

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. Title VIII of the Dodd-Frank Act

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. The Financial Stability Oversight Council (“FSOC”) published in July of 2011 a final rule concerning its authority to designate FMUs as systemically important,¹ and a year later, 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 thereunder before performing the functions of a clearing agency. 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 before 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 further developed the regulatory framework for registered clearing agencies by adding new Rule 17ad-22(e), which strengthened the existing framework by establishing requirements for registered clearing agencies that meet the definition of a “covered clearing agency.”⁴

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”). 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 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.

As originally adopted in 2016, “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.⁵ In 2020, the Commission amended the definition of a “covered clearing agency” under Rule 17ad-22(a) to mean a registered clearing agency that provides the services of a central counterparty or a central securities depository.⁶

Exchange Act Rule 17ab2-2

When adopting Rule 17ad-22(e) – standards for covered clearing agencies, the Commission also adopted Rule 17ab2-2, which establishes procedures for making determinations affecting covered clearing agencies in certain defined circumstances.⁷ Exchange Act Rule 17ab2-2(a) 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. Exchange Act Rule 17ab2-2(b) establishes 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. Exchange Act Rule 17ab2-2(c) provides a procedure for the Commission to determine, either of its own initiative or upon application by any clearing agency or member of a clearing agency, whether to rescind any such determinations previously made by the Commission.⁸

Under the amended definition of “covered clearing agency,” a determination by the Commission under Rule 17ab2-2 no longer can affect a registered clearing agency’s status as a covered clearing agency. However, a determination under Rule 17ab2-2 would continue to concern a covered clearing agency under certain requirements of Rule 17ad-22(e). 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

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

⁶ Exchange Act Release No. 34-88616 (April 9, 2020), 85 FR 28853, 28855 (May 14, 2020).

⁷ See 17 CFR 240.17ab2-2; CCA Standards adopting release, supra note 4, 81 FR at 70848.

⁸ A clearing agency submitting an application to the Commission for a determination or rescission of a determination under Rule 17ab2-2 would be required to keep and preserve a copy of that application as a record under Rule 17a-1 of the Exchange Act.

activities with a more complex risk profile must maintain additional financial resources that other covered clearing agencies are not required to maintain.⁹

Determinations made under Rule 17ab2-2 also are relevant to definitions in Rule 17ad-22. Under Exchange Act Rule 17ad-22(a), 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).¹⁰ Similarly, under Rule 17ad-22(a), “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 17ab2-2.¹¹

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.

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

⁹ 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).

¹⁰ 17 CFR 240.17ad-22(a)(4).

¹¹ 17 CFR 240.17ad-22(a)(18).

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.

A clearing agency or one of its members may submit an application to the Commission to make a determination regarding systemic importance in multiple jurisdictions or rescission of any determination previously made by the Commission under Rule 17ab2-2. A respondent would have the burden of preparing such application for submission to the Commission. The purpose of the information collection is to enable determinations by the Commission. Upon receipt of such an application, the Commission would use the information provided to make a determination under Rule 17ab2-2.

3. Consideration Given to Information Technology

Exchange Act Rule 17ab2-2 does not specify the manner in which a respondent is required to submit an application for determination. While the Commission would accept such a request for determination as a paper (hardcopy) document, the Commission believes that respondents 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 for 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. Rule 17ab2-2 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 Rule 17ab2-2 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)

An application by clearing agency submitted to the Commission under Rule 17ab2-2 would be required to be kept and preserved by the clearing agency for no less than five years under recordkeeping obligations in Rule 17a-1 under the Exchange Act. This five-year period is required for any documents made by a clearing agency in the conduct of its self-regulatory activity.

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 Rule 17ab2-2, the Commission expects such information would be kept confidential, subject to the provisions of applicable law.¹²

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.

12. Information Collection Burden

Commission staff believes that Rule 17ab2-2 would impose a PRA burden on a clearing agency that applies for a determination from the Commission under the rule. Commission staff estimate that two respondent clearing agencies (or a member of a clearing agency) may submit an application for such a determination. Commission staff estimates that respondent clearing

¹² 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).

agency would incur a one-time burden of approximately 20 hours to draft and review a determination application submitted to the Commission.¹³

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.¹⁴ The reporting burden per respondent would be approximately 10 hours, or approximately 3.33 hours per year when annualized over three years.¹⁵

Rule	Burden Type	Number of Respondents	Number of Annual Responses Per Respondent	Time Per Response (Hours)	Total Burden Per Burden Type (Hours)
Rule 17ab2-2 Application	Initial Reporting	2	1	10	20
Total Aggregate Burden					20

13. Costs to Respondents

A respondent clearing agency seeking a determination from the Commission under Rule 17ab2-2 may require the respondent to hire outside counsel. In such instances where a respondent seeks the assistance of outside counsel, Commission staff estimates that Rule 17ab2-2 would impose a one-time cost on all respondents. Commission staff estimates this one-time cost on all respondents would total \$4,380.¹⁶

In summary, Commission staff estimates that should respondents 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

¹³ 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 respondents = 20 hours.

¹⁴ 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.

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

¹⁶ This figure was calculated as follows: (Outside Counsel for 5 hours at \$438 per hour) x 2 respondents = \$4,380.

\$4,380 or \$1,460 per year when annualized over three years.¹⁷ The total labor cost per respondent would be approximately \$2,190 or \$730 when annualized over three years.¹⁸

14. Costs to Federal Government

The SEC is in the process of revising its methodologies to estimate annualized costs to the Federal government for all its relevant collections of information. The SEC anticipates that future extensions of this collection of information will reflect the revised methodologies.

15. Changes in Burden

The increase in the annual cost estimate from \$666.67 to \$730 is from an inflation adjustment to the cost of hiring an outside counsel from 2022 to 2025. The estimated per hour cost of hiring an outside counsel was adjusted for inflation using the U.S. Bureau of Labor Statistics Consumer Price Index Inflation Calculator.

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.

¹⁷ This figure was calculated as follows: (Outside Counsel for 5 hours at \$2,190 per hour) x 2 respondents = \$4,380 ÷ 3 years = \$1,460.

¹⁸ \$4,380 (total labor cost over three years) ÷ 2 respondents = \$2,190 ÷ 3 years = \$730.