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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-69302; File No. SR-NSCC-2012-10)

April 4, 2013

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving Proposed Rule Change to Eliminate the Offset of Its Obligations with Institutional Delivery Transactions that Settle at The Depository Trust Company for the Purpose of Calculating Its Clearing Fund Under Procedure XV of Its Rules & Procedures

I. Introduction

On December 17, 2012, National Securities Clearing Corporation (“NSCC”) filed with the Securities and Exchange Commission (“Commission”) proposed rule change SR-NSCC-2012-10 (“Proposed Rule Change”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder.² The Proposed Rule Change was published in the Federal Register on January 4, 2013.³ The Commission extended the period of review of the Proposed Rule Change on February 5, 2013.⁴ The Commission received two comment letters to the Proposed Rule Change from one commenter,⁵ as well as two responses from NSCC to the comment letters.⁶ This order approves the Proposed Rule Change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Release No. 34-68549 (Dec. 28, 2012), 78 FR 792 (Jan. 4, 2013). NSCC also filed an advance notice pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 relating to these changes. Release No. 34-68621 (Jan. 10, 2013), 78 FR 3960 (Jan. 17, 2013).

⁴ Release No. 34-68829 (Feb. 5, 2013), 78 FR 9751 (Feb. 11, 2013).

⁵ Comment Letter from Lek Securities Corporation dated January 25, 2013 (“First Lek Letter”) (<http://sec.gov/comments/sr-nsc-2012-810/nsc2012810-1.pdf>), and Comment Letter from Lek Securities Corporation dated March 18, 2013 (“Second Lek Letter”) (<http://sec.gov/comments/sr-nsc-2012-810/nsc2012810-3.pdf>), (collectively, the “Lek Letters”).

II. Description

NSCC filed the Proposed Rule Change to permit it to make rule changes to its Rules and Procedures (“Rules”) designed to eliminate the offset of NSCC obligations with institutional delivery (“ID”) transactions that settle at The Depository Trust Company (“DTC”) for the purpose of calculating the NSCC clearing fund (“Clearing Fund”) under Procedure XV of its Rules, as discussed below.

A. ID Offset

NSCC maintains a Clearing Fund to have on deposit assets sufficient to satisfy losses that may otherwise be incurred by NSCC as the result of the default of an NSCC member (“Member”) and the resulting closeout of that Member’s unsettled positions under NSCC’s trade guaranty. Each Member is required to contribute to the Clearing Fund pursuant to a formula calculated daily. The Clearing Fund formula accounts for a variety of risk factors through the application of a number of components, including Value-at-Risk (“VaR”)⁷ and Market Maker Domination (“MMDOM”).⁸

⁶ Response Letter from NSCC dated February 22, 2013 (“First NSCC Response”) (<http://sec.gov/comments/sr-nsc-2012-810/nsc2012810-2.pdf>), and Response Letter from NSCC dated March 21, 2013 (“Second NSCC Response”) (<http://sec.gov/comments/sr-nsc-2012-810/nsc2012810-4.pdf>), (collectively, the “NSCC Responses”).

⁷ The VaR component of the Clearing Fund calculation is a core component of the formula and is designed to calculate the amount of money that may be lost on a portfolio over a given period of time that is assumed necessary to liquidate the portfolio, within a given level of confidence. See Release No. 34-68549 (Dec. 28, 2012), 78 FR 792 (Jan. 4, 2013).

⁸ The MMDOM component of the Clearing Fund calculation is charged to market makers or firms that clear for them. In calculating the MMDOM, if the sum of the absolute values of net unsettled positions in a security for which the firm in question makes a market is greater than that firm’s excess net capital, NSCC may then charge the firm an

NSCC currently calculates the VaR and MMDOM components of a Member's Clearing Fund required deposit after allowing for a Member's net unsettled NSCC positions in a particular CUSIP to be offset by any pending ID transactions settling at DTC in the same CUSIP, which have been confirmed and/or affirmed through an institutional delivery system acceptable to NSCC ("ID Offset").⁹ ID Offset is based on the assumption that in the event of a Member's insolvency NSCC will be able to close out any trade for which there is a corresponding ID transaction settling at DTC by completing that ID transaction.¹⁰

B. Potential Inability to Complete ID Transactions

Generally, when NSCC ceases to act for a Member, it is obligated, for those transactions that it has guaranteed, to pay for deliveries made by non-defaulting Members that are due to the failed Member on the day they are due. If NSCC is unable to complete the ID transactions as contemplated by the current Clearing Fund calculation, then NSCC may need to liquidate a portfolio that could be substantially different than the portfolio for which NSCC collected its Clearing Fund, leaving NSCC potentially under-collateralized and exposed to market risk.

