

SUPPORTING STATEMENT
for the Paperwork Reduction Act Information Collection Submission for
Rule 17Ab2-2-Determinations affecting covered clearing agencies
OMB Control Number: 3235-0728

A. JUSTIFICATION

1. Information Collection Necessity

Legal and Administrative Requirements

i. Title VII of Dodd-Frank Act

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) added new provisions to the Securities Exchange Act of 1934 (“Exchange Act”) that require clearing agencies that clear security-based swaps (“security-based swap clearing agencies”) to register with the Securities and Exchange Commission (“Commission”) and require the Commission to adopt rules with respect to security-based swap clearing agencies.

Specifically, the Dodd-Frank Act added new Section 17A(j) of the Exchange Act, which required the Commission to adopt rules governing security-based swap clearing agencies. The Dodd-Frank Act also added Section 17A(i) of the Exchange Act, which provides the Commission with authority to promulgate rules that establish standards for security-based swap clearing agencies. Compliance with any such rules is a prerequisite to the registration of a clearing agency with the Commission and is also a condition to the maintenance of that security-based swap clearing agency’s continued registration.

ii. Payment, Clearing, and Settlement Supervision Act of 2010

Title VIII of the Dodd-Frank Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (“Clearing Supervision Act”), established an enhanced supervisory and risk control system for systemically important clearing agencies and other financial market utilities (“FMUs”). Among other things, the Clearing Supervision Act provided that the Commission may prescribe regulations containing risk management standards, taking into consideration relevant international standards and existing prudential requirements, for any designated clearing entities it regulates. In July, 2011, the Financial Stability Oversight Council (“FSOC”) published a final rule concerning its authority to designate FMUs as systemically important¹ and on July 18, 2012, the FSOC designated as systemically important eight FMUs, including six registered clearing agencies.²

¹ See 76 FR 44763 (July 24, 2011).

² See Press Release, Financial Stability Oversight Council, Financial Stability Oversight Council Makes First Designations in Effort to Protect Against Future Financial Crises (July 18, 2012), available at: <https://home.treasury.gov/news/press-releases/tg1645>.

Congress recognized in the Clearing Supervision Act that the operation of multilateral payment, clearing or settlement activities may reduce risks for clearing participants and the broader financial system, while at the same time creating new risks that require multilateral payment, clearing or settlement activities to be well-designed and operated in a safe and sound manner. The Clearing Supervision Act is designed, in part, to provide a regulatory framework to help address such risk management issues, which is generally consistent with the Exchange Act requirement that clearing agencies be organized in a manner so as to facilitate prompt and accurate clearance and settlement, safeguard securities and funds and protect investors.

iii. Section 17A of Exchange Act

In addition to the authority provided to the Commission under Titles VII and VIII of the Dodd-Frank Act, the Commission has authority over clearing agencies under the Exchange Act. For example, entities are required to register with the Commission pursuant to Section 17A of the Exchange Act and Rule 17Ab2-1 prior to performing the functions of a clearing agency. Under this registration system, the Commission is not permitted to grant registration unless it determines that the rules and operations of the clearing agency meet the standards set forth in Section 17A. Specifically, Sections 17A(b)(3)(A)-(I) identify determinations that the Commission must make about the rules and structure of a clearing agency prior to granting registration. If a clearing agency is granted registration, the Commission oversees the clearing agency to facilitate compliance with the Exchange Act through the rule filing process for self-regulatory organizations (“SROs”) and through on-site examinations by Commission staff. Section 17A also gives the Commission authority to adopt rules for clearing agencies as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act and prohibits a registered clearing agency from engaging in any activity in contravention of these rules and regulations.

iv. Exchange Act Rule 17Ad-22

In 2012, the Commission adopted Rule 17Ad-22 under the Exchange Act to strengthen the substantive regulation of registered clearing agencies and promote their safe and reliable operation.³ In 2016, the Commission also took an important step in the development of its regulatory framework for registered clearing agencies by adding new Rule 17Ad-22(e),⁴ which strengthened the existing framework by establishing requirements for registered clearing agencies that meet the definition of a “covered clearing agency.”⁵

³ See 17 CFR 240.17Ad-22; Exchange Act Release No. 68080 (Oct. 22, 2012), 77 FR 66219, 66225–26 (Nov. 2, 2012).

