



October 28, 2022

By Electronic Delivery

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 205499-1090
rule-comments@sec.gov

Re: Clearing Agency Governance and Conflicts of Interest (File No. S7-21-22)

Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment in response to the release (“Proposing Release”) by the U.S. Securities and Exchange Commission (the “SEC” or “Commission”) proposing new Rule 17Ad-25 under the Securities Exchange Act of 1934 (“Exchange Act”).² The new rule is designed to help improve the governance of clearing agencies registered with the Commission (“registered clearing agencies”) by reducing the likelihood that conflicts of interest may influence the board of directors or equivalent governing body (“board”) of a registered clearing agency. The new rule would identify certain responsibilities of the board, increase transparency into board governance, and, more generally, be designed to improve the alignment of incentives among owners and participants of a registered clearing agency. In support of these objectives, the new rule would establish new requirements for board and committee composition, independent directors, management of conflicts of interest, and board oversight.

SIFMA supports the Commission’s efforts to enhance the regulatory framework for the governance of clearing agencies, particularly ones that are treated as “covered clearing agencies” under the SEC Rule 17Ab2-2. Covered clearing agencies and other central counterparties (“CCPs”) have become even more critical in the U.S. and global financial system after the Dodd-

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² See Exchange Act Release No. 95431 (August 8, 2022), 87 FR 51812 (August 23, 2022).

Frank Act and other international efforts. It is therefore crucial that the Commission and other regulators continue to foster improvements to the governance and overall regulatory framework for these critical market infrastructures to ensure that they continue to serve in a way that is designed to mitigate systemic risk.

I. General Comments on the Proposal

The unique features of covered clearing agencies as described by the Commission in the Proposing Release, considered together with the essential role (and risks) that they provide (and pose) to financial stability, makes effective risk governance of a clearing agency a critical policy goal. As the Commission notes in the Proposing Release, “the risk mutualizing and trade guaranty features provided by covered clearing agencies provide for the shift of the consequences of one party’s actions to another, binding disparate interests together in certain circumstances, such as a participant default,” and that “[t]hese features both affect how different stakeholders maximize their own self-interest and also distinguish the governance of a clearing agency from other corporate structures, such as those of other financial services companies or, more generally, publicly traded companies, who are unable to legally bind their customers with financial obligations that are theoretically uncapped.”³ These Commission observations underscore in a very direct way the need for improvements to covered clearing agency governance.

While we support the new rule, we would recommend that the SEC continue to work to coordinate with the Commodity Futures Trading Commission (“CFTC”) with regard to those jointly registered covered clearing agencies / derivatives clearing organizations (“DCOs”) that are also subject to the CFTC’s conflicts of interest and board composition rules, so that the treatment of these jointly registered entities, and indirectly, their participants, is consistent between the two regulators. As the Commission notes in the Proposing Release, certain proposed requirements in its rulemaking also are consistent with the requirements in the CFTC’s DCO regime, so coordination between the SEC and CFTC is critical to ensure consistent standards for such entities.⁴ As an overall matter, we continue to believe that coordination between the SEC and CFTC in this and other spaces leads to better regulatory outcomes through more consistency across the industry.

Lastly, we would encourage the SEC to consider the proposal as a new starting point involving further steps to enhance the regulatory framework for CCPs. Governance is a building block to the resilience of a CCP, and should be designed to ensure a CCP solicits, considers and addresses input from clearing members and end-users in decisions that materially affect the risk profile of the CCP. While the proposal is a good first step, there are several other important issues related to covered clearing agencies in which further regulatory action is warranted, including margin adequacy, transparency and CCP capital. We look forward to continuing to engage with the Commission and other regulators on these critically important topics.

³ See Proposing Release at 51822.

⁴ See DCO General Provisions and Core Principles, 85 FR 4800 (Jan. 27, 2020) (<https://www.cftc.gov/sites/default/files/2020/01/2020-01065a.pdf>).