A defaulting Member's pending ID transactions may not be completed for a number of reasons. Completion of an ID transaction by its institutional counterparty is voluntary because

amount equal to such excess or the sum of each of the absolute values of the affected net unsettled positions, or a combination of both. MMDOM operates to identify concentration within a given CUSIP. See Release No. 34-68549 (Dec. 28, 2012), 78 FR 792 (Jan. 4, 2013).

⁹ For purposes of the ID Offset, NSCC includes ID transactions that are confirmed and/or affirmed on trade date, as well as ID transactions affirmed one day after trade date and remain affirmed through settlement date. See Release No. 34-68549 (Dec. 28, 2012), 78 FR 792 (Jan. 4, 2013).

¹⁰ ID transactions are included in the ID Offset only if they are on the opposite side of the market from the Member's net NSCC position (i.e., only if they reduce the net position). See Release No. 34-68549 (Dec. 28, 2012), 78 FR 792 (Jan. 4, 2013).

that counterparty is not a Member, which means it is not bound by NSCC's Rules and is not party to any legally binding contract with NSCC that requires it or its custodian to complete the transaction. Moreover, based on news that a Member may be in distress or insolvent, the institutional counterparty or its investment adviser may take immediate market action with respect to the ID transaction, in order to reduce its market risk, which effectively eliminates the option for NSCC to complete the transactions. Finally, ID transactions settle trade-by-trade between the executing broker and the custodian; the netted ID positions used to offset the NSCC position could be comprised of thousands of individual trades with hundreds of different counterparties. In the event of a Member default, it could be time consuming for NSCC to contact the counterparties individually to get their agreement to complete the ID transactions. Even if NSCC were to get all of the counterparties to agree to complete the ID transactions, this could delay the prompt closeout of the defaulter's open positions and possibly expose NSCC to additional market risk in excess of the Clearing Fund.

Due to the risk that, in the event it ceases to act for a Member with pending ID transactions, NSCC may be unable to complete the pending ID transactions in the timeframe contemplated by its current Clearing Fund calculations and, as a result, may have insufficient margin in its Clearing Fund, as described above, NSCC will eliminate the ID Offset calculation from the VaR and MMDOM components of a Member's Clearing Fund requirement deposit.

C. Implementation Schedule

In order to mitigate the impact of this rule change on its Members, NSCC will implement the changes set forth in the Proposed Rule Change over an 18-month period. On a date no earlier than 10 days following notice to Members by Important Notice ("Initial Implementation Date"), NSCC will eliminate ID Offset from ID transactions that have only been confirmed, but have not

yet been affirmed. Beginning on a date approximately 12 months from the Initial Implementation Date, and no earlier than 10 days following notice to Members by Important Notice, NSCC will eliminate from ID Offset all affirmed ID transactions that have reached settlement date at the time the Clearing Fund calculations are run. Three months later, or approximately 15 months following the Initial Implementation Date, and on a date no earlier than 10 days following notice to Members by Important Notice, NSCC will eliminate from ID Offset all affirmed ID transactions that have reached either settlement date or the day prior to settlement date. Finally, on a date approximately 18 months following the Initial Implementation Date, and no earlier than 10 days following notice to Members by Important Notice, NSCC will eliminate ID Offset entirely for all ID transactions. Members will be advised of each proposed implementation date through issuance of NSCC Important Notices, which are publicly available at www.dtcc.com.

III. Comments

The Commission received two comment letters to the Proposed Rule Change from a single commenter,¹¹ and two responses from NSCC to the comment letters.¹²

The commenter's arguments opposing NSCC's proposal generally fall into two categories: (1) those that challenge a premise for, or the decision-making process with respect to, the Proposed Rule Change; and (2) those that identify potential ramifications of the Proposed Rule Change.¹³ Each of the arguments, as well as NSCC's responses, are discussed in more

¹¹ See Lek Letters, supra note 5.