⁴ Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786, 70902–05 (Oct. 13, 2016) (“CCA Standards adopting release”).

⁵ Rule 17Ad-22(e) includes requirements for covered clearing agencies intended to address the activity and risks that their size, operation, and importance pose to the U.S. securities markets, the risks inherent in the products they clear, and the goals of both the Exchange Act and the Dodd-Frank Act. Of particular note, the requirements in Rule 17Ad-22(e) that address

Under the version of Exchange Act Rule 17Ad-22(a)(5) adopted by the Commission in 2016, the term “covered clearing agency” meant a registered clearing agency that (i) has been designated as systemically important by FSOC and for which the Commission is the supervisory agency under the Clearing Supervision Act (“designated clearing agency”), or (ii) provides central counterparty services for security-based swaps or is involved in activities the Commission determines to have a more complex risk profile (“complex risk profile clearing agency”), unless the Commodity Futures Trading Commission (“CFTC”) is the supervisory agency under the Clearing Supervision Act.⁶ In 2020 the Commission amended the definition of a “covered clearing agency” under Rule 17Ad-22(a)(5) to mean a registered clearing agency that provides the services of a central counterparty or a central securities depository.⁷

Exchange Act Rule 17Ab2-2

When the Commission adopted the 2016 amendments to Exchange Act Rule 17Ad-22, it also adopted Rule 17Ab2-2 under the Exchange Act, which establishes procedures for the Commission to make a determination, either of its own initiative or upon application by any clearing agency or member of a clearing agency, whether a covered clearing agency is systemically important in multiple jurisdictions and procedures to determine, if the Commission deems appropriate, whether any of the activities of a clearing agency providing central counterparty services, in addition to clearing agencies registered with the Commission for the purpose of clearing security-based swaps, have a more complex risk profile. In addition, Rule 17Ab2-2 establishes procedures for the Commission to determine whether to rescind any such determination previously made by the Commission.

While Exchange Act Rule 17Ad-22(a)(5) no longer provides that a “covered clearing agency” means a registered clearing agency that (i) has been designated as systemically important by FSOC and for which the Commission is the supervisory agency under the Clearing Supervision Act (“designated clearing agency”), or (ii) provides central counterparty services for security-based swaps or is involved in activities the Commission determines to have a more complex risk profile, certain requirements under Exchange Act Rule 17Ad-22(e) continue to be applicable only to such clearing agencies. For example, under Rule 17Ad-22(e)(4)(ii), a covered clearing agency providing central counterparty services that is either designated as systemically important in multiple jurisdictions, or involved in activities with a more complex risk profile

policies and procedures for transparency, governance, financial risk management, and operational risk management help ensure that covered clearing agencies are robust and stable. CCA Standards adopting release at 70793, 70801–10, 70837–38.

⁶ See CCA Standards adopting release, *supra* note 4, at 81 FR 70902 (providing rule text for 17 CFR 240.17Ad-22(a)(5)).

⁷ Exchange Act Release No. 34-88616 (April 9, 2020), 85 FR 28853, 28855 (May 14, 2020).

must maintain additional financial resources that other covered clearing agencies are not required to maintain.⁸

Under Exchange Act Rule 17Ad-22(a)(4), a clearing agency involved in activities with a more complex risk profile means a clearing agency registered with the Commission under Section 17A of the Act that: (i) provides central counterparty services for security-based swaps; (ii) has been determined by the Commission to be involved in activities with a more complex risk profile at the time of its initial registration; or (iii) is subsequently determined by the Commission to be involved in activities with a more complex risk profile pursuant to Exchange Act Rule 17Ab2-2(b).⁹ Similarly, under Rule 17Ad-22(a)(18), “systemically important in multiple jurisdictions” means, with respect to a covered clearing agency, a covered clearing agency that has been determined by the Commission to be systemically important in more than one jurisdiction pursuant to Exchange Act Rule 17Ab2-2.¹⁰

Exchange Act Rule 17Ab2-2 is a necessary tool to provide transparency in governing determinations regarding a clearing agency’s status as systemically important in multiple jurisdictions or being involved with activities with a more complex risk profile, and additionally, providing for a process to rescind any determinations made pursuant to the Rule. Exchange Act Rule 17Ab2-2 also provides the Commission with the flexibility necessary to achieve the goals of Section 17A of the Exchange Act, Title VII of the Dodd-Frank Act, and the Clearing Supervision Act, in light of the ever-changing nature of the U.S. securities markets, including the nature and character of the participants in the market and the products required to be cleared and settled.

