



January 13, 2012

VIA E-MAIL

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

**Re: Petition for Rulemaking and Request for Exemption from Provisions
of the Securities Act of 1933 and Securities Exchange Act of 1934 for
Cleared OTC Options**

Ladies and Gentlemen:

The Options Clearing Corporation (“OCC”) intends to begin clearing over-the-counter equity index options (the “OTC Options”) in the first quarter of 2012. After having received comments on an initial draft from the Commission staff, OCC filed with the Commission a proposal to amend its By-Laws and Rules to provide for the clearing of the OTC Options.¹ To address regulatory issues raised by the clearing of these products, we hereby submit this petition for rulemaking pursuant to Rule 192(a) of the Commission’s Rules of Practice.² This petition requests the only Commission rulemaking we believe will be required to allow OCC to begin clearing OTC Options, although other action by the Commission staff will also be necessary or desirable.³

The actions we are requesting will further a central objective of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)⁴ by facilitating the

¹ See SR-OCC-2011-19 (filed with the Commission on December 20, 2011; amended on January 3, 2012).

² 17 CFR § 201.192(a).

³ Among other regulatory issues that OCC has discussed with the Commission staff are the following: no action or interpretive relief that would permit cleared OTC Options to be treated the same as standardized options for purposes of the net capital rule (Exchange Act Rule 15c3-1), issuance of an interpretive letter under Securities Act Section 18(b)(1)(C) to the effect that cleared OTC Options would be “covered securities” for purposes of Section 18(b)(1), and approval by the Commission of a proposed rule change by SIPC that would amend SIPC Rule 400 to, among other things, include cleared OTC Options within its coverage. (SIPC staff has provided a draft of such a rule to the Commission staff for review.) In addition, OCC has approached both the SEC and FINRA staffs regarding certain clarifications that OCC believes would be desirable with respect to FINRA Rules 2360 (options) and 4210 (margin requirements) in order to eliminate any uncertainty about which provisions of those rules would or would not apply to cleared OTC Options.

⁴ Public Law 111-203 (July 21, 2010).

central clearing of OTC Options. Substitution of a central counterparty (“CCP”) as buyer to each seller and seller to each buyer reduces counterparty risk inherent in uncleared OTC Options.⁵ Central clearing may decrease risk to end-users and systemic risk. Putting an appropriately safe and user-friendly regulatory regime in place should also encourage the repatriation of transactions in risk-management instruments now occurring predominantly outside the United States,⁶ thus benefitting investors by subjecting the transactions to the Commission’s oversight, including its authority to prevent fraud and manipulation. As the Commission has stated: “The operation of a well-regulated CCP can significantly reduce counterparty risks by preventing the failure of a single market participant from having a disproportionate effect on the overall market[.]”⁷ This statement is as true of OTC Options as it is with respect to credit default swaps (“CDS”), which have been the subject of regulatory relief substantially similar to the relief requested herein.

While the OTC Options are not “swaps” or “security-based swaps,” and therefore will not be subject to any Dodd-Frank clearing mandate, OCC anticipates that it may clear security-based swaps in the future. OCC expects to apply the same basic procedures proposed for OTC Options to security-based swaps. It would therefore be anomalous for cleared OTC Options and cleared security-based swaps to be treated differently with respect to the regulatory relief requested herein.

⁵ Although options on securities and indexes of securities were excluded from regulation as swaps or security-based swaps and therefore not included in the clearing mandate of Dodd-Frank, we believe such options were excluded under Dodd-Frank because they were not excluded from Commission regulation by Section 3A of the Exchange Act (as were security-based swaps) prior to the amendments made to the Exchange Act by Dodd-Frank. The exclusion of OTC Options from the “swap” and “security-based swap” definitions in Dodd-Frank therefore did not reflect a determination by Congress that clearing of OTC Options would not be beneficial and should not be encouraged.