¹² See NSCC Responses, supra note 6.

¹³ See Lek Letters, supra note 5. The First Lek Letter also argued that broker-dealers should be permitted to use customer funds to meet margin requirements derived from customer positions. See First Lek Letter, supra note 5. Because that argument addresses

detail below.

The commenter argues that it is a reasonable assumption that most ID transactions will be completed because institutional customers are reliable and creditworthy, so NSCC should not assume for purposes of the Proposed Rule Change that all ID transactions will not be completed.¹⁴

NSCC responded that there is no guarantee that any pending ID transaction will be completed because there is no privity of contract between NSCC and the non-member institutional counterparties to the ID transactions,¹⁵ which the commenter conceded.¹⁶ Therefore, notwithstanding institutional customers' past practices, NSCC argues that there is no contractual obligation with NSCC that ID transactions be completed; as a result, the assumption that NSCC will be able to close out defaulting member trades for which there is a corresponding ID transaction that will settle at DTC is wrong.¹⁷

a Commission requirement and not an NSCC requirement, it is outside the scope of this Proposed Rule Change.

¹⁴ See First Lek Letter, supra note 5.

¹⁵ See NSCC Responses, supra note 6; see also Release No. 34-68549 (Dec. 28, 2012), 78 FR 792 (Jan. 4, 2013).

¹⁶ See Second Lek Letter, supra note 5 (“NSCC is however correct that there is lack of privity of contract between NSCC and the institutional counterparty, and that if left un-addressed NSCC would not be able to complete the pending ID transactions. We applaud NSCC for identifying this concern.”); see also First Lek Letter, supra note 5 (“We do concede that one, or maybe even two, of an agency broker’s customers might renege [sic] on their losing trades... and as a result the broker would be stuck with the trades and lose money covering them.”).

¹⁷ See NSCC Responses, supra note 6; see also Release No. 34-68549 (Dec. 28, 2012), 78 FR 792 (Jan. 4, 2013).

The commenter claims that NSCC currently collects sufficient margin, as NSCC has never had to use the Clearing Fund deposits of a non-defaulting Member, nor has it ever suffered a loss due to insufficient margin.¹⁸ Because NSCC's current margin requirements are adequately calculated, the ID Offset should remain.¹⁹

In response, NSCC stated, and to which the commenter agreed,²⁰ that past events may not be adequate indicators of future risks when calculating its margin requirements, particularly in light of recent financial market disruptions, changing trading patterns, and new trading technologies.²¹ Additionally, by allowing the ID Offset, NSCC maintains that its current Clearing Fund calculation fails to account for the risk that NSCC will not be able to settle pending ID trades, and that therefore the calculation should be adjusted to eliminate this known risk, irrespective of whether the current margin has been sufficient.²²

The commenter argues that agency broker-dealers are less risky than Members engaged in proprietary trading for a number of reasons, including that agency broker-dealers do not trade on margin, cannot assume short positions, and cannot write options.²³ As a result, the

¹⁸ See First Lek Letter, supra note 5.

¹⁹ Id.

²⁰ See Second Lek Letter, supra note 5 (“We... agree that NSCC should not necessarily rely on past events as indicators of future risks and that high frequency trading and computerized algorithms have introduced additional risk into the market.”).

²¹ See First NSCC Response, supra note 6.

²² Id.

²³ See First Lek Letter, supra note 5.

commenter argues that agency broker-dealers should not be required to meet the same margin requirements as Members engaged in proprietary trading.²⁴

NSCC responds that agency broker-dealer firms, along with other firms, are trading in greater volume and frequency and are employing riskier trading techniques, like high frequency trading, than they have historically.²⁵ As a result, NSCC believes that all firms, including agency broker-dealers, present a greater risk of failure now than they have historically.²⁶

Citing the requirement in Section 17A(b)(3)(C) of the Act that the rules of a registered clearing agency should assure a fair representation of its members and participants in the selection of its directors and administration of its affairs, the commenter suggests that the Depository Trust and Clearing Corporation (“DTCC”)²⁷ Board may not fairly represent NSCC’s independent, agency broker-dealer Members, given that there is not one representative on the board from a traditional, non-bank affiliated brokerage firm; although, the commenter notes that it is not suggesting that the DTCC Board’s composition is a direct violation of 17A(b)(3)(C) of the Act.²⁸ As discussed below, NSCC has noted that it took various steps to discuss the proposal with its Members and seek input from Members.

