 2018) (SR–NSCC–2017–017) (stating that the RWP provided a description of its services and the criteria to determine which services are considered critical) (''NSCC 2017 Notice''); 82352 (Dec. 19, 2017), 82 FR 61072, 61074–75 (Dec. 26, 2017) (SR–OCC–2017–021) (stating that OCC's RWP identifies critical services and critical support functions) (''OCC 2017 Notice'').

[119] For example, OCC's plan discusses the critical vendors for each of the identified critical services, as well as the Critical Support Functions, as well as the critical external interconnections that OCC maintains with other FMUs, exchanges (including designated contract markets), clearing and settlement banks, custodian banks, letter of credit banks, clearing members and credit facility lenders, and the appendices to the plan identifies key vendors and service providers, as well as key agreements to be maintained. OCC 2017 Notice, *supra* note 118, 82 FR at 61075. ICC's plan categorizes its critical services by those that are provided to ICC by its parent company versus those that are provided by external third parties, and it also details the IT systems and applications critical to ICC's clearing operations, including those

Continued

states that it is reducing dependencies on third parties.

c. Scenarios

Each RWP generally identifies and describes certain scenarios that may potentially prevent the covered clearing agency from being able to provide its critical payment, clearing, and settlement services as a going concern.[120] The RWPs differ in the number of scenarios identified and described as well as the extent of the specificity with which each scenario is discussed. For example, some RWPs present short qualitative analyses of member defaults, while others present long, detailed quantitative analyses of member defaults.

d. Criteria That Would Trigger Implementation

Each RWP identifies and describes criteria that would trigger the implementation of the recovery and orderly wind-down plan.[121] The RWPs differ in the number of identified triggering criterion and the detail in which they discuss each triggering criteria; there are also differences in the descriptions of the processes that covered clearing agencies use to monitor and determine whether the triggering criteria have been met, thus causing their RWPs to be activated.

e. Rules, Policies, Procedures, and Other Tools or Resources

Each RWP describes, to varying degrees, the rules, policies, procedures, and other tools or resources the covered clearing agency would rely upon in a recovery or orderly wind-down to address the scenarios identified in the RWP.[122]

f. Procedures To Ensure Timely Implementation

Each RWP mentions, to varying degrees, mechanisms that would ensure timely implementation of the RWP.[123] Some of the RWPs include specific procedures to ensure timely implementation of a recovery and orderly wind-down plan after specific criteria have been triggered. One of the RWPs has taken steps to ensure timely completion of a recovery or orderly wind-down.

g. Procedures for Informing the Commission

Each RWP generally refers to informing the Commission about recovery or orderly wind-down activities, but the majority of RWPs do not include specific procedures for informing the Commission. Some of the RWPs state that they will inform the Commission *after* a recovery or wind-down has been initiated.

h. Testing

Three RWPs provide for annual plan testing but with varying degrees of specificity about the participants' involvement as well as the frequency of such testing. One such covered clearing agency specifically refers to sharing the results of the testing with the board of directors and another states that the RWP would be updated as appropriate as a result of the testing.[124] The remaining covered clearing agencies do not mention testing in their RWPs.

i. Plan Reviews

Each RWP provides for periodic plan reviews, typically annually or biennially.[125] Two RWPs provide for

provided by ICE, those provided by external third parties, and those that ICC itself provides. Further, the plan analyzes ICC's contractual arrangements in the context of continuing services under those contracts during recovery. ICC 2017 Notice and Order, *supra* note 41, 82 FR at 26561–62. In addition, NSCC's, FICC's, and DTC's plans identify external service providers for which the relationships are managed by a particular office within DTCC. *See, e.g.,* Securities Exchange Act Release Nos. 91428 (Mar. 29, 2021), 86 FR 17440, 17442 (Mar. 29, 2021) (SR–NSCC–2021–004) (''NSCC 2021 Notice''); 91430 (Mar. 29, 2021), 86 FR 17432, 17433–34 (Apr. 2, 2021) (SR–FICC–2021–002) (''FICC 2021 Notice''); 91429 (Mar. 29, 2021), 86 FR 17421, 17422 (Mar. 29, 2021) (SR–DTC–2021–004) (''DTC 2021 Notice'').

[120] For example, OCC's plan identifies and considers scenarios that may potentially prevent it from being able to provide its critical services as a going concern. *See* OCC 2017 Notice, *supra* note 118, 82 FR at 61073. ICC's plan describes potential stress scenarios that may prevent it from being able to meet obligations and provide services and the recovery tools available to it to address these stress scenarios. *See* Securities Exchange Act Release No. 91439 (Mar. 30, 2021), 86 FR 17649, 17650 (Apr. 5, 2021) (SR–ICC–2021–005) (''ICC 2021 Notice''). ICEEU's plans outlines a number of firm-specific and market-wide stress scenarios that, in its determination, may result in significant losses or liquidity shortfall, suspension or failure of its critical services and related functions and systems, and damage to other market infrastructure, with resulting uncertainty in the markets for which ICEEU clears. *See* Exchange Act Release No. 82496 (Jan. 12, 2018), 83 FR 2855 (Jan. 19, 2018) (SR–ICEEU–2017–016). LCH SA's plans categorizes potential stress scenarios in two ways as a result of either: (i) Clearing member defaults and (ii) non-clearing member events. *See* LCH 2017 Notice, *supra* note 118, 82 FR at 60248. In addition, each of the plans for NSCC, FICC, and DTC discuss, at a general level, scenarios in terms of uncovered losses or liquidity shortfalls that could result from the default of one or more of its members as well as losses that could arising from non-default events. *See, e.g.,* NSCC 2021 Notice, *supra* note 119, 86 FR at 17441; FICC 2021 Notice, *supra* note 119, 86 FR at 17433; DTC 2021 Notice, *supra* note 119, 86 FR 17421.

[121] *See* OCC 2017 Notice, *supra* note 118, 82 FR at 61079–80 (discussing OCC's identification of qualitative trigger events for both recovery and wind-down); 83 FR at 34183, 34221, and 44970 (stating the DTC, NSCC, and FICC have identified wind-down triggers and that a covered clearing agency would have entered ''recovery phase'' when it issues its first loss allocation round); ICC 2021 Order, supra note 41, 86 FR at 26562; 84 FR at 24455 (ICEEU).

[122] *See, e.g.,* 83 FR at 34220–21 (identifying NSCC's recovery tool characteristics); FICC 2017 Notice, *supra* note 118, 83 FR at 878 (identifying FICC's recovery tool characteristics); 83 FR at 44970 (identifying DTC's recovery tool characteristics); OCC 2017 Notice, *supra* note 118, 82 FR at 61075–80 (identifying OCC's enhanced risk management and recovery tools); ICC 2021 Order, supra note 41, 86 FR at 26562 (identifying ICC's recovery tools); 84 FR at 34456 (identifying key aspects of recovery tools for ICEEU); 83 FR at 28886–87 (describing LCH SA's tools).

[123] Each of the plans for NSCC, FICC, and DTC provides a description of the governance and process around management of a stress event along a ''Crisis Continuum'' timeline. *See, e.g.,* NSCC 2017 Notice, *supra* note 118, 83 FR at 842; FICC 2017 Notice, *supra* note 118, 83 FR at 872; DTC 2017 Notice, *supra* note 118, 83 FR at 886. OCC's recovery plan outlines an escalation process for the occurrence of a ''Recovery Trigger Event'' as well as provides general descriptions of how it would anticipate deploying its recovery tools in response to the six stress scenarios it identified. OCC 2017 Notice, *supra* note 118, 82 FR at 61079–80. The ICC recovery plan describes the governance arrangements that provide oversight and direction of the plan. *See* ICC 2021 Notice, *supra* note 120, 86 FR 17649. ICEEU revised its recovery plan to more clearly address decision-making during recovery in 2019. *See* Securities Exchange Act Release No. 85907 (May 21, 2019), 84 FR 24549 (May 28, 2019) (SR–ICEEU–2019–013) (''ICEEU 2019 Notice''). The LCH SA recovery plan identifies the groups and individuals within LCH SA that are responsible for the various aspects of plan. *See* LCH 2017 Notice, *supra* note 118, 82 FR at 60250.

[124] *See* ICC 2021 Order, supra note 41, 86 FR at 26562 (referencing testing its Recovery Plan at least annually, as part of its annual default management drills and providing the results of such testing, as well as any changes it recommends due to such testing, to the ICC Board and Risk Committee); ICCEU, 83 FR at 2857 (referencing testing elements of the Recovery Plan as part of normal operations and risk management procedures); LCH 2017 Notice, *supra* note 118, 82 FR at 60250 (referencing fire drills intended to simulate all aspects of a member default, including the auctioning of the defaulting members portfolio to non-defaulting members (where appropriate) and involving the participation of members and relevant functions within the LCH SA organization., with revisions to the recovery plan as appropriate in light of the testing).

[125] NSCC, FICC, and DTC review their respective RWPs biennially. *See* NSCC 2021 Notice, *supra* note 119, 86 FR at 17441; FICC 2021 Notice, *supra* note 119, 86 FR at 17433; DTC 2021 Notice, *supra* note 119, 86 FR at 17421. OCC conducts an annual review of its RWP. *See* Securities Exchange Act Release No. 90315 (Nov. 3, 2020), 85 FR 71384, 71385 (Nov. 9, 2020) (SR–OCC–2020–013); *see also* OCC 2017 Notice, *supra* note 118, 82 FR at 61080. ICC's RWP describes governance arrangements that provide for oversight and direction in respect to review and testing of the plans. *See* ICC 2021 Notice, *supra* note 120, 86 FR at 17651–52. The ICEEU recovery plan is subject to annual review and ad hoc reviews may be commissioned if the business materially changes. *See* Securities Exchange Act Release No. 83651 (Jul. 17, 2018), 83 FR 34891, 34893 (Jul. 23, 2018) (SR–ICEEU–2017–016 and SR–ICEEU–2017–017). In addition, ICEEU requires annual testing of the plan via a table-top exercise to ensure ICE Clear Europe staff's understanding of the plan and its implementation. *See* ICEEU 2019 Notice, *supra* note 123, 84 FR at 24550. LCH SA decided to review its wind-down plan on an annual basis or more frequently, if

non-scheduled reviews. In the existing plans, the boards of directors of the covered clearing agency are responsible for the review and approval of the RWPs, but the plans vary in whether they specify that such review will also occur after material changes to the covered clearing agency's operations or in light of the results of periodic testing of the RWPs.