⁶ According to the Bank for International Settlements (“BIS”), the notional value of the global market in OTC equity-linked options was approximately \$4.8 trillion at the end of the first half of 2011 (the most recent period for which such data is available). Of this amount, approximately \$1.2 trillion constituted options on U.S. equities. BIS, Semiannual OTC derivatives statistics at end-June 2011, November 2011, Amounts outstanding of OTC equity-linked derivatives, by instrument and market (Table 22B), *available at* <http://www.bis.org/statistics/otcder/dt22b22c.pdf>. The Commission has noted that many U.S. broker-dealers “conduct some or all of their securities OTC derivatives activities from abroad.” “In response to the concerns raised by firms seeking to conduct an OTC derivatives business in the United States, the Commission proposed to establish a form of limited broker-dealer regulation that would give the firm an opportunity to conduct business in a vehicle subject to modified regulation appropriate to the OTC derivatives markets.” OTC Derivative Dealers – Final Rule, Release No. 34-40594, 63 FR 59362 at 59363 (Nov. 3, 1998). Under OCC’s proposal, transactions in cleared OTC Options would be effected through regularly registered broker-dealers and not OTC derivative dealers. Nevertheless, we believe that OCC’s proposal would further the Commission’s objectives in repatriating some portion of the existing OTC options market. [OCC is working with a group of sixteen firms, including most of the largest U.S. broker-dealers, who have expressed interest in effecting transactions in cleared OTC Options.][confirm]

⁷ Release No. 33-8999, Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties To Clear and Settle Credit Default Swaps (January 14, 2009) at 74 FR 3968 (the “CDS Exemption Release”).

OCC proposes to clear OTC Options in a manner closely similar to the manner in which it clears listed options, with only such modifications as are necessary to reflect the different characteristics of the OTC Options. Accordingly, OCC respectfully requests that the Commission take the actions described herein to ensure that the OTC Options will be subject to the same regulatory framework that applies to listed options, except to the extent that differences between the products make different rules appropriate. As discussed below, we do *not* request that OTC Options be designated by the Commission as “standardized options” pursuant to Rule 9b-1 under the Securities Exchange Act of 1934 (the “Exchange Act”).⁸ We nevertheless ask the Commission to extend to cleared OTC Options certain exemptions⁹ currently applicable to standardized options. All of the rulemaking and/or exemptive relief we are currently requesting, as well as much additional exemptive relief that is not needed to implement OCC’s current proposal,¹⁰ has already been extended on a temporary and expedited basis to other clearing organizations and market participants for the purpose of clearing OTC transactions in CDS. The Commission has also proposed similar permanent exemptions from most Securities Act and certain Exchange Act provisions with respect to cleared security-based swaps.¹¹ The CDS and security-based swap exemptions were patterned in large part on exemptions extended to standardized options in 2002.¹² The exemptions requested herein would permit cleared OTC Options to be regulated in a similar manner.

Under item 5 below, we have included a summary comparing and contrasting the regulatory schemes under the federal securities laws and the Commission’s regulations applicable or proposed to be applicable to (i) standardized options, (ii) uncleared OTC options, and (iii) security-based swaps with the regulatory scheme we propose for cleared OTC Options. Our proposal incorporates appropriate elements of each of these other regulatory schemes. The specific elements incorporated in our proposal, and the rationales for those elements, are discussed further below.

Based upon the foregoing, we respectfully request that the Commission take the actions described below.

⁸ 15 USC § 78a *et seq.*

⁹ See Securities Act of 1933 (the “Securities Act”) Rule 238, 17 CFR § 230.238 and Exchange Act Rule 12h-1(d), 17 CFR § 240.12h-1(d).

¹⁰ For example, exemptive relief was extended to permit clearing of CDS by entities not registered as clearing agencies and permitting persons not registered as broker-dealers under the Exchange Act to act as brokers and dealers with respect to CDS. Under OCC’s proposal, transactions in cleared OTC Options, like transactions in listed options, would be effected in the United States through registered broker-dealers and cleared by a clearing agency registered under the Exchange Act.

¹¹ Release No. 33-9222, Exemptions for Security-Based Swaps Issued by Certain Clearing Agencies (June 9, 2011) (the “SB Swap Exemption Release”).

¹² Release No. 33-8171, Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From the Registration Requirements of the Securities Exchange Act of 1934 (December 23, 2002) (the “Options Exemption Release”).