²⁴ Id.

²⁵ See First NSCC Response, supra note 6. NSCC noted that a technology-related trading disruption that occurred in August 2012 was generated by an agency broker-dealer. Id.

²⁶ Id.

²⁷ NSCC is a wholly owned subsidiary of DTCC. About DTCC: NSCC, <http://dtcc.com/about/subs/nscc.php> (last visited Apr. 2, 2013).

²⁸ See First Lek Letter, supra note 5 (“[W]e are not suggesting that the Board’s current makeup directly violates [Section 17A(b)(3)(C) of the Exchange Act]....”); see also 15 U.S.C. 78q-1(b)(3)(C).

The commenter argues that the proposal has a disparate, negative impact on agency broker-dealers not only because such firms are less risky and, therefore, should not require as much margin, as discussed above, but also because the elimination of the ID Offset will likely increase Clearing Fund margin requirements, increases that independent broker-dealers (i.e., non-bank affiliated firms) may be unable to meet due to funding restraints, which may force such broker-dealers out of business, possibly reducing competition in the industry. The commenter has also stated that the proposal may have a negative impact on customers of such broker-dealers.²⁹

NSCC responded that the elimination of the ID Offset is equally applied to its Members, and that the ID Offset provides an unfair and disproportionate advantage currently enjoyed by Members who have ID transactions to offset; therefore, the proposal actually “levels the playing field,” with respect to calculating the margin collected for the Clearing Fund.³⁰ Additionally, NSCC acknowledges that the proposal to eliminate ID Offsets will likely increase the Clearing Fund requirements of certain Members.³¹ However, to mitigate that effect, NSCC explains that it performed an impact study of the proposal, shared the results of the study with impacted Members, and provided opportunities for those Members to discuss, prepare for, and further mitigate the impact, most specifically through a working group that, ultimately, developed an 18-month implementation timeframe, as outlined in the notice of the Proposed Rule Change.³²

²⁹ See Lek Letters, supra note 5.

³⁰ See First NSCC Response, supra note 6.

³¹ See NSCC Responses, supra note 6.

³² See First NSCC Response, supra note 6; see also Release No. 34-68549 (Dec. 28, 2012), 78 FR 792 (Jan. 4, 2013).

NSCC has also noted that NSCC Relationship Management and Enterprise Risk Management staff met with Members that would have experienced a change to their clearing fund requirement of greater than 25%, and other impacted Members were invited to contact their NSCC Relationship Managers to schedule meetings with NSCC staff. Furthermore, NSCC notes that Members who are unable to meet its Clearing Fund requirements are not necessarily forced out of business; rather, such firms could choose to clear their transactions through Members who continue to meet the requirements, as some agency broker-dealers currently do.³³ Finally, NSCC argues that given the important risk mitigating benefits of eliminating the ID Offset, NSCC believes the possible, unintended impact on competition should not be considered unreasonable or inappropriate. NSCC also has stated that the rule change will improve the safety and soundness of the U.S. capital markets, generally.³⁴

The commenter states that a viable alternative to the proposal to eliminate the ID Offset exists, in that NSCC could serve as a central counterparty (“CCP”) for ID transactions (“CCP Alternative”),³⁵ as it does for other transactions.³⁶ According to the commenter, this would alleviate NSCC’s concern that it may not be able to close out defaulting member trades for which there is a corresponding ID transaction that will settle at DTC with the corresponding ID transaction.³⁷ Furthermore, the commenter claims that NSCC staff believes that the CCP

³³ See First NSCC Response, supra note 6.

³⁴ See First NSCC Response, supra note 6.

³⁵ See Second Lek Letter, supra note 5.

³⁶ Among other things, NSCC provides CCP services and guarantees completion for certain transactions, but not ID transactions. See About DTCC: NSCC, supra note 27.

³⁷ See Lek Letters, supra note 5.