4. Current Risk-Based Margin

As discussed in section III.A *supra,* Rule 17Ad-22(e)(6) requires covered clearing agencies that provide central counterparty services to establish written policies and procedures reasonably designed to cover its credit exposure to its participants by establishing a risk-based margin systems with certain characteristics. Intraday margining represents an important tool that covered clearing agencies use to manage risk exposures on a real-time basis, by virtue of allowing a quick response to volatility spikes that call for changes in collateral to cover actual and potential losses.

a. Monitoring Exposure and Intraday Margin Calls

Each covered clearing agency currently has some ability to monitor for intraday exposure and to make certain intraday margin calls. The frequency of intraday monitoring and margin calls varies across markets, and it is responsive to the risk characteristics of the underlying markets and participants. Participants are generally required to post margin within an hour of notification or at specified times pursuant to the covered clearing agency's rules and procedures. The current practice of covered clearing agencies is to release excess margin to participants only once a day at a pre-scheduled time.

For example, OCC revalues its participants' portfolios throughout the day to calculated updated account net asset value, and its rules provide it the authority to issue intraday margin calls. Its intraday calls are generally issued between 11 a.m. and 1:30 p.m. when unrealized losses of an account, based on its start-of-day positions, exceed 50% of the account's total margin.[126] NSCC's rules provide the authority to impose intraday mark-to-market charges, and it tracks intraday market price and position changes in 15-minute intervals. NSCC generally collects additional margin if the difference between the most recent mark-to-market price of a participant's net positions and the most recent observed market price exceeds a predetermined threshold, which is currently 80 percent of the participant's volatility charge and may be reduced if NSCC determines that a reduction of the threshold is appropriate to mitigate risk during volatile market conditions.[127]

FICC's GSD and FICC's MBSD have the authority to make intraday margin calls.[128] FICC monitors changes in pricing and positions frequently throughout the day, and it may collect intraday margin to cover the price movement from those participants with a significant exposure in an identified security or net portfolio and the market value of those positions.[129]

ICC also monitors each participant's intraday profit and loss to determine if its intraday exposure is covered by the margin on deposit, and it may issue margin calls to participants that are not sufficiently collateralized.[130] LCH SA also has the ability and authority to make intraday margin calls that are based on intraday positions and valuations.[131]

b. Reliable Sources of Timely Price Data and Other Substantive Inputs

Covered clearing agencies use price data as well as other data sources and other substantive inputs in their risk-based margin systems, which is expected given the substantive differences in the markets and participants they serve. Based on its supervisory experience, the Commission understands that all covered clearing agencies generally have policies and procedures in place to use a risk-based margin system that uses reliable sources of timely price data and includes procedures and sound valuation models for addressing circumstances in which price data are not readily available or reliable. The Commission also understands that if a covered clearing agency uses other substantive inputs, such as portfolio size, asset price volatility, duration, convexity, and outputs from external model vendors, which are not required by the Commission's rules, not all covered clearing agencies have policies and procedures for addressing circumstances in which those substantive inputs are not readily available or reliable so that the covered clearing agency can continue to meet its requirements under Rule 17Ad–22(e)(6).

The policies and procedures used when price data or other substantive inputs are not available vary from one RWP to another. For example, the largest component of margin at FICC's GSD is typically its ''VaR Charge.'' The VaR Charge is based on the potential price volatility of unsettled positions using a sensitivity-based Value-at-Risk (''VaR'') methodology over a ten-year historical look-back period. In addition, FICC's GSD also uses an alternative ''Margin Proxy'' calculation as a back-up VaR Charge calculation to the sensitivity approach in the event that FICC experiences a data disruption with the third-party vendor upon which FICC relies to produce the sensitivity-based VaR Charge.[132] FICC's MBSD relies upon a similar approach, that is, using a sensitivity-based VaR methodology as its primary model, which relies upon third-party data, as well as a Margin Proxy, and it also uses an additional alternative calculation referred to as the ''Minimum Margin Amount'' that also does not rely on external vendor data.[133]

required. *See* Securities Exchange Act Release No. 88297 (Feb. 27, 2020), 85 FR 12814 (Mar. 4, 2020) (SR–LCH SA–2020–001).

[126] *See* Options Clearing Corporation, Disclosure Framework at 52, *available at https://www.theocc.com/getmedia/4664dece-7172-42a5-8f55-5982f358b696/pfmi-disclosures.pdf,* and OCC Rule 609 (regarding intra-day margin calls).

[127] *See* NSCC Disclosure Framework at 58, *available at https://www.dtcc.com/-/media/Files/Downloads/legal/policy-and-compliance/NSCC_Disclosure_Framework.pdf* (''*NSCC Disclosure Framework*''), and NSCC Rules, Procedure XV (defining intraday mark-to-market charge).

[128] *See* FICC's GSD Rule 4, section 2a (regarding the intraday supplemental fund deposit); FICC's MBSD Rule 1 (defining intraday VaR and intraday mark-to-market charges) and Rule 4, section 2(b) (regarding the daily margin requirement) and section 3a (regarding the intraday requirements). In addition, FICC's GSD collects margin twice a day under its current rules, notwithstanding any additional intraday margin calls. *See* FICC's GSD Rules, schedule of timeframes.

[129] *See generally* note 128 *supra* and FICC Disclosure Framework at 65, *available at https://www.dtcc.com/-/media/Files/Downloads/legal/policy-and-compliance/FICC_Disclosure_Framework.pdf.*

[130] ICC Disclosure Framework at 22–23, *available at https://www.theice.com/publicdocs/clear_credit/ICEClearCredit_DisclosureFramework.pdf,* and ICC Rule 401.

[131] *See generally* LCH SA Disclosure Framework at 31, *available at https://www.lch.com/system/files/media_root/LCH%20SA%20-%20Comprehensive%20Disclosure%20as%20required%20by%20SEC%20Rule%2017Ad-22%28e%29%2823%29_2022%20Q32022.pdf,* and LCH CDS Clearing Procedures section 2.21 (describing ''extraordinary margin'' that LCH SA may require to cover the risk of price/spread fluctuations occurring on an intraday basis).

[132] *See generally* FICC Disclosure Framework at 62, Exchange Act Release No. 82779 (Feb. 26, 2018) (File No. SR–FICC–2018–801) (describing both the sensitivity-based VaR model that would use a third party vendor to supply security-level risk sensitivity data and relevant historical risk factor time series data and the use of the Margin Proxy in the event of a disruption at FICC's third-party vendor, as well as the procedures that would govern in the event that the vendor fails to deliver such data).

[133] *See, e.g.,* FICC Disclosure Framework at 64; 81 FR 95669 (Dec. 28, 2016) (describing both the sensitivity-based VaR model that would use a third

Continued

NSCC relies upon a parametric VaR model to determine the potential future exposure of a given portfolio based on historical price movements, using 153 days as the minimum sample period for the historical data. For certain securities, including fixed income securities, UITs, illiquid securities, securities that are amendable to statistical analysis only in a complex manner and securities that are less amenable to statistical analysis, a haircut-based volatility charge is applied in lieu of the VaR charge.[134]

C. Consideration of Benefits and Costs as Well as the Effects on Efficiency, Competition, and Capital Formation

The following discussion sets forth the potential economic effects stemming from adopting the proposed rule and amendments, including the effects on efficiency, competition, and capital formation.

The benefits and costs discussed in this subsection are relative to the economic baseline discussed previously, which includes the covered clearing agencies' current RWPs and their current risk-based margin practices. In some instances, the proposals reflect what the Commission understands to be current practices at many covered clearing agencies. To the extent that a covered clearing agency's current practices align with part of a proposed rule or amendment, the covered clearing agency, its participants, and the broader market would have already absorbed the benefits and costs of that part of the proposed rule and amendments and, therefore, might not experience any direct benefits or costs if the Commission adopts that part of the new rule or amendments. In this case, the Commission believes that imposing these requirements on covered clearing agencies that have largely implemented the proposals in this release would essentially codify these elements and ensure that the covered clearing agencies are required to continue to include these elements in their RWPs or risk-based margin systems. Additionally, the proposed rule and amendments would ensure that the RWPs and risk-based margin systems of any new covered clearing agency would be required to have RWPs that contain all of the proposed elements.

Disruptions in the operations at any of the covered clearing agencies would cause significant negative externalities in the markets they serve, which would likely spill over into other markets. These ripple effects would negatively affect numerous market participants, including investors. Because covered clearing agencies may not internalize the full cost of these externalities, their investments in their RWPs and risk-based margin systems might be suboptimal from a public welfare perspective. An important benefit of the proposed rule and amendments is that they require covered clearing agencies to maintain a higher investment than they might otherwise maintain.

The Commission recognizes that the existing rules allow a degree of discretion that would be reduced or eliminated by the proposals. Even if covered clearing agencies would not need to change their current practices significantly to align with the proposals, if adopted, they would incur indirect costs in terms of less discretion in the future. For example, a covered clearing agency that currently plans an annual review of its RWP would lose the ability to change to a biennial review in the future.