There is a collection of information associated with Exchange Act Rule 17Ab2-2. The information collected is necessary to carry out the mandates of the Exchange Act, as amended by the Dodd-Frank Act.

The statutory basis for proposing Exchange Act Rule 17Ab2-2 is as follows: Exchange Act Section 17A, 15 U.S.C. 78q-1, and Section 805 of the Clearing Supervision Act, 12 U.S.C. 5464.

⁸ 17 CFR 240.17Ad-22(e)(4)(ii). In addition to the requirements under Exchange Act Rule 17Ad-22(e)(4)(ii), covered clearing agencies that provide centrally counterparty services that are involved in activities with a higher risk profile are subject to heightened requirements under Rules 17Ad-22(e)(7)(x) and (e)(4), and covered clearing agencies that provide central counterparty services that have been designated as systemically important in multiple jurisdictions are subject to these same heightened requirements, as well as additional requirements under Rule 17Ad-22(e)(14). 17 CFR 240.17Ad-22(e)(4)(ii), (e)(7)(x), (e)(14).

⁹ 17 CFR 240.17Ad-22(a)(4).

¹⁰ 17 CFR 240.17Ad-22(a)(18).

2. Information Collection Purpose and Use

Exchange Act Rule 17Ab2-2 establishes a process for Commission determinations regarding whether a covered clearing agency is systemically important in multiple jurisdictions and whether a clearing agency providing central counterparty services has a more complex risk profile. In addition, Exchange Act Rule 17Ab2-2 establishes procedures for the Commission to determine whether to rescind any such determination previously made by the Commission. Because determinations made by the Commission pursuant to Exchange Act Rule 17Ab2-2 may be made upon the request of a clearing agency, respondent clearing agencies would have the burden of preparing such requests for submission to the Commission. The purpose of the information collection is to enable determinations by the Commission regarding the status of a covered clearing agency or clearing agency providing central counterparty services, as described above. Upon receipt of such a request, the Commission would use the information provided in the submission to make a determination under Exchange Act Rule 17Ab2-2 regarding either (i) whether a covered clearing agency as systemically important in multiple jurisdictions, (ii) whether a clearing agency that provides central counterparty services or clearing agency that is registered with the Commission for the purpose of clearing security-based swaps, has a more complex risk profile; or (iii) whether to rescind any such determination previously made by the Commission.

3. Consideration Given to Information Technology

Exchange Act Rule 17Ab2-2 does not specify the manner in which a registered clearing agency, or a member of a registered clearing agency, is required to submit a request for determination as to the status of the registrant as a covered clearing agency. While the Commission would accept such a request for determination as a paper (hardcopy) document, the Commission believes that clearing agencies would utilize various computer information systems to identify and compile the necessary information and could submit such an information and request for a determination electronically.

4. Duplication

Section 712(a)(2) of the Dodd-Frank Act provides that, before commencing any rulemaking regarding, among other things, clearing agencies with regard to security-based swaps, the Commission must consult and coordinate with CFTC and other prudential regulators for the purposes of assuring regulatory consistency and comparability, to the extent possible. The Commission staff and the CFTC staff have consulted and coordinated with one another regarding their respective Commissions' rules regarding clearing agencies as mandated by the Dodd-Frank Act. The Commission staff has also consulted and coordinated with other prudential regulators. The Rule does not duplicate information required to be collected elsewhere.

5. Effect on Small Entities

Exchange Act Rule 17Ab2-2 does not affect any small entities.

6. Consequences of Not Conducting Collection

The Dodd-Frank Act enacted sweeping reforms in the financial system, including reforms regarding FMUs such as clearing agencies. It also charged the Commission with significant duties in carrying out these reforms. The consequences of not conducting the collection of information pursuant to the Rule would significantly impair the Commission's ability to carry out its statutory obligations under the Exchange Act, as amended by Titles VII and VIII of the Dodd-Frank Act.