Alternative is viable and would satisfy NSCC concerns with regard to ID Offsets, but it is not supported by NSCC's senior management, who may have ulterior motives in seeing ID Offsets eliminated.³⁸

NSCC counters, generally, that alternatives to the proposal were explored, particularly through the working group mentioned above, but no viable options exist.³⁹ More specifically, NSCC argues that the CCP Alternative is not practical because the institutional counterparties to ID trades are not NSCC members, and thus NSCC would have to voluntarily guarantee uncollateralized ID trades without collecting margin to insulate NSCC from a default of a counterparty, which would not resolve the market risk that ID Offsets present and NSCC seeks to eliminate with its proposal.⁴⁰ Additionally, even if the CCP Alternative were to eliminate the ID Offset market risk, NSCC claims that implementing the CCP Alternative would require a significant change to the current securities market structure.⁴¹ Finally, NSCC asserts that the CCP Alternative is not viable.⁴²

IV. Discussion

In its assessment of the Proposed Rule Change for consistency with the Act, the Commission carefully considered the comments and responses it received and the information

³⁸ See Second Lek Letter, supra note 5.

³⁹ See First NSCC Response, supra note 6.

⁴⁰ See Second NSCC Response, supra note 6 (“The [CCP Alternative] would require the buy-side of the market to contractually agree to settle its transactions at NSCC, whereby NSCC would essentially provide a central counterparty guarantee to the buy-side of those trades on an uncollateralized basis, without collecting margin that would protect it and its membership from the default of those buy-side parties.”).

⁴¹ Id.

⁴² Id.

provided in the Proposed Rule Change itself. After an extended review, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Act and the applicable rules and regulations thereunder, as discussed below.⁴³

Section 17A(b)(3)(F) of the Act requires that, among other things, “[t]he rules of the clearing agency are designed to promote the prompt and accurate clearance and settlement of securities transactions and... to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.”⁴⁴

As a CCP, NSCC occupies an important role in the securities settlement system by interposing itself between counterparties to financial transactions, thereby reducing certain risks faced by Members and contributing to global financial stability. In this role, however, NSCC is necessarily subject to certain risks in the event of the default of a Member.

Here, NSCC’s proposal to eliminate the ID Offset, as described above, is designed to help mitigate the risk that NSCC will be under-collateralized if it ceases to act for a defaulting Member and is unable to complete the offsetting ID transactions in the time currently contemplated by its Clearing Fund calculation. As such, the Commission believes that NSCC’s proposal to eliminate ID Offsets should help further promote the prompt and accurate clearance and settlement of securities transactions, and assure the safeguarding of securities and funds for which NSCC is responsible.

Furthermore, Commission Rule 17Ad-22(b)(1) regarding measurement and management of credit exposure,⁴⁵ adopted as part of the Clearing Agency Standards,⁴⁶ requires a CCP to

⁴³ In approving the Proposed Rule Change, the Commission considered the proposal’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁴⁴ 15 U.S.C. 78q-1(b)(3)(F).

⁴⁵ 17 CFR 240.17Ad-22(b)(1).

establish, implement, maintain and enforce written policies and procedures reasonably designed to measure its credit exposures to its participants at least once a day and limit its exposures to potential losses from defaults by its participants under normal market conditions so that the operations of the CCP would not be disrupted and non-defaulting participants would not be exposed to losses that they cannot anticipate or control.⁴⁷

Here, as described in detail above, NSCC's proposal to eliminate ID Offsets should help to limit its exposure, as well as non-defaulting members' exposure, to potential losses from a defaulting Member, while minimizing disruption to its CCP operations, by more accurately reflecting its risks in the calculation of its Clearing Fund margin. As discussed above, NSCC's calculation of its Clearing Fund margin will be more accurate in that it will not include an assumption of trade closeouts following a Member insolvency with respect to trades for which there is a corresponding ID transaction.

Finally, Commission Rules 17Ad-22(d)(4) regarding identification and mitigation of operational risk,⁴⁸ and 17Ad-22(d)(11) regarding default procedures,⁴⁹ also both adopted as part of the Clearing Agency Standards,⁵⁰ require that registered clearing agencies "establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable: ...Identify sources of operational risk and minimize them through the development of

⁴⁶ Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

⁴⁷ 17 CFR 240.17Ad-22(b)(1).

⁴⁸ 17 CFR 240.17Ad-22(d)(4).