The costs discussed in this subsection would be borne by covered clearing agencies and their participants. For covered clearing agencies owned by participants, all of the costs will ultimately be passed on to participants because they are residual beneficiaries of the covered clearing agency. For covered clearing agencies not owned by participants, the level of pass-through would depend upon a number of factors, including the level of competition among clearing agencies. In both cases, the participants will likely pass through some of these costs to their customers, the level of which will depend on factors such as the customers' sensitivities to costs and the amount of competition between participants for customers. Generally, if a covered clearing agency does not face significant competition, it will have an incentive to absorb part of the cost increase. On the other hand, in the extreme case of a perfectly competitive market, there are no economic profits and price equals marginal costs so an increase in cost could be fully passed through to the customer.[135] If the Commission adopts the proposed rule and amendments, to the extent that a covered clearing agency's current practices are misaligned with a proposed rule or amendment, the covered clearing agency, as discussed in the remainder of this subsection, would need to modify its RWP or risk-based margin system in order to comply with the new standards. The resulting benefits and costs would increase with the amount of modifications. Because the Commission has previously stated that RWPs are rules for purposes of a covered clearing agency's SRO obligations, and because the covered clearing agencies already have filed such RWPs with the Commission for approval, any such modifications would be subject to Commission review and public comment pursuant to Rule 19b–4,[136] the costs of which are included in the cost estimates presented in this subsection. Similarly, the Commission considers changes to a covered clearing agency's risk-based margin system as part of the SRO rule filing process, making any such modifications also subject to Commission review and public comment pursuant to Rule 19b–4, the costs of which are included in the cost estimates presented in this subsection. Adopting the proposed rule and amendments could also cause a clearing agency to make different business decisions, such as capital expenditure decisions, that may not be subject to the same Commission review process.

1. Proposed Rule 17ad–26

Proposed Rule 17ad–26 sets forth nine elements that must be included in a covered clearing agency's RWP. The remainder of this subsection discusses each of these elements in turn, explaining how some would make RWPs more effective in guiding the covered clearing agencies during times of recovery or wind-down while others would help participants and regulators better understand how the covered clearing agencies will prepare for and respond to stress. The Commission believes that this proposed rule would reduce systemic risk to the extent that it reduces the risk of unsuccessful recoveries, disorderly wind-downs, and negative spillovers to other clearing

party vendor to supply security-level risk sensitivity data and relevant historical risk factor time series data and the use of the Margin Proxy in the event of a disruption at FICC's third-party vendor, as well as the procedures that would govern in the event that the vendor fails to deliver such data); Exchange Act Release No. 92145 (June 10, 2021), 86 FR 32079 (June 16, 2021) (File No. SR–FICC–2020–804) (describing the calculation of the Minimum Margin Amount).

[134] *See* NSCC Disclosure Framework, *supra* note 127, at 58–61.

[135] More specifically, the market clearing quantity of the good or service supplied will adjust and the extent of industry-wide cost pass-through in a perfectly competitive market depends on the elasticity of demand relative to supply. The more elastic is demand, and the less elastic is supply, the smaller the extent of pass-through, all else being equal. *See* RBB Economics, *Cost Pass-Through: Theory, Measurement and Potential Policy Implications,* 4 (Feb. 2014), *available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/320912/Cost_Pass-Through_Report.pdf.*

[136] *Supra* note 115.

agencies and to other markets.[137] These benefits are expected to increase with the amount of change each covered clearing agency makes to align itself with the rule. Proposed Rule 17ad–26 would require covered clearing agencies to modify their RWPs to the extent their RWPs do not already align with the proposed rule. The Commission anticipates that these changes may result in the covered clearing agencies being more aware of potential risks and the associated costs of certain factors under their control, which could, in turn, lead to the covered clearing agency making changes to certain business practices.

a. Critical Clearing and Settlement Services

Proposed Rule 17ad–26(a)(1) requires RWPs to identify and describe their critical payment, clearing, and settlement services and to address how the covered clearing agency would continue to provide such critical services in the event of a recovery and during an orderly wind-down, including the identification of the staffing necessary to support such critical services and analysis of how such staffing would continue in the event of a recovery and during an orderly wind-down.

Covered clearing agencies play an important role as financial market utilities. By virtue of the unique services that they offer, the network effects under which they operate, and their specialization by asset class, any failure of the covered clearing agency to provide their critical services would have implications with respect to financial stability.[138] Policies and procedures that increase the resiliency of covered clearing agencies have, as a result, direct benefits on the stability of U.S. financial markets.

Each of the covered clearing agencies' RWPs currently identifies its critical services, as stated in the baseline analysis, but they differ in the degree to which they address continuation.

Markets in which the dominant covered clearing agencies are currently less comprehensive in addressing continuation in their RWPs are expected to benefit from this requirement because they would be required to work through and memorialize in their RWPs how the clearing agency would continue to provide its critical services in case of a recovery or during an orderly wind-down.

As mentioned in the economic baseline section, none of the covered clearing agencies currently identifies the staffing necessary to support critical services or provides in their RWPs analyses of how such staffing would continue in the event of a recovery and during an orderly wind-down. Because covered clearing agencies do not currently identify the staffing necessary to support critical services and how such staffing would continue during times of crisis, this new requirement likely would provide benefits to the market. Forward-looking analyses around issues such as potential staffing shortfalls and employment agreement terms that are robust regardless of the financial situation of the covered clearing agency should provide each covered clearing agency with additional certainty and clarity around the presence of key personnel that would deploy the RWPs and supervise their implementation.

Similarly, the current lack of these staffing analyses creates costs that covered clearing agencies would have to assume, in terms of both drafting the analyses and implementing the resulting conclusions from the analyses. For instance, a covered clearing agency may conclude when undertaking this analysis that key personnel could easily leave their organization in case of a recovery or wind-down scenario. In that case, the covered clearing agency may wish to incur the extra costs attendant to strengthening its employee agreements so that key employees remain at the covered clearing agency during a sale or transfer of one or more of its critical services to another entity or a receiver.

b. Service Providers

Proposed Rule 17ad–26(a)(2) requires RWPs to identify and describe any service providers upon which the covered clearing agency relies to provide the services identified in Rule 17ad–26(a)(1), specify to what services such service providers are relevant, and address how the covered clearing agency would ensure that such service providers would continue to perform in the event of a recovery and during an orderly wind-down. As stated in the baseline analysis, the RWPs differ in their degree of alignment with this proposed rule and the level of descriptiveness of service providers. The markets that likely would benefit the most from this proposed requirement are the ones in which the dominant covered clearing agencies' RWPs are currently the least comprehensive in identifying and describing the required service provides and identifying how those service providers will perform in the event of a recovery and during an orderly wind-down, as they would be better prepared to manage and negotiate with service providers to ensure their continued performance. Covered clearing agencies that make more changes in identifying the service providers and the critical services provided by each critical service provider likely will bring more benefits to the markets they serve by putting themselves in a better position to manage their service providers during a recovery or orderly wind-down.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. These alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP, including any contractual changes with the service providers.

c. Scenarios

Proposed Rule 17ad–26(a)(3) requires RWPs to identify and describe scenarios that may potentially prevent the covered clearing agency from being able to provide its critical payment, clearing, and settlement services as a going concern, including uncovered credit losses, uncovered liquidity shortfalls, and general business losses. As stated in the baseline analysis, each of the covered clearing agencies' RWPs currently identifies and describes, to varying degrees, certain relevant scenarios. The Commission believes that the more significant benefits of being required to identify these scenarios would accrue to those markets in which the dominant covered clearing agencies lack breadth and specificity in identifying and describing their scenarios. By better understanding the circumstances that could threaten their ability to provide their critical services, these covered clearing agencies can take steps to reduce the likelihood of these scenarios and, should they materialize, be better prepared to achieve a recovery or orderly wind-down.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. The alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP. The Commission believes that the costs to modify plans that require changes, including those that need to be

[137] *See supra* note 106 and accompanying text.

[138] Five of the seven covered clearing agencies have been designated by the Financial Stability Oversight Council as Significantly Important Financial Market Utilities (''SIFMUs'') because the failure or disruption to the functioning of the financial market utility could create or increase the risk of significant liquidity or credit problems spreading among financial institutions or markets. *See Designations,* U.S. Dep't Treasury, *available at https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/designations.*

expanded to include additional scenarios, would be modest but would vary across covered clearing agencies because of differences in the markets and participants they serve.

d. Criteria That Would Trigger Implementation

Proposed Rule 17ad–26(a)(4) requires RWPs to identify and describe criteria that would trigger the implementation of the RWPs. As stated in the baseline analysis, each covered clearing agency's RWP identifies and describes, to varying degrees, criteria that would trigger the implementation of a recovery or orderly wind-down. The Commission believes that the largest benefits of this rule likely would accrue to the markets in which the dominant covered clearing agencies that currently have the least comprehensive RWPs in identifying and describing appropriate triggers. The *ex ante* identification and description of triggers should have the benefit of being a disciplining mechanism that signals when the covered clearing agency may act during periods of market stress.[139] The Commission further believes that the *ex ante* identification and description of triggers would lead covered clearing agencies to anticipate and prepare for market stress or other events that could lead to a recovery or wind-down.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. The alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP.

e. Rules, Policies, Procedures, and Other Tools or Resources

Proposed Rule 17ad–26(a)(5) requires RWPs to identify and describe the rules, policies, procedures, and any other tools or resources the covered clearing agency would use in a recovery or orderly wind-down to address the scenarios identified in the RWP. The Commission believes that the markets that likely would benefit the most from this requirement are the ones in which the dominant covered clearing agencies have the least comprehensive RWPs in describing how the rules, policies, procedures, tools and other resources would be used during a recovery or wind-down. Making these changes to their RWPs should enable the covered clearing agencies to more fully anticipate how future crises might impact their operations, which should enhance their ability to respond and accordingly decrease the expected costs borne by covered clearing agencies, the participants, and other stakeholders in future crises. For example, if a covered clearing agency determines that it needs a new rule to respond to a specific scenario and if that scenario ever materializes, the covered clearing agency should be better positioned to respond appropriately to it.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. The alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP. Covered clearing agencies that determine that they need to include more responses, different resources, or better descriptions would incur more costs as they make appropriate revisions to their RWPs and their resources. The Commission believes that the costs to modify plans that require changes, including those that need to be expanded, would increase in the number of required changes such as the number of new rules the covered clearing agency is required to adopt.