7. Inconsistencies with Guidelines in 5 CFR 1320.5(d)(2)

There are no special circumstances. This collection is consistent with the general information collection guidelines imposed for public protection as set forth in 5 CFR 1320.5(d)(2).

8. Consultations Outside the Agency

The required Federal Register notice with a 60-day comment period soliciting comments on this collection of information was published. No public comments were received.

9. Payment or Gift

Not applicable.

10. Confidentiality

The Commission staff does not anticipate that it will receive confidential information in response to this collection of information. To the extent that the Commission receives confidential information pursuant to the collection of information associated with the Rule, the Commission expects such information would be kept confidential, subject to the provisions of applicable law.¹¹

11. Sensitive Questions

The Information Collection does not collect information about individuals but rather only business contact information. Based on the business practice of handling the information collection, the collection does not constitute a system of records under the Privacy Act and does not require a PIA per the E-Government Act of 2002.

¹¹ 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).

12. Information Collection Burden

Commission staff believes that Rule 17Ab2-2 will impose a PRA burden on registered clearing agencies that seek a determination from the Commission regarding the covered clearing agency's status as systemically important in multiple jurisdictions. Commission staff estimates that two registered clearing agencies or their members on their behalf will apply for a Commission determination, or may be subject to a Commission-initiated determination, regarding whether a registered clearing agency is involved in activities with a more complex risk profile or whether a covered clearing agency is systemically important in multiple jurisdictions.

Commission staff estimates that respondent clearing agencies would incur a one-time burden of approximately 20 hours to draft and review a determination request submitted to the Commission.¹²

In summary, the Commission staff estimates that, over a three-year period, the total reporting burden to comply with Rule 17Ab2-2 would be 20 hours, or 6.66 hours per year when annualized over three years.¹³ The reporting burden per respondent would be approximately 10 hours, or approximately 3.33 hours per year when annualized over three years.¹⁴

13. Costs to Respondents

Registered clearing agencies seeking a determination from the Commission regarding the clearing agency's status as systemically important in multiple jurisdictions may require the agency to hire outside counsel. In such instances where a clearing agency seeks the assistance of outside counsel, Commission staff estimates that Rule 17Ab2-2 would impose a one-time cost on all respondent clearing agencies. Commission staff estimates this one-time cost on all respondents would total \$4,000.

In summary, Commission staff estimates that should respondent clearing agencies decide to hire outside counsel to seek a determination from the Commission in accordance with Rule 17Ab2-2, the one-time cost associated with hiring outside counsel would be approximately \$4,000 or \$1,333.33 per year when annualized over three years.¹⁵ The total

¹² This figure was calculated as follows: ((Assistant General Counsel for 2 hours) + (Staff Attorney for 3 hours) + (Outside Counsel for 5 hours))) = 10 hours x 2 respondent clearing agencies = 20 hours.

¹³ 2 respondents * (10 hours (Year 1 burden) + 0 hours (Year 2 burden) + 0 hours (Year 3 burden) = 20 hours (estimated total burden over 3 years) ÷ 3 years = 6.66 hours.

¹⁴ 20 hours (total burden over three years) ÷ 2 respondents = 10 hours (estimated total burden over 3 years) ÷ 3 years = 3.33 hours.

¹⁵ This figure was calculated as follows: (Outside Counsel for 5 hours at \$400 per hour) x 2 registered clearing agencies = \$4,000 ÷ 3 years = \$1,333.33.

labor cost per respondent would be approximately \$2,000 or \$666.67 when annualized over three years.¹⁶

14. Costs to Federal Government

Not applicable.

15. Changes in Burden

None.

16. Information Planned for Statistical Purposes

Not applicable.

17. Display of OMB Approval Date

The Commission is not seeking approval to omit the OMB approval expiration date.

18. Exceptions to Certification for Paperwork Reduction Act Submissions

This collection complies with the requirements in 5 CFR 1320.9.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

Not applicable. The collection of information does not employ statistical methods.

¹⁶ \$4,000 (total labor cost over three years) ÷ 2 respondents = \$2,000 ÷ 3 years = \$666.67.