⁴⁹ 17 CFR 240.17Ad-22(d)(11).

⁵⁰ Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

appropriate systems, controls, and procedures...”,⁵¹ and “...establish default procedures that ensure that the clearing agency can take timely action to contain losses and liquidity pressures and to continue meeting its obligations in the event of a participant default,”⁵² respectively.

Here, as described in detail above, the elimination of ID Offsets should help NSCC better minimize settlement risks and better ensure that it can contain losses and liquidity pressures, and meet its obligations in a timely fashion, by more accurately accounting for those risks in its Clearing Fund calculation that is designed to satisfy potential losses in a timely manner.

After specifically considering each of the commenter’s claims, as discussed below, the Commission maintains its belief that the Proposed Rule Change is consistent with the requirements of the Act and the applicable rules and regulations thereunder, as discussed above.

The Commission understands that institutional counterparties to ID transactions are not NSCC members and, therefore, maintain no privity of contract with NSCC regarding ID trades.⁵³ Since there is no contractual obligation with NSCC that ID transactions be completed, the assumption that NSCC may not be able to close out defaulting member trades for which there is a corresponding ID transaction that will settle at DTC is correct.

Given the risk that NSCC may not be able to settle ID trades, as discussed above, NSCC may be collecting insufficient margin, regardless of past needs, potentially leaving it under-collateralized if a Member defaults. The Commission believes that the Proposed Rule Change furthers NSCC’s compliance with the requirements of Section 17A(b)(3)(F)⁵⁴ of the Act, as well

⁵¹ 17 CFR 240.17Ad-22(d)(4).

⁵² 17 CFR 240.17Ad-22(d)(11).

⁵³ See NSCC Responses, supra note 6, and see Second Lek Letter, supra note 5.

⁵⁴ 15 U.S.C. 78q-1(b)(3)(F).

as Rules 17Ad-22(b)(1),⁵⁵ 17Ad-22(d)(4),⁵⁶ and 17Ad-22(d)(11),⁵⁷ as described above.

The Commission believes that agency broker-dealer firms are not riskless and those Members could present serious risks to NSCC, as demonstrated by the significant market events involving an NSCC Member in August 2012, which both NSCC and the commenter acknowledge.⁵⁸ Therefore, as noted above, the Commission believes that the elimination of the ID Offset, which would mitigate a known risk, as discussed above, furthers NSCC's compliance with Section 17A(b)(3)(F) of the Act,⁵⁹ as well as Rules 17Ad-22(b)(1),⁶⁰ 17Ad-22(d)(4),⁶¹ and 17Ad-22(d)(11),⁶² as discussed above.

Though the commenter did not suggest that DTCC Board's composition is a direct violation of 17A(b)(3)(C) of the Act,⁶³ the Commission notes that fair representation can be achieved through multiple channels, including exposing Members to proposed rule changes in order for Members to have an opportunity to express their particular needs or concerns.⁶⁴ Here,

⁵⁵ 17 CFR 240.17Ad-22(b)(1).

⁵⁶ 17 CFR 240.17Ad-22(d)(4).

⁵⁷ 17 CFR 240.17Ad-22(d)(11).

⁵⁸ See First NSCC Response, supra note 6, and see Second Lek Letter, supra note 5.

⁵⁹ 15 U.S.C. 78q-1(b)(3)(F).

⁶⁰ 17 CFR 240.17Ad-22(b)(1).

⁶¹ 17 CFR 240.17Ad-22(d)(4).

⁶² 17 CFR 240.17Ad-22(d)(11).

⁶³ See First Lek Letter, supra note 5 (“[W]e are not suggesting that the Board’s current makeup directly violations [Section 17A(b)(3)(C) of the Exchange Act]....”), and see 15 U.S.C. 78q-1(b)(3)(C).

⁶⁴ See Release No. 34-16900 (June 17, 1980), 45 FR 41920 (June 23, 1980).

before filing the proposal with the Commission, where the proposal became available for public comment,⁶⁵ NSCC: notified its Members of its intent to file; completed a study on the proposal's impact; provided impacted Members with direct feedback; convened a working group of impacted Members to address ways of mitigating the proposals impact; and incorporated an 18-month implementation schedule into the proposal – a direct result of the working group.⁶⁶ The Commission believes that in the circumstances of the Proposed Rule Change, these processes have provided NSCC Members adequate opportunity to fairly represent themselves in the development of the proposal.