f. Procedures To Ensure Timely Implementation

Proposed Rule 17ad–26(a)(6) requires RWPs to address how the rules, policies, procedures, and any other tools or resources identified in 17ad–26(a)(5) would ensure timely implementation of the RWP. As stated in the baseline analysis, each RWP mentions the concept of timeliness in either recovery or wind-down, but most RWPs do not list specific procedures to ensure timely implementation of itself. A key benefit of this rule is that covered clearing agencies will address in their RWPs how the RWP will be implemented in a timely manner when the need arises. The Commission believes that a timely start will increase the chance that the covered clearing agency is able to address the underlying problem in a timely manner and with lower costs to the various stakeholders. The benefits of this rule likely would accrue primarily to the markets in which the dominant covered clearing agencies add more or better rules, policies, procedures, tools, or other resources to ensure timely implementation of their RWPs.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. The alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP. The Commission believes that the costs to modify plans that require changes, including those that need to be expanded to include additional rules, policies, procedures, or any other tool or resource would be modest because current RWPs already place some focus on timeliness as a desired feature.

g. Procedures for Informing the Commission

Proposed Rule 17ad–26(a)(7) requires RWPs to include procedures for informing the Commission as soon as practicable when the covered clearing agency is considering initiating a recovery or orderly wind-down. As stated in the baseline analysis, each RWP generally refers to informing the Commission, but not every plan includes specific procedures, and some plans include procedures for informing the Commission *after* initiating a recovery or orderly wind-down. Providing notice to the Commission may help ensure that the Commission has the opportunity to consider whether a covered clearing agency engages the recovery or wind-down event consistent with its established RWPs and the requirements of Commission rules to help mitigate the potential onward transmission of system risk and may help ensure that a wind-down, if necessary, is orderly. These benefits likely would accrue primarily to the markets in which the dominant covered clearing agencies currently do not have procedures in place for informing the Commission as soon as practicable.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. The alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP. The Commission believes that the costs to modify plans that require changes, including those that need to be expanded to include additional procedures would be modest because current RWPs already place some focus on informing the Commission.

h. Testing

Proposed Rule 17ad–26(a)(8) requires RWPs to include procedures for testing the covered clearing agency's ability to implement the recovery and wind-down plans at least every twelve months, including by requiring the covered clearing agency's participants and, when practicable, other stakeholders to participate in the testing of its plans, providing for reporting the results of the testing to the covered clearing agency's board of directors and senior management, and specifying the procedures for, as appropriate,

[139] Ansgar Walther and Lucy White, *Rules Versus Discretion in Bank Resolution,* Banque de France (Mar. 25, 2016), *available at https://acpr.banque-france.fr/sites/default/files/medias/documents/waltherwhite.pdf* (''*[T]he optimal regulatory arrangement is a combination of rules and discretion: Discretion when public information is relatively benign, and rules when public information is more negative.*'').

amending the plans to address the results of the testing. As stated in the baseline analysis, only a few RWPs refer to plan testing. The Commission believes that the markets that likely would benefit the most from this requirement are those in which the dominant covered clearing agencies have the least comprehensive policies around testing in their RWPs because those covered clearing agencies would create procedures for more frequent testing, and those changes should help ensure that those RWPs remain current and take into account changing system and market conditions.

The Commission believes that the costs to start plan tests every twelve months will not be large for the four covered clearing agencies that do not mention plan testing in their RWPs because they might be able to leverage existing requirements around default management testing.[140] On a preliminary basis, the Commission believes that the corresponding testing costs for the covered clearing agencies' participants and, when practicable, other stakeholders likely will be moderate, in part because the covered clearing agencies are already required to include such entities in their default procedures testing under Rule 17Ad–22(e)(13). The costs for any subsequent RWP amendments likely will be small.

i. Plan Reviews

Proposed Rule 17ad–26(a)(9) requires RWPs to include procedures requiring review and approval by the board of directors of the plans at least every twelve months or following material changes to the covered clearing agency's operations that would significantly affect the viability or execution of the plans, with such review informed, as appropriate, by the covered clearing agency's testing of the plans. As stated in the baseline analysis, each RWP makes reference to periodic plan reviews, typically annually or biennially.

The Commission believes that the markets that likely would benefit the most from this requirement are those in which the dominant covered clearing agencies currently have the least comprehensive RWPs in addressing plan review because they would create more frequent procedures for review, and more frequent reviews, in turn, should help ensure that RWPs remain current and take into account any changes to the covered clearing agencies' operations.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. The alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP. The Commission believes that the costs to modify plans that have biennial reviews to replace them with annual reviews will be modest. The costs to review RWPs after material changes to the covered clearing agencies' operations will depend on the nature and number of material changes that result in new reviews.

j. Burden Estimate Associated With Proposed Rule 17ad–26

The Commission has estimated the initial and ongoing cost burden of adopting proposed rule 17ad–26. Accordingly, the Commission preliminarily believes that eight respondent clearing agencies would incur an aggregate one-time burden of approximately 960 hours (or 120 hours each) to review and update existing policies and procedures. The cost estimate associated with the initial burden is based on 20 hours for an assistant general counsel at $551 per hour; 50 hours for a compliance attorney at $432 per hour; 35 hours for a business risk analyst at $ 235 per hour; and 15 hours for a senior risk management specialist at $423 per hour. The initial burden for one covered clearing agency is $47,190, and it is $377,520 for all eight covered clearing agencies.

Proposed Rule 17ad–26 would also impose ongoing burdens on a respondent covered clearing agency. The proposed rule would require ongoing monitoring and compliance activities with respect to the written policies and procedures created in response to the proposed rule. Based on the Commission's previous estimates for ongoing monitoring and compliance burdens with respect to existing 17 CFR 240.17Ad–22(e)(2) (''Rule 17Ad–22(e)(2)''),[141] the Commission preliminarily estimates that the ongoing activities required by proposed Rule 17ad–26 would impose an aggregate annual burden on respondent covered clearing agencies of 320 hours (40 hours for each covered clearing agency). The ongoing burden is based on 10 hours for an assistant general counsel at $551 per hour and 30 hours for a compliance attorney at $432 per hour, totaling $18,470 per covered clearing agency and $147,760 for all eight covered clearing agencies.[142]

2. Amendments to Rule 17Ad–22(e)(6)

Rule 17Ad–22(e)(6) requires covered clearing agencies that provide central counterparty services to establish a risk-based margin system to manage their credit exposures to their participants. The proposed amendment to Rule 17Ad–22(e)(6)(ii) will strengthen the requirements: (a) by requiring that covered clearing agencies monitor intraday risk exposures to their participants on an ongoing basis, and (b) by providing additional specificity to the circumstances in which covered clearing agencies should have policies and procedures in place to make intraday margin calls. The proposed amendment to Rule 17Ad–22(e)(6)(iv) will amend the requirements by ensuring covered clearing agencies can meet their Rule 17Ad–22(e)(6) obligations when their price data and substantive inputs are not available by including procedures to use price data or substantive inputs from an alternate source or to use an alternate risk-based margin system that does not similarly rely on the unavailable or unreliable substantive inputs.

a. Monitoring Exposure and Intraday Margin Calls

The ability to assess intraday margin calls is an important tool that covered clearing agencies have to manage their credit exposures to their participants. The proposed amendment to Rule 17Ad–22(e)(6)(ii) requires covered clearing agencies to monitor exposure on an ongoing basis and to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility, which would help reduce, but not eliminate, their credit exposure to their participants.

Each covered clearing agency would have to determine how to operationalize ''on an ongoing basis'' and ''as frequently as circumstances warrant'' given its own market and participants. Each covered clearing agency would also need to ensure that its systems are capable of monitoring exposure and making margin calls at those frequencies. As discussed in the baseline analysis, each covered clearing agency is already capable of monitoring exposure and collecting margin on an intraday basis; nevertheless, some covered clearing agencies might need to

[140] *See* 17 CFR 240.17Ad–22(e)(13).

[141] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70892 (discussing Rule 17Ad–22(e)(2)).

[142] All values were determined from SIFMA's October 2013 values (*see, Management and Professional Earnings in the Security Industry—2013* (Oct. 7, 2013) and adjusted to March 2023 values using the Bureau of Labor Statistics' CPI Inflation Calculator, *available at https://www.bls.gov/data/inflation_calculator.htm.*

make changes to align with the proposed amendment such as increasing the frequency of exposure monitoring and improving their information technology so they can process more frequent margin calls.

To the extent a covered clearing agency currently aligns with the proposed amendment it will not experience new benefits from its adoption. Nevertheless, the proposed amendment will have incremental benefits for the market because it will ensure that the covered clearing agencies continue to meet the standard of the proposed amendment that they are currently aligned with and that any new covered clearing agency that provides central counterparty services meets the same standard.

The Commission further believes that the costs to modify the risk-based margin systems that require changes would be modest because covered clearing agencies have already incurred the initial costs of building their risk management infrastructure, including the ability to make intraday margin calls based on some sort of intraday monitoring. Once those costs have been incurred and amortized, the variable costs of modifying the *frequency* of the monitoring, and any additional margin calls, are likely low.

To the extent that the proposed amendment results in covered clearing agencies making more unanticipated margin calls, participants may face increased liquidity-management costs. This may potentially result in procyclicality problems that exacerbate market stress: margin calls during periods of declining asset prices may cause participants to sell assets, putting further negative pressure on asset prices and the market that may spill over into other covered clearing agencies and their markets. This stress may be transmitted by participants that are members of more than one covered clearing agency when, for example, a margin call in one market makes a participant sell assets in a different market. The stress may also be transmitted by assets that are linked between markets, such as the link between option prices (OCC) and equity prices (NSCC). Various industry participants have expressed concerns that excessive intraday margin calls, especially unanticipated ones, have the potential to exacerbate liquidity issues for clearing members who would have to post new liquid collateral to the covered clearing agency with little notice.[143] On the other hand, such intraday margin calls reduce credit risk during periods of market stress.

b. Reliable Sources of Timely Price Data and Other Substantive Inputs

The Commission believes that every covered clearing agency has a risk-based margin system that largely aligns with the proposed amendment to Rule 17Ad–22(e)(6)(iv), with the exception of at least one covered clearing agency that likely would need to implement additional changes to its risk-based margin system to ensure that it could continue to meet its obligations under Rule 17Ad–22(e)(6) in the event of the unavailability of a substantive inputs from a third party. If that one covered clearing agency were to lose access to its price data or other inputs, it may be unable to perform its critical payment, clearing, and settlement services, and that, in turn, may force it into a wind-down, which may have negative implications for its participants and the broader financial system.