II. Specific Comments on New Rule 17Ad-25

In new Rule 17Ad-25, the SEC includes new definitions establishing when a director on the board of a registered clearing agency is an independent director. While we do not have specific comments related to the proposed definitions, SIFMA supports the SEC's efforts to diversify the representation on, and increase the independence of, boards of registered clearing agencies to better facilitate representation of the views of participants and the range of customers and clients they serve. However, we urge the SEC not to take an overly prescriptive approach that could result in under-representation on a clearing agency's board of participants, who have critical market expertise. In this regard, registered clearing agencies under the SEC have historically functioned as industry utilities and it is extremely important that the market expertise of their participants continue to be brought to bear on their operations through, among other things, adequate representation on their boards. In the end, it is the participants who would bear substantially all of the losses associated with a failure of such a clearing agency. It is therefore important for them to participate in the CCP Governance process, prioritizing stability of financial markets in connection with potential conflicts of interests stemming from a fiduciary duty to the clearing agency.

New Rule 17Ad-25 also contains a requirement in paragraph (d) that registered clearing agencies establish one or more risk management committees to assist the board of directors in overseeing the risk management of the registered clearing agency. The provision also provides that the membership of each risk management committee(s) must be reconstituted on a regular basis and at all times include representatives from the owners and participants of the registered clearing agency. SIFMA supports this part of the rule and urges the Commission to adopt it. SIFMA members believe that it is critically important that registered clearing agencies' risk management practices continue to be a critical focus with adequate participant representation, and believe that the Commission's specific proposal in this regard will help formalize this structure and further foster consistent practices across such clearing agencies.

In addition, paragraph (j) of new Rule 17Ad-25 requires registered clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to solicit, consider and document its consideration of the views of participants and other relevant stakeholders regarding material developments in its governance and operations on a recurring basis. As the Commission notes in the Proposing Release, this would require registered clearing agencies to document their consideration of such viewpoints to help ensure a record exists of the viewpoints provided and that such clearing agencies have evaluated their merits. We support this provision, as we agree with the notion in the Proposing Release that the requirement would help foster confidence in the overall risk management processes of such clearing agencies.

Further, and consistent with a recommendation by the CFTC's Market Risk Advisory Committee ("MRAC"), we suggest that the Commission include in any final rulemaking a requirement that registered clearing agencies formally establish one or more risk working groups to provide a forum for them to seek risk-based input from a broad array of market participants,


including participant members and their clients.⁵ Such a requirement would, for example, allow individual participants to express views on behalf of their member firms without running afoul of restrictions that may exist if such firms were members of the registered clearing agency's risk management committee. Similarly, we suggest that the Commission encourage registered clearing agencies to publicly vet any proposals affecting their risk management practices before formally filing them as proposed rule changes with the Commission. We note that given its regulatory importance to the brokerage industry, the Financial Industry Regulatory Authority, Inc. ("FINRA") engages in such a practice with regard to significant rulemakings that would change the compliance obligations of its members.⁶ We would suggest that the Commission and registered clearing agencies look to the FINRA model for a workable approach.

Finally, we suggest that the Commission work with registered clearing agencies to enhance their governance arrangements regarding their potential use of emergency powers. As we have seen recently, greater transparency and a more rigorous governance process, including consultation with primary regulators, regarding the use of emergency powers should help further confidence in the overall financial system and ensure that affected stakeholders are aware and have buy-in when such powers are used. In this respect, we note that many registered clearing agency rulebooks currently provide such clearing agencies with broad and vaguely defined powers that can exacerbate market uncertainty in times of extreme volatility or market stress.

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We would be pleased to provide further information regarding our comments above to the Commission or its staff. If you have any questions or require additional information, please do not hesitate to contact us by calling Tom Price at [REDACTED], Rob Toomey at [REDACTED] or Joe Corcoran at [REDACTED].

Sincerely,



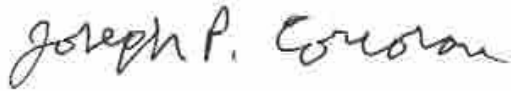
Thomas Price
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⁵ See (https://www.cftc.gov/media/6201/MRAC_CCPRGS_RCCOG022321/download (Feb. 23, 2021)).

⁶ See, e.g., FINRA RN 21-19, in which FINRA sought public comment about potential changes to its short interest reporting rule (Rule 4560) and other contemplated short sale-related proposals prior any formal rule filing(s) with the Commission (<https://www.finra.org/rules-guidance/notices/21-19>).



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