(1) Exemption from 1933 Act Registration. We request that the Commission amend Rule 238 under the Securities Act¹³ to extend the rule's exemption from all provisions of the Securities Act (other than Section 17(a)) to over-the-counter options that are cleared by a clearing agency registered with the Commission pursuant to Section 17A of the Exchange Act, provided that such options are offered and sold only to "eligible contract participants" as defined in Section 3(a)(65) of the Exchange Act ("ECPs").¹⁴ Such options would not be required to be "standardized options" as defined in Exchange Act Rule 9b-1 or be traded on a national securities exchange or national securities association to qualify for the exemption. A markup of Rule 238 setting forth the requested amendments is attached as Appendix A. Because we anticipate that the Commission staff's current workload may result in unavoidable delays in implementing amendments to Rule 238 within the first quarter of 2012, we also request a temporary exemption such as provided in Rule 239T¹⁵ with respect to CDS that was included among other interim temporary rules (the "Temporary CDS Rules")¹⁶ approved by the Commission in 2009 to facilitate clearing of CDS.¹⁷

(2) Exemption from Registration under Section 12 of the Exchange Act. Similarly, OCC requests that the Commission amend Rule 12h-1 under the Exchange Act, to extend the rule's exemption from registration to options that are cleared by a clearing agency registered with the Commission pursuant to Section 17A of the Exchange Act, without requiring that such options be "standardized options," as defined in Exchange Act Rule 9b-1, provided that such options are offered and sold only to ECPs. A markup of Rule 12h-1(d) setting forth the requested amendments is attached as Exhibit B. For the reasons mentioned above, we also request a temporary exemptive order under Section 36 of the Exchange Act that would grant relief substantively similar to certain of the

¹³ 15 USC § 77a *et seq.*

¹⁴ Section 3(a)(65) was added by Dodd-Frank and incorporates by reference the definition of ECP set forth in Section 1a(18) of the CEA, as that definition was amended by Dodd-Frank.

¹⁵ 17 CFR § 230.239T.

¹⁶ Release No. 33-8999 (January 14, 2009) (implementing the Temporary CDS Rules); Release No. 33-9063 (September 14, 2009) (extending the expiration date of the Temporary CDS Rules); Release No. 33-9158 (November 19, 2010) (further extending the expiration date of the Temporary CDS Rules).

¹⁷ The Temporary CDS Rules remain in effect through April 16, 2012. Rule 239T (17 CFR § 230.239T) exempts cleared "eligible credit default swaps" from all provisions of the Securities Act other than anti-fraud provisions of Section 17(a). The Commission has also proposed new Rule 239, which would exempt certain cleared security-based swaps from all provisions of the Securities Act, other than Section 17(a). *See* SB Swap Exemption Release.

Temporary CDS Rules or, in the alternative, interpretive relief that would make such relief unnecessary.¹⁸

Further details regarding these requests are included below.

1. Background Information

a. About OCC

Founded in 1973, OCC is the world's largest clearing organization for financial derivatives. OCC clears securities options, security futures and other securities contracts subject to the Commission's jurisdiction, and commodity futures and commodity options subject to the jurisdiction of the Commodity Futures Trading Commission ("CFTC"). OCC clears derivatives for all nine U.S. securities options exchanges and five U.S. futures exchanges and is the clearing agency for all standardized options listed on national securities exchanges in the United States. Since the Commission first permitted trading of standardized options in 1973, OCC has been deemed to be the issuer of the options it clears for purposes of both the Securities Act and the Exchange Act.¹⁹ Until 2003, when Securities Act Rule 238 and Exchange Act Rule 12a-9 became effective, OCC was required to register the options it cleared under both statutes.²⁰

b. The OTC Options

OCC proposes to clear OTC Options on equity indices published by Standard & Poor's Financial Services LLC ("S&P")²¹ beginning in the first quarter of 2012. OCC may in the future clear OTC Options on individual equity securities. The OTC Options will have predominantly common terms and characteristics, but will also include certain terms negotiated by the parties. Transactions in the OTC Options will not be executed through the facilities of any exchange, but will instead be entered into bilaterally and submitted to OCC for clearance through one or more providers of trade affirmation services.²² Under the terms of OCC's license agreement with S&P, OTC Options on the S&P indices may not be bought or sold or otherwise transacted on an

¹⁸ The Temporary CDS Rules include Rules 12a-10T (17 CFR § 240.12a-10T) and 12h-1(h)T (17 CFR § 240.12h-1(h)T) (exempting cleared CDS from registration under Section 12(a) and 12(g) of the Exchange Act). The Commission has also proposed new Rule 12a-10 and an amendment to Rule 12h-1 that would exempt certain cleared security-based swaps from registration under the Exchange Act pursuant to Sections 12(a) and 12(g). Section 12(a) relief is unnecessary for cleared OTC Options because there will be no exchange involved in transactions in cleared OTC Options.