The incremental benefits of these proposed amendments beyond the baseline lie primarily in expanding the scope of this rule beyond price data and further specifying the nature of the procedures that a covered clearing agency uses in the event that such data or inputs are not readily available or reliable and in ensuring that any new covered clearing agency keeps that same standard of the proposed amendment. The Commission is unable to estimate the specific quantitative benefit of that covered clearing agency meeting the proposed amendment, but it believes that it is substantial because the proposed amendment reduces the risk that the covered clearing agency fails to provide its critical payment, clearing, and settlement services in future periods of high market stress. For example, the Options Clearing Corporation cleared a year-to-date average daily volume of 46.3 million contracts through March 2023, and DTCC reported that the average daily cleared broker-to-broker transactions was $2 trillion in 2021.[144] Assuming that a price data shortage happens by the end of a regular trading day, when there is increased activity in the financial markets,[145] even a one-hour price data feed malfunction could affect the normal processing of millions of options contracts and hundreds of billions of dollars of equity transactions.

Moreover, a price data shortage in one covered clearing agency that is closely interconnected to another covered clearing agency[146] could result in spill-over effects that spread to that other covered clearing agency, magnifying the effect of the initial price data shortage.

c. Burden Estimate Associated With Proposed Amendments to Rule 17Ad–22(e)(6)

Overall, the Commission preliminarily believes that the estimated burdens for the proposed amendment to Rule 17Ad–22(e)(6) may require a respondent covered clearing agency to make fairly substantial changes to its policies and procedures. Based on the similar policies and procedures requirements and the corresponding burden estimates previously made by the Commission for several rules in the Covered Clearing Agency Standards where the Commission anticipated similar burdens,[147] the Commission preliminarily estimates that respondent covered clearing agencies would incur an aggregate one-time burden of approximately 903 hours (or 129 hours per covered clearing agency) to review existing policies and procedures and create new policies and procedures. The initial cost is based on 20 hours for an assistant general counsel at $551 per hour; 40 hours for a compliance attorney at $432 per hour; 12 hours for a computer operations manager at $521

[143] *Revisiting Procyclicality: The Impact of the COVID Crisis on CCP Margin Requirements,* Futures Indus. Ass'n (Oct. 2020), *available at https://www.fia.org/sites/default/files/2020-10/FIA_WP_Procyclicality_CCP%20Margin%20Requirements.pdf.*

[144] *See OCC Clears Over 1B Total Contracts in March 2023, Highest Month on Record and up 12.2% Year-Over-Year, supra* note 103 and *DTCC 2021 Annual Report, supra* note 100.

[145] Trading after the opening bell and right before the closing bell are usually the two busiest trading periods for both equities and equity options.

[146] For instance, OCC and NSCC have an information-sharing agreement to facilitate the settlement and delivery of physically-settled stock options cleared by OCC via NSCC. See Securities Exchange Act Release No. 37731 (September 26, 1996), 61 FR 51731 (October 3, 1996) (SR–OCC–96–04 and SRNSCC–96–11) (Order Approving Proposed Rule Change Related to an Amended and Restated Options Exercise Settlement Agreement Between the Options Clearing Corporation and the National Securities Clearing Corporation); Securities Exchange Act Release No. 43837 (January 12, 2001), 66 FR 6726 (January 22, 2001) (SR–OCC–00–12) (Order Granting Accelerated Approval of a Proposed Rule Change Relating to the Creation of a Program to Relieve Strains on Clearing Members' Liquidity in Connection With Exercise Settlements); and Securities Exchange Act Release No. 58988 (November 20, 2008), 73 FR 72098 (November 26, 2008) (SR–OCC–2008–18 and SR–NSCC–2008–09) (Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Changes Relating to Amendment No. 2 to the Third Amended and Restated Options Exercise Settlement Agreement).

[147] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70892 and 70895–97 (discussing Rules 17Ad–22(e)(2) and (13)). Although the proposed rule amendment is with respect to Rule 17Ad–22(e)(6), the Commission believes that these Rules present the best overall comparison to the current proposed rule amendment, in light of the nature of the changes needed to implement the proposal here and what was proposed in the Covered Clearing Agency Standards.

per hour; 20 hours for a senior programmer at $392 per hour; 25 hours for a senior risk management specialist at $423 per hour; and 12 hours for a senior business analyst at $324 per hour. In total, the initial burden is estimated to be $56,855 per covered clearing agency or $397,985 for all seven covered clearing agencies combined.

The proposed amendments to Rule 17Ad–22(e)(6) would also impose ongoing burdens on the covered clearing agencies. The proposed rule would require ongoing monitoring and compliance activities with respect to the written policies and procedures created in response to the proposed rule. Based on the similar reporting requirements and the corresponding burden estimates previously made by the Commission for several rules in the Covered Clearing Agency Standards where the Commission anticipated similar burdens,[148] the Commission preliminarily estimates that the ongoing activities required by the proposed amendments to Rule 17Ad–22(e)(6) would impose an aggregate annual burden on covered clearing agencies of 595 hours (or 85 hours per covered clearing agency). The cost of the ongoing burden was estimated assuming 25 hours for a compliance attorney at $432 per hour; 40 hours for a business risk analyst at $235 per hour; and 20 hours for a senior risk management specialist at $423 per hour, totaling $30,660 per covered clearing agency or $214,620 for all seven covered clearing agencies combined.[149]

3. Efficiency, Competition, and Capital Formation

a. Efficiency

The Commission believes that the proposed rule and amendments, if adopted, may improve informational and productive efficiency in the market for cleared securities.

Covered clearing agencies current policies and procedures largely align with proposed Rule 17ad–26. Therefore, the Commission does not expect substantive efficiency changes due to the proposed new rule.

The proposed amendment to Rule 17Ad–22(e)(6)(ii) would benefit participants by providing increased specificity around the methods used by covered clearing agencies to assess intraday margin calls, thus enabling more efficient planning in the use of scarce margin funds.

The proposed amendment to Rule 17Ad–22(e)(6)(iv) would increase informational efficiency during periods when price data or other substantive inputs are not available. Calculating margin and managing and disseminating risk information are core competencies of all covered clearing agencies, and various stakeholders rely on those data outputs. By requiring secondary sources, the proposed amendment may mitigate the reduction in efficiency that would otherwise happen when primary sources fail at a covered clearing that does not have secondary sources. Having the ability to continue calculating margin and disseminating that information to participants even when primary data are not available will prevent informational efficiency to decrease when price data or other substantive inputs are not available.

b. Competition

As described in the baseline, covered clearing agencies are currently not subject to strong competitive pressures given high start-up costs, the network effects that are inherent in the clearing business, and their subsequent historical consolidation by market segments (options clearing for OCC, equities clearing for NSCC, fixed-income clearing for FICC, etc.). In terms of potential new entrants in the market for clearing and settlement services, the incremental costs of the proposed Rule 17ad–26 and the proposed amendment to Rule 17Ad–22(e)(6)(ii) are small and, therefore, unlikely to be noteworthy barriers to entry. The amendment to Rule 17Ad–22(e)(6)(iv) may have a modest effect on competition because they are start-up costs that a new competitor would have to assume to enter into the covered clearing agency market.

c. Capital Formation

The Commission expects the effects of the proposed rule and amendments on capital formation to be second-order because the proposal focuses on issues related to secondary market trading and not on issues related to primary market issuances. To the degree that market participants view equity and fixed-income covered clearing agencies as more reliable venues for risk transfer, they may increase their activity and therefore signal a demand for more capital-creating securities.

D. Reasonable Alternatives to the Proposed Rule and Amendments

1. Establish Precise Triggers for Implementation of RWPs Across Covered Clearing Agencies

Instead of requiring covered clearing agencies to identify and implement their own triggers to resolution and wind-down procedures, the Commission could adopt a more prescriptive approach and determine specific triggers that covered clearing agencies would be required to follow. For example, the Commission could specify that exhausting prefunded financial resources in the waterfall structure of a covered clearing agency would immediately trigger a recovery or wind-down procedure.[150] Alternatively, the Commission could require a trigger when unfunded commitments to the CCP are called upon and reach a specific dollar number.

This alternative would harmonize triggers across covered clearing agencies and would create a single standard that market participants could rely on, eliminating any confusion or ambiguity attendant to different triggers. Nevertheless, covered clearing agencies are active in different markets (equities, bonds, options, CDS, etc.), have different organizational structures, and focus on different risks. As an example, one of the OCC's focus areas is monitoring option sensitivities, and, as a result, its margin models and waterfall structure are responsive to that consideration while FICC, on the other hand, focuses on duration and convexity so its waterfall structure is more responsive to those risks. The Commission preliminarily believes that having this more prescriptive approach would be unresponsive to the characteristics of each market and could expose covered clearing agencies to

[148] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70893 and 70895–96 (discussing Rules 17Ad–22(e)(6) and (13)).

[149] All values were determined from SIFMA's October 2013 values (*see, Management and Professional Earnings in the Security Industry—2013* (Oct. 7, 2013) and adjusted to March 2023 values using the Bureau of Labor Statistics' CPI Inflation Calculator, *available at https://www.bls.gov/data/inflation_calculator.htm.*

[150] *See* John W. McPartland and Rebecca Lewis, *The Goldilocks Problem: How to Get Incentives and Default Waterfalls ''Just Right'',* 41 Econ. Persps. 1, 2 (Mar. 2017), *available at https://www.chicagofed.org/publications/economic-perspectives/2017/1-mcpartland-lewis* (''All CCPs have a default waterfall that provides financial resources for managing a clearing member default. The waterfall consists of both prefunded resources and unfunded obligations. When a clearing member defaults, the CCP must continue to meet defaulter's financial obligations, whose performance it guarantees, to the non-defaulting clearing members, attempt to find clearing members willing accept the defaulter's clients, and return to a matched book status by liquidating or auctioning off the defaulter's positions. If the CCP cannot find other clearing members willing to onboard the defaulter's clients, then the clients' positions must be liquidated in order to restore the CCP to a matched book status. The default waterfall provides funding to cover the cost of meeting the defaulter's obligations and liquidating the defaulter's positions, as well as, if necessary, those of its clients.'').

recovery or wind-down triggers that are not aligned with the actual risks.