By eliminating the ID Offset, which the Commission believes applies universally to all Members and which would be consistent with Section 17A(b)(3)(F) of the Act,⁶⁷ as well as Rules 17Ad-22(b)(1),⁶⁸ 17Ad-22(d)(4),⁶⁹ and 17Ad-22(d)(11),⁷⁰ as discussed above, there could be a resulting increase in NSCC's Clearing Fund requirement, as both NSCC and the commenter acknowledge,⁷¹ which may have a detrimental impact on certain Members and possibly competition overall. However, the Commission believes NSCC has taken adequate steps to engage Members impacted by the increase and mitigate the effect of the increase, as demonstrated by the impact studies and the working group that NSCC convened that resulted in

⁶⁵ Release No. 34-68549 (Dec. 28, 2012), 78 FR 792 (Jan. 4, 2013).

⁶⁶ See NSCC Reponses, supra note 6.

⁶⁷ 15 U.S.C. 78q-1(b)(3)(F).

⁶⁸ 17 CFR 240.17Ad-22(b)(1).

⁶⁹ 17 CFR 240.17Ad-22(d)(4).

⁷⁰ 17 CFR 240.17Ad-22(d)(11).

⁷¹ See First Lek Letter, supra note 5, and see NSCC Responses, supra note 6.

the 18-month implementation scheduled.⁷² Additionally, the Commission believes that while there could be a redistribution of business for agency broker-dealers,⁷³ agency broker-dealers impacted by the Proposed Rule Change could seek alternative arrangements, such as moving the applicable portion of the impacted business to or through a continuing Member, as NSCC suggests and as is currently done by some firms.⁷⁴ The Commission also acknowledges that while the proposal may have an effect on customers, a more accurate reflection of risks in the calculation of Clearing Fund margin, however, could benefit customers through reducing risks to NSCC.

NSCC has not proposed the CCP Alternative discussed above as a proposed rule change, and thus the CCP Alternative is outside the scope of this Proposed Rule Change. Nonetheless, in considering the consistency of the Proposed Rule Change with the requirements of the Act and the applicable rules and regulations thereunder, the Commission acknowledges that the CCP Alternative does not appear practical for NSCC at the current time because, as NSCC has pointed out, the institutional counterparties to ID trades are not NSCC members, and thus, absent new membership for these counterparties, NSCC would have to voluntarily guarantee uncollateralized ID trades without collecting margin to insulate NSCC from a default of a counterparty, which would not resolve the market risk that ID Offsets present and NSCC seeks to eliminate through the Proposed Rule Change. Furthermore, even if the CCP Alternative did resolve the market risk that the Proposed Rule Change is intended to address, the CCP

⁷² See NSCC Responses, supra note 6.

⁷³ See Lek Letters, supra note 5.

⁷⁴ See First NSCC response, supra note 6. The Commission notes that it did not receive comments from any other firms potentially impacted by the Proposed Rule Change.

Alternative does not appear to be an immediately viable option for NSCC, as it would likely require potentially complicated changes to the current clearance and settlement structure.⁷⁵

V. Conclusion

On the basis of the foregoing, the Commission finds the Proposed Rule Change consistent with the requirements of the Act, particularly with the requirements of Section 17A of the Act,⁷⁶ and the rules and regulations thereunder.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁷⁷ that the proposed rule change SR-NSCC-2012-10 be and hereby is APPROVED as of the date of this order or the date of the “Notice of Filing No Objection to Advance Notice Filing to Eliminate the Offset of [NSCC’s] Obligations with Institutional Delivery Transactions that Settle at The Depository Trust Company for the Purpose of Calculating Its Clearing Fund Under Procedure XV of Its Rules & Procedures” (File No. SR-NSCC-2012-810),⁷⁸ whichever is later.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.⁷⁹

Kevin M. O’Neill
Deputy Secretary

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⁷⁵ See Second NSCC Response, supra note 6.

⁷⁶ 15 U.S.C. 78q-1.

⁷⁷ 15 U.S.C. 78s(b)(2).

⁷⁸ Release No. 34-69301

⁷⁹ 17 CFR 200.30-3(a)(12).