¹⁹ SEC Release No. 34-9985 (February 1, 1973).

²⁰ Securities Act Release No. 33-8171 (December 23, 2002).

²¹ OCC's license agreement with S&P currently allows OCC to clear OTC Options on the S&P 500 Index, the S&P MidCap 400 Index and the S&P Small Cap 600 Index. OCC anticipates that it may clear options on other securities indices in the future.

²² The initial provider of the trade affirmation services in connection with the OTC Options will be MarkitServ.

“Exchange or Exchange-Like Market,” defined to mean U.S. or foreign securities exchanges, alternative trading systems, or any other similar domestic or foreign entity or organization.

The OTC Options are similar to exchange-traded standardized equity index options called “FLEX Options” that are currently traded on the Chicago Board Options Exchange. FLEX Options are exchange-traded put and call options that allow for customization of certain terms.

A limited number of variable terms will be allowed for the OTC Options, with a specified range of values that may be assigned to each, as agreed between the buyer and seller. The variable terms and permitted values are specified in OCC’s proposed rules governing OTC Options, which have been filed with the Commission. Parties submitting transactions in OTC Options for clearing by OCC will be able to customize six discrete terms: (1) put or call; (2) option premium; (3) exercise price; (4) expiration date; (5) American or European exercise style; and (6) method of calculating settlement value.²³

OCC expects to clear OTC Options subject to the same basic rules and procedures used for the clearance of listed index options. OCC will require in its rules that the counterparties to the OTC Options must be ECPs and that the transactions must be cleared through a clearing member of OCC that is registered with the Commission as a broker-dealer or one of the small number of clearing members that are “non-U.S. securities firms,” as defined in OCC’s By-Laws.

Exercise of an OTC Option will result in delivery of cash on the business day following expiration. The exercise-settlement amount will be equal to the difference between the exercise-settlement value and the exercise price of the OTC Option, multiplied by the number of OTC Options (the multiplier for the initial OTC Options being fixed at one). With respect to margin requirements, OCC will use its STANS margin system on the same basis as with listed index options.

OCC does not presently contemplate imposing higher financial standards for clearing OTC Options. However, clearing members must be approved by OCC to clear OTC Options. OTC Options may be carried in a clearing member’s firm account or in its securities customers’ account, as applicable. Although customer positions in OTC Options will be carried in the customers’ account (an omnibus account), OCC will use a “customer ID” to identify positions of individual customers based on information provided by clearing members.²⁴ However, positions are not presently intended to be carried in individual customer sub-accounts, and positions in OTC options will be margined at OCC in the omnibus customers’ account on the same basis as listed options. If a clearing member takes the other side of a transaction with its customer in an

²³ The method of determining the exercise settlement value of an OTC Option may be either (A) each day’s final value of the SPX option traded on CBOE, such price to be provided by CBOE, or (B) the opening settlement value (SET), which is calculated by S&P using the opening sales price in the primary market for each component security on the last business day (usually a Friday) before the expiration date of the OTC Option.

²⁴ Such customer IDs are necessary in order to allow OCC to comply with the terms of OCC’s license agreement with S&P.

OTC Option, the transaction will result in the creation of a long or short position (as applicable) in the clearing member's customers' account and the opposite short or long position in the clearing member's firm account. The positions could also be includable in the internal cross-margining account, subject to any necessary regulatory approvals, or in market-maker accounts (although this functionality may not be available immediately).

Each party to an OTC Option trade will enter the trade data into the system of MarkitSERV or another trade affirmation vendor (the "OTC Trade Source"). The OTC Trade Source will "match" or "affirm" the trade.²⁵ It will be permissible for parties to submit trades for clearance that were entered into bilaterally at any time in the past provided that the eligibility for clearance will be determined as of the date the trade is submitted to OCC for clearance.²⁶ The OTC Trade Source will process the trade and submit it as a matched trade to OCC for clearing. If OCC accepts the trade, OCC will so notify the OTC Trade Source, which will notify the submitting parties. Customers of clearing members may have direct access to the OTC Trade Source for purposes of entering or affirming trade data and receiving communications regarding the status of transactions, in which case mechanisms will be put in place for a clearing member to authorize a customer to enter a trade for the clearing member's customers' account or for the clearing member to affirm a trade once entered.