2. Establish Specific Scenarios and Analyses

Instead of requiring covered clearing agencies to identify scenarios that may prevent the covered clearing agency from being able to provide its critical payment, clearing, and settlement services, the Commission could adopt a more prescriptive approach and identify specific scenarios in new Rule 17ad–26 that each covered clearing agency must include in its RWP. For example, the Commission could identify the scenario of the default of the covered clearing agency's one or two largest participants and scenarios of specific business risks such as the default of a custodian bank or a significant cyber-attack.[151] The Commission could also require more detail regarding how each the covered clearing agency analyzes these scenarios.[152]

This alternative approach may reduce compliance costs by establishing the precise scope of the rule which could allow covered clearing agencies to tailor their RWPs to the enumerated requirements for identifying scenarios and analyses. In addition, including elements similar to those proscribed by other agencies that also regulate several covered clearing agencies could result in certain efficiencies and reduced costs for those covered clearing agencies. However, the Commission preliminarily believes that the proposed approach retains flexibility compared to this alternative by permitting the scenarios to vary across covered clearing agencies because the underlying risks vary across markets and participants. Because participants vary in size and economic significance across covered clearing agencies, scenarios invoking a pre-determined number of failures or fixed dollar amounts may have significantly different effects in one covered clearing agency than in another.

3. Establish Specific Rules, Policies, Procedures, Tools, and Resources

Instead of requiring covered clearing agencies to describes the rules, policies, procedures, and any other tools or resources the covered clearing agency would rely upon in a recovery or orderly wind-down to address the scenarios identified in their RWPs, the Commission could adopt a more prescriptive approach and identify in new Rule 17ad–26 the rules, policies, procedures, and any other tools or resources for all covered clearing agencies. The Commission could also require in Rule 17ad–26 more detail regarding how a covered clearing agency analyzes its rules, policies, procedures, tools, and resources.[153]

This alternative approach may reduce compliance costs by establishing the precise scope of the rule, which could allow covered clearing agencies to tailor their RWPs to the enumerated requirements for describing rules, policies, procedures, and other tools or resources. In addition, including elements similar to those proscribed by other agencies that also regulate several covered clearing agencies could result in certain efficiencies and reduced costs for those covered clearing agencies.[154]

However, the Commission preliminarily believes that it is better to permit the rules, policies, procedures, and any other tools or resources to vary across covered clearing agencies because the underlying risks and resources vary. For example, a covered clearing agency that clears products of longer duration may have a greater need for a tear-up tool that extinguishes a participant's positions in certain circumstances than a covered clearing agency that clears contracts with a relatively short settlement cycle. In addition, the overall volume of transactions settled by a covered clearing agency may affect the choice of its liquidity tools or resources, as the covered clearing agency would have to ensure that it had sufficient liquidity resources to complete settlement.

4. Require the Identification of Interconnections and Interdependencies

In addition to the requirements with respect to service providers set forth in proposed Rule 17ad–26(a)(2), the Commission could require that the covered clearing agency's RWP identify any financial or operational interconnections and interdependencies that the covered clearing agency has with other market participants. This would allow for consideration of the impact of the multiple roles and relationships that a single financial entity may have with respect to the covered clearing agency including affiliated entities and third parties (*e.g.,* a single entity that acts as both a clearing member and a settlement bank and a liquidity provider).[155]

The Commission preliminarily believes that it is better not to include this particular requirement. A covered clearing agency is already required to establish, implement, maintain, and enforce written policies and procedures reasonably designed to identify, monitor, and manage risks related to

[151] Additional such scenarios that could be enumerated in new Rule 17ad–26 could include any or all of the following scenarios: (A) credit losses or liquidity shortfalls created by single and multiple clearing member defaults; (B) liquidity shortfall created by a combination of clearing member default and a failure of a liquidity provider to perform; (C) settlement bank failure; (D) custodian or depository bank failure; (E) losses resulting from investment risk; (F) losses from poor business results; (G) financial effects from cybersecurity events; (H) fraud (internal, external, and/or actions of criminals or of public enemies); (I) legal liabilities, including those not specific to the covered clearing agency's business as a covered clearing agency; (J) losses resulting from interconnections and interdependencies among the covered clearing agency and its parent, affiliates, and/or internal or external service providers; (K) losses resulting from interconnections and interdependencies with other covered clearing agencies; and (L) losses resulting from issues relating to services that are ancillary to the covered clearing agency's critical services. It could also include scenarios involving multiple failures (*e.g.,* a member default occurring simultaneously, or nearly so, with a failure of a service provider) that, in the judgment of the covered clearing agency, are particularly relevant to its business.

[152] That is, the Commission could require in new Rule 17ad–26 that the RWP include an analysis that includes: (A) a description of the scenario; (B) the events that are likely to trigger the scenario; (C) the covered clearing agency's process for monitoring for such events; (D) the market conditions, operational and financial difficulties and other relevant circumstances that are likely to result from the scenario; (E) the potential financial and operational impact of the scenario on the covered clearing agency and on its clearing members, internal and external service providers and relevant affiliated companies, both in an orderly market and in a disorderly market; and (F) the specific steps the covered clearing agency would expect to take when the scenario occurs, or appears likely to occur, including, without limitation, any governance or other procedures that may be necessary to implement the relevant recovery tools and to ensure that such implementation occurs in sufficient time for the recovery tools to achieve their intended effect.

[153] For example, the Commission could require in new Rule 17ad–26 that the RWP include an analysis that includes: (i) a description of the tools that the covered clearing agency would expect to use in each scenario; (ii) the order in which each tool would be expected to be used; (iii) the time frame within which the tool would be used; (iv) the governance and approval processes and arrangements within the covered clearing agency for the use of each of the tools available, including the exercise of any available discretion; (v) the processes to obtain any approvals external to the covered clearing agency (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained; (vi) the steps necessary to implement the tools; (vii) the roles and responsibilities of all parties, including non-defaulting participants; (viii) whether the tool is mandatory or voluntary; (ix) an assessment of the associated risks from the use of each tool to non-defaulting clearing members and their customers, linked financial market infrastructures, and the financial system more broadly; and (x), for wind-down, an assessment of the likelihood that the tool would result in orderly wind-down.

[154] *See supra* section IV.B.2, *supra* footnotes 68 and 69, and Request for Comments 15, 20–22, and 27.

[155] More specifically, a bank holding company structure may operate through a set of legal entities (*e.g.,* a broker-dealer/futures commission merchant separate from a bank separate from an information technology service provider), each of which has different relationships with the covered clearing agency.

any link the covered clearing agency establishes with one or more other clearing agencies, financial market utilities, or trading markets.[156] This requirement, in conjunction with the proposed requirement to identify and describe service providers for critical services and to specify to which critical service they relate, should accomplish the same general objective, making this reasonable alternative inferior to the proposed policy choice.

5. Establish a Specific Monitoring Frequency for Intraday Margin Calls

The proposed amendment to Rule 17Ad–22(e)(6)(ii) expressly incorporates the requirement of intraday monitoring to ensure that such monitoring is done on an ongoing basis. One reasonable alternative is to prescribe the necessary frequency of monitoring as opposed to ''on an ongoing basis''. For example, covered clearing agencies could be required to monitor exposure every 5 or 15 minutes.

The Commission preliminarily believes, however, that monitoring on an ongoing basis is preferable because a fixed, pre-specified monitoring frequency may not be responsive enough to risk differences that exist across the markets served by the covered clearing agencies or to volatility changes that may happen through time.

6. Adopt Only Certain Elements of Proposed Rule 17ad–26

Instead of adopting all nine elements of proposed Rule 17ad–26, the Commission could adopt a subset of the proposed elements. For example, the Commission could drop the proposed element to identify service providers or the proposed element to address how the covered clearing agency would ensure that the service providers would continue to perform in the event of a recovery and during and orderly wind-down. Alternatively, the Commission could drop the proposed element for plan review or the proposed element for plan testing.

The Commission preliminarily believes that it is better to adopt all nine elements of proposed Rule 17ad–26 because each element helps ensure that the plan is fit for purpose and provides sufficient identification of how a covered clearing agency would operate in a recovery and how it would handle an orderly wind-down.

7. Focus Intraday Margin Requirements on a Subset of Covered Clearing Agencies

As an alternative to implementing the proposed intraday margin amendments on a blanket basis, the Commission could adopt a more tailored approach that imposes the requirements only on a subset of covered clearing agencies that operate in certain markets such as those markets with the highest levels of activity [157] or those markets that have only one covered clearing agency.[158] A more tailored market-level risk-based approach would adjust to the size and systemic importance of each market, which would reduce the counter-factual compliance costs for the covered clearing agencies in the markets with less activity or with more than one available clearing agency.

However, the Commission preliminarily believes that the proposed amendments already include an appropriate adjustment for market-level risk insofar as they would require the covered clearing agencies to consider their own particular facts and circumstances when aligning with the proposed rules. For example, the proposed amendment to Rule 17Ad–22(e)(6)(ii) would require covered clearing agencies to have the operational capacity to make intraday margin calls ''as frequently as circumstances warrant,'' and that frequency is expected to vary across markets and through time.

E. Request for Comment

The Commission requests comment on all aspects of this initial economic analysis, including the potential benefits and costs, all effects on efficiency, competition (including any effects on barriers to entry), and capital formation, and reasonable alternatives to the proposed rule and amendments. We request and encourage any interested person to submit comments regarding the proposed rule and amendments, our analysis of the potential effects of the proposed rule and amendments, and other matters that may have an effect on the proposed rule and amendments. We request that commenters identify sources of data and information as well as provide data and information to assist us in analyzing the economic consequences of the proposed rule and amendments and each reasonable alternative. We are also interested in comments on the qualitative benefits and costs we have identified and any qualitative benefits and costs we may have overlooked, including those associated with each reasonable alternative. In addition, we are interested in comments on any other reasonable alternative, including any alternative that would distinguish covered clearing agencies based on certain factors, such as organizational structure or products cleared.

34. For covered clearing agencies that are currently able to calculate and collect intraday margin, how costly is it to start monitoring exposure on an ongoing basis, and how costly is it to make intraday margin calls as frequently as circumstances warrant?

35. How quickly are participants able to satisfy margin calls during periods of market calm? How quickly are participants able to satisfy margin calls during periods of market stress?

36. How much more costly is it for participants to satisfy margin calls in periods of market stress than in periods of markets calm? How does an increase of margin call frequency affect costs for participants in periods of market stress?

37. How much more costly is it for participants to satisfy margin calls that are unanticipated than those that are anticipated? To what extend do participants model when the covered clearing agency is likely to make margin calls? How will the proposed amendments affect participants' ability or incentive to model the timing of margin calls?

38. Should the length of time participants takes to satisfy a margin call influence the decision of the covered clearing agency to make a margin call? For example, should covered clearing agencies refrain from issuing a new margin call before the participants have responded to a prior margin call? Why or why not?

39. Do commenters believe that certain participants of covered clearing agencies, including, for example, participants with less capital or using smaller settlement banks, could face operational challenges or pricing disadvantages, if proposed Rule 17Ad–22(e)(ii) were to result in more frequent margin calls? If so, please explain those challenges and disadvantages.

40. How costly is it for covered clearing agencies to secure the use of

[156] 17 CFR 240.17Ad–22(e)(20).

[157] Activity could be measured in different ways, including the number or value of cleared transactions. Average daily settlement value is much higher in the equity market (NSCC) than it is in the fixed income market (FICC). *See* DTCC, *Annual Report* (2021), *available at https://www.dtcc.com/~/media/files/downloads/about/annual-reports/DTCC-2021-Annual-Report.*

[158] The following securities markets have only one central counterparty: exchange-traded equity options (OCC), government securities (FICC), mortgage-backed securities (FICC), and equity securities (NSCC). The market for central securities depository services has only one provider (DTC). The credit default swaps market is served by LCH SA, ICC, and ICEEU.

price data or substantive inputs from an alternate source? Must the data or substantive inputs subscription be purchased outright, or can the covered clearing agency, for a lower fee, purchase an option to use the data and substantive inputs only when its primary sources prove inadequate?

41. How costly is it for covered clearing agencies to secure the use of alternate risk-based margin systems? Would covered clearing agencies create their own alternate risk-based margin systems, or would they secure access to one from a third party, and, if so, at what cost?

42. Are our estimates of the costs to secure alternate data inputs reasonable? Why or why not?

43. Proposed Rule 17ad–26(a)(2) requires RWPs to address how the covered clearing agency would ensure that service providers would continue to perform in the event of a recovery and during an orderly wind-down. Would it be better for RWPs to address instead how the covered clearing agency would continue to provide its critical services in the event of the non-performance of one or more service providers? Why or why not?

44. How costly will it be for covered clearing agencies to test their plans as required in proposed Rule 17ad–26(a)(8)? What costs will be incurred by the participants and, when practicable, other stakeholders? Will any of these costs substantively vary based on whether or not the current RWP includes testing?

V. Paperwork Reduction Act

The proposed amendments to Rule 17Ad–22(e)(6) and Proposed Rule 17ad–26 contain ''collection of information'' requirements within the PRA.[159] The Commission is submitting the proposed collections of information to the Office of Management and Budget (''OMB'') for review in accordance with the PRA. The title of these information collections is ''Clearing Agency Standards for Operation and Governance'' (OMB Control No. 3235–0695). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

A. Proposed Amendment to Rule 17Ad–22(e)(6)

Respondents under this Rule 17Ad–22(e)(6) are covered clearing agencies that provide central counterparty services, of which there are currently six. The Commission anticipates that one additional entity may seek to register as a clearing agency to provide CCP services in the next three years, and so for purposes of this proposal the Commission has assumed seven respondents.

The purpose of this collection of information is to enable a covered clearing agency to have the authority and operational capacity to monitor intraday exposures on an ongoing basis and to collect intraday margin in certain specified circumstances. The collection is mandatory. To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential subject to the provisions of applicable law.[160]

The proposed amendments to Rule 17Ad–22(e)(6) would require a covered clearing agency to establish, implement, maintain, and enforce written policies and procedures. The proposed rule amendment contains similar provisions to existing covered clearing agency rules (*i.e.,* Rule 17Ad–22(e)(6)(ii) and (iv)), but would also impose additional requirements that do not appear in the existing Rule 17Ad–22. As a result, the Commission preliminarily believes that a respondent covered clearing agency would incur burdens of reviewing and updating existing policies and procedures to consider whether they comply with the proposed amendment to Rule 17Ad–22(e)(6) and, in some cases, may need to create new policies and procedures to comply with the proposed amendments to Rule 17Ad–22(e)(6). For example, a covered clearing agency likely would need to review its existing margin methodology and consider whether any additional changes are necessary to ensure that it can meet the strengthened requirements of the proposed rule.

The Commission preliminarily believes that the estimated PRA burdens for the proposed amendment to Rule 17Ad–22(e)(6) may require a respondent covered clearing agency to make fairly substantial changes to its policies and procedures. Based on the similar policies and procedures requirements and the corresponding burden estimates previously made by the Commission for several rules in the Covered Clearing Agency Standards where the Commission anticipated similar burdens,[161] the Commission preliminarily estimates that respondent covered clearing agencies would incur an aggregate one-time burden of approximately 903 hours to review existing policies and procedures and create new policies and procedures.[162]

The proposed amendments to Rule 17Ad–22(e)(6) would impose ongoing burdens on a respondent covered clearing agencies. The proposed rule would require ongoing monitoring and compliance activities with respect to the written policies and procedures created in response to the proposed rule. Based on the similar reporting requirements and the corresponding burden estimates previously made by the Commission for several rules in the Covered Clearing Agency Standards where the Commission anticipated similar burdens,[163] the Commission preliminarily estimates that the ongoing activities required by the proposed amendments to Rule 17Ad–22(e)(6) would impose an aggregate annual burden on respondent covered clearing agencies of 560 hours.[164]

---

[159] *See* 44 U.S.C. 3501 *et seq.*

[160] *See, e.g.,* 5 U.S.C. 552. Exemption 4 of the Freedom of Information Act provides an exemption for trade secrets and commercial or financial information obtained from a person and privileged or confidential. *See* 5 U.S.C. 552(b)(4). Exemption 8 of the Freedom of Information Act provides an exemption for matters that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions. *See* 5 U.S.C. 552(b)(8).

[161] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70892 and 70895–97 (discussing Rules 17Ad–22(e)(2) and (13)). Although the proposed rule amendment is with respect to Rule 17Ad–22(e)(6), the Commission believes that these Rules present the best overall comparison to the current proposed rule amendment, in light of the nature of the changes needed to implement the proposal here and what was proposed in the Covered Clearing Agency Standards.

[162] This figure was calculated as follows: (Assistant General Counsel for 20 hours) + (Compliance Attorney for 40 hours) + (Computer Operations Manager for 12 hours) + (Senior Programmer for 20 hours) + (Senior Risk Management Specialist for 25 hours) + (Senior Business Analyst for 12 hours) = 129 hours × 7 respondent clearing agencies = 903 hours.

[163] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70893 and 70895–96 (discussing Rules 17Ad–22(e)(6) and (13)).

[164] This figure was calculated as follows: (Compliance Attorney for 25 hours + Business Risk Analyst for 40 hours + Senior Risk Management Specialist for 20 hours) = 85 hours × 7 respondent clearing agencies = 560 hours.

Name of information collection	Type of burden	Number of respondents	Initial burden per entity	Aggregate initial burden	Ongoing burden per entity	Aggregate ongoing burden
17Ad–22(e)(6)	Recordkeeping	7	129	903	85	595

B. Proposed Rule 17Ad–26

Respondents under proposed Rule 17ad–26 are covered clearing agencies, of which there is currently seven. The Commission anticipates that one additional entity may seek to register as a covered clearing agency in the next three years, and so for purposes of this proposal the Commission has assumed eight respondents.

The purpose of the collections under proposed Rule 17ad–26 is to ensure that covered clearing agencies include a set of particular items in the recovery and wind-down plans currently required under Rule 17Ad–22(e)(3)(ii). The collections are mandatory. To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential subject to the provisions of applicable law.[165]

Because of the existence of current Rule 17Ad–22(e)(3)(ii), which means that covered clearing agencies are already required to maintain RWPs, Proposed Rule 17ad–26 would impose on a covered clearing agency similar burdens as when, for example, Rule 17Ad–22(e)(2) was proposed and covered clearing agencies generally had governance arrangements in place at that time.[166] Based on the Commission's review and understanding of the covered clearing agencies' existing RWPs,[167] respondent covered clearing agencies generally have written rules, policies, and procedures similar to the requirements that would be imposed under the Proposed Rule 17ad–26. The PRA burden imposed by the proposed rule would therefore be minimal and would likely be limited to the review of current policies and procedures and updating existing policies and procedures where appropriate to ensure compliance with the proposed rule. Accordingly, the Commission preliminarily believes that respondent clearing agencies would incur an aggregate one-time burden of approximately 960 hours to review and update existing policies and procedures.[168]

Proposed Rule 17ad–26 would also impose ongoing burdens on a respondent covered clearing agency. The proposed rule would require ongoing monitoring and compliance activities with respect to the written policies and procedures created in response to the proposed rule. Based on the Commission's previous estimates for ongoing monitoring and compliance burdens with respect to existing Rule 17Ad–22(e)(2),[169] the Commission preliminarily estimates that the ongoing activities required by proposed Rule 17ad–26 would impose an aggregate annual burden on respondent covered clearing agencies of 40 hours.[170]

Name of information collection	Type of burden	Number of respondents	Initial burden per entity	Aggregate initial burden	Ongoing burden per entity	Aggregate ongoing burden
17ad–26	Recordkeeping	8	120	960	40	320

C. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

45. Evaluate whether the proposed collections of information are necessary for the proper performance of the Commission's functions, including whether the information shall have practical utility;

46. Evaluate the accuracy of the Commission's estimates of the burdens of the proposed collections of information;

47. Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;

48. Evaluate whether there are ways to minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and

49. Evaluate whether the proposed rules and rule amendments would have any effects on any other collection of information not previously identified in this section.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File Number S7–10–23. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number S7–10–23 and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Services, 100 F Street NE, Washington, DC 20549–2736. As OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

[165] *See, e.g.,* 5 U.S.C. 552 *et seq.* Exemption 4 of the Freedom of Information Act provides an exemption for trade secrets and commercial or financial information obtained from a person and privileged or confidential. *See* 5 U.S.C. 552(b)(4). Exemption 8 of the Freedom of Information Act provides an exemption for matters that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions. See 5 U.S.C. 552(b)(8).

[166] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70892 (discussing Rule 17Ad–22(e)(2)).

[167] *See supra,* note 41.

[168] This figure was calculated as follows: ((Assistant General Counsel for 20 hours) + (Compliance Attorney for 50 hours) + (Business Risk Analyst for 35 hours) + (Senior Risk Management Specialist for 15) = 120 hours × 8 respondent clearing agencies = 960 hours.

[169] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70892 (discussing Rule 17Ad–22(e)(2)).

[170] This figure was calculated as follows: ((Assistant General Counsel for 10 hours) + Compliance Attorney for 30 hours)) × 8 respondent clearing agencies = 320 hours.

VI. Small Business Regulatory Enforcement Fairness Act

Under the Small Business Regulatory Enforcement Fairness Act of 1996,[171] a rule is ''major'' if it has resulted, or is likely to result in: an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers or individual industries; or significant adverse effects on competition, investment, or innovation. The Commission requests comment on whether the proposed rules and rule amendments would be a ''major'' rule for purposes of the Small Business Regulatory Enforcement Fairness Act. In addition, the Commission solicits comment and empirical data on: the potential effect on the U.S. economy on annual basis; any potential increase in costs or prices for consumer or individual industries; and any potential effect on competition, investment, or innovation.

VII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'') requires the Commission, in promulgating rules, to consider the impact of those rules on small entities.[172] Section 603(a) of the Administrative Procedure Act,[173] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules to determine the impact of such rulemaking on ''small entities.'' [174] Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule which, if adopted, would not have a significant economic impact on a substantial number of small entities.[175]

The proposed amendments to Rule 17Ad–22 and new Rule 17ad–26 would apply to covered clearing agencies, which would include registered clearing agencies that provide the services of a central counterparty or central securities depository.[176] For the purposes of Commission rulemaking and as applicable to the proposed amendments to Rule 17Ad–22 and the addition of proposed Rule 17ad–26, a small entity includes, when used with reference to a clearing agency, a clearing agency that (i) compared, cleared, and settled less than $500 million in securities transactions during the preceding fiscal year, (ii) had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or at any time that it has been in business, if shorter), and (iii) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[177]

Based on the Commission's existing information about the clearing agencies currently registered with the Commission, the Commission preliminarily believes that such entities exceed the thresholds defining ''small entities'' set out above. While other clearing agencies may emerge and seek to register as clearing agencies, the Commission preliminarily does not believe that any such entities would be ''small entities'' as defined in Exchange Act Rule 0–10.[178] In any case, clearing agencies can only become subject to the new requirements under proposed Rule 17Ad–22(e) should they meet the definition of a covered clearing agency, as described above. Accordingly, the Commission preliminarily believes that any such registered clearing agencies will exceed the thresholds for ''small entities'' set forth in Exchange Act Rule 0–10.

For the reasons described above, the Commission certifies that the proposed amendments to Rules 17Ad–22 and proposed new Rule 17ad–26 would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The Commission requests comment regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities, including clearing agencies, and provide empirical data to support the extent of the impact.

VIII. Statutory Authority

The Commission is proposing amendments to 17 CFR 240.17Ad–22 and proposing 17 CFR 240.17ad–26 under the Commission's rulemaking authority set forth in section 17A of the Exchange Act, 15 U.S.C. 78q–1 and Section 23(a), 15 U.S.C. 78w(a), and in Section 805 of the Clearing Supervision Act, 15 U.S.C. 5464.

[171] Public Law 104–121, Title II, 110 Stat. 857 (1996).

[172] *See* 5 U.S.C. 601 *et seq.*

[173] 5 U.S.C. 603(a).

[174] Section 601(b) of the RFA permits agencies to formulate their own definitions of ''small entities.'' *See* 5 U.S.C. 601(b). The Commission has adopted definitions for the term ''small entity'' for the purposes of rulemaking in accordance with the RFA. These definitions, as relevant to this proposed rulemaking, are set forth in Rule 0–10, 17 CFR 240.0–10.

[175] *See* 5 U.S.C. 605(b).

[176] 17 CFR 240.17AD–22(a)(5).

[177] *See* 17 CFR 240.0–10(d).

[178] *See* 17 CFR 240.0–10(d). The Commission based this determination on its review of public sources of financial information about registered clearing agencies and lifecycle event service providers for OTC derivatives.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Text of Amendments

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read, and the sectional authority for § 240.17Ad–22 is revised to read, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Section 240.17ad–22 is also issued under 12 U.S.C. 5461 *et seq.*

* * * * *

■ 2. Amend § 240.17Ad–22 by:

■ a. Redesignating § 240.17Ad–22 as § 240.17ad–22; and

■ b. Revising paragraphs (e)(6)(ii) and (iv) in newly redesignated § 240.17ad–22.

The revisions read as follows:

§ 240.17ad–22 Standards for clearing agencies.

* * * * *

(e) * * *

(6) * * *

(ii) Marks participant positions to market and collects margin, including variation margin or equivalent charges if relevant, at least daily, monitors intraday exposures on an ongoing basis, and includes the authority and operational capacity to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility;

* * * * *

(iv) Uses reliable sources of timely price data and other substantive inputs, and uses procedures and, with respect to price data, sound valuation models, for addressing circumstances in which price data or other substantive inputs are not readily available or reliable to ensure that the covered clearing agency

can continue to meet its obligations under this section. Such procedures shall include the use of price data or substantive inputs from an alternate source or, if it does not use an alternate source, the use of an alternate risk-based margin system that does not similarly rely on the unavailable or unreliable substantive input;

* * * * *

■ 3. Section 240.17ad–26 is added to read as follows:

§ 240.17ad–26 Covered Clearing Agency Recovery and Orderly Wind-Down Plans.

(a) The plans for the recovery and orderly wind-down of the covered clearing agency referenced in 17 CFR 240.17ad–22(e)(3)(ii) shall:

(1) Identify and describe the covered clearing agency's critical payment, clearing, and settlement services and address how the covered clearing agency would continue to provide such critical services in the event of a recovery and during an orderly wind-down, including the identification of the staffing necessary to support such critical services and analysis of how such staffing would continue in the event of a recovery and during an orderly wind-down;

(2) Identify and describe any service providers upon which the covered clearing agency relies to provide the services identified in paragraph (a)(1) of this section, specify to what services such service providers are relevant, and address how the covered clearing agency would ensure that such service providers would continue to perform in the event of a recovery and during an orderly wind-down, including consideration of contractual obligations with such service providers and whether those obligations are subject to alteration or termination as a result of initiation of the recovery and orderly wind-down plan;

(3) Identify and describe scenarios that may potentially prevent the covered clearing agency from being able to provide its critical payment, clearing, and settlement services identified in paragraph (a)(1) of this section as a going concern, including uncovered credit losses (as described in paragraph (e)(4)(viii) of 17 CFR 240.17ad–22), uncovered liquidity shortfalls (as described in paragraph (e)(7)(viii) of 17 CFR 240.17ad–22), and general business losses (as described in paragraph (e)(15) of 17 CFR 240.17ad–22);

(4) Identify and describe criteria that would trigger the implementation of the recovery and orderly wind-down plans and the process that the covered clearing agency uses to monitor and determine whether the criteria have been met, including the governance arrangements applicable to such process;

(5) Identify and describe the rules, policies, procedures, and any other tools or resources the covered clearing agency would rely upon in a recovery or orderly wind-down;

(6) Address how the rules, policies, procedures, and any other tools or resources identified in paragraph (a)(5) of this section would ensure timely implementation of the recovery and orderly wind-down plan;

(7) Include procedures for informing the Commission as soon as practicable when the covered clearing agency is considering initiating a recovery or orderly wind-down;

(8) Include procedures for testing the covered clearing agency's ability to implement the recovery and wind-down plans at least every twelve months, including by requiring the covered clearing agency's participants and, when practicable, other stakeholders to participate in the testing of its plans, providing for reporting the results of the testing to the covered clearing agency's board of directors and senior management, and specifying the procedures for, as appropriate, amending the plans to address the results of the testing; and

(9) Include procedures requiring review and approval by the board of directors of the plans at least every twelve months or following material changes to the covered clearing agency's operations that would significantly affect the viability or execution of the plans, with such review informed, as appropriate by the covered clearing agency's testing of the plans.

(b) Definitions. For the purposes of this section:

Affiliate means a person that directly or indirectly controls, is controlled by, or is under common control with the covered clearing agency.

Orderly wind-down means the actions of a covered clearing agency to effect the permanent cessation, sale, or transfer of one or more of its critical services in a manner that would not increase the risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system.

Recovery means the actions of a covered clearing agency, consistent with its rules, procedures, and other ex ante contractual arrangements, to address any uncovered loss, liquidity shortfall, or capital inadequacy, whether arising from participant default or other causes (such as business, operational, or other structural weaknesses), including actions to replenish any depleted prefunded financial resources and liquidity arrangements, as necessary to maintain the covered clearing agency's viability as a going concern and to continue its provision of critical services.

Service provider means any person, including an affiliate or a third party, that is contractually obligated to the covered clearing agency in any way related to the provision of critical services, as identified by the covered clearing agency in 17 CFR 240.17ad–26(a)(1).

By the Commission.

Dated: May 17, 2023.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2023–10889 Filed 5–26–23; 8:45 am]

BILLING CODE 8011–01–P