At launch, OTC Options will not be subject to the same clearing member trade assignment ("CMTA") rules and procedures through which exchange-traded options can be cleared by a clearing member other than the executing clearing member. This function may be added by OCC at a later date. At launch, MarkitSERV will support bilateral and trilateral procedures that permit a customer that has an account with clearing member A ("CM A") to enter into an OTC Option transaction with clearing member B ("CM B") and have the position included in its account at CM A and cleared in CM A's customers' account at OCC.

OTC Options will be fungible with each other to the extent that there are OTC Options in the system with identical terms. However, OCC will not treat OTC Options as fungible with index options listed on any exchange, even if an OTC Option has terms identical to the terms of the exchange-listed option.

c. Eligibility Criteria

OCC proposes to limit purchases and sales of OTC Options to ECPs. To clear customer positions in OTC Options, OCC's clearing members must meet OCC's stringent membership criteria and (except in the case of non-U.S. securities firms as mentioned above) be registered

²⁵ If a trade is "matched," both sides of the trade will be entered into MarkitServ and the trade details will be compared and matched by MarkitServ. If a trade is "affirmed," a dealer will enter the trade details into MarkitServ and the other party to the trade will then view the information and affirm it if it is correct. Whichever method is used, OCC will receive a matched trade from MarkitServ.

²⁶ OCC's license agreement with S&P imposes certain minimum requirements relating to time remaining to expiration of the OTC Option.

with the Commission as broker-dealers pursuant to Section 15 of the Exchange Act. Clearing members that carry customer positions in OTC Options will be subject to all OCC rules governing cleared options generally, as well as all applicable rules of the Commission and of any self-regulatory organization of which they are members.

2. Regulatory Status of the OTC Options Absent Commission Action

a. Securities Act

Section 2(a)(1) of the Securities Act defines a “security” to include “any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities[.]” The OTC Options are therefore securities for purposes of the Securities Act. Consequently, any offer, sale, or delivery of an OTC Option would, in the absence of an exemption, be subject to the requirements of Section 5 of the Securities Act with respect to the filing and effectiveness of a registration statement and the delivery of a prospectus conforming to statutory standards. As OCC will be treated as the issuer of the OTC Options,²⁷ absent an exemption, this registration requirement would fall on OCC.

Listed options are exempted from registration with the Commission under the Securities Act by Securities Act Rule 238, which applies only to “standardized options” as defined in Exchange Act Rule 9b-1. Standardized options are those options that are issued by a registered clearing agency and traded on a registered national securities exchange. Thus the OTC Options will not be “standardized options” as currently defined. In the absence of amendments to Securities Act Rule 238, offers and sales of OTC Options could be made only pursuant to an effective registration statement or under a different exemption from registration.²⁸

b. Exchange Act

Section 3(a)(10) of the Exchange Act defines a “security” to include “any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities [.]” The OTC Options are therefore securities for purposes of the Exchange Act. Section 12(g) of the Exchange Act requires the registration of any class of equity securities if, on the last day of any fiscal year, the class is held of record by at least 500 persons and the issuer has total assets exceeding \$1,000,000.²⁹ Section 12(g)(5) of the Exchange Act defines a class of securities to “include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges.” While it is not clear that all OTC Options on the same underlying interest would constitute a single “class” of securities

²⁷ See discussion below in Section 3 concerning OCC’s role as the issuer of OCC-cleared options.

²⁸ For example, as we have previously discussed with the Commission, absent amendment of Rule 238 or similar temporary exemptive relief, we may seek to rely on Rule 506 under Regulation D for exemption from Securities Act registration.

²⁹ Exchange Act Rule 12g-1 increases the asset test to \$10,000,000.

for purposes of Section 12(g), we do not think it is necessary to address the issue at this time, and will assume for purposes of our analysis that all OTC Options cleared by OCC on the same underlying security or group or index of securities will constitute a single class for purpose of Section 12(g).

Exchange Act Rule 12h-1(d) exempts issuers from registration under Section 12(g) with respect to “[a]ny standardized option, as that term is defined in Rule 9b-1(a)(4), that is issued by a clearing agency registered under section 17A of the [Exchange] Act and traded on a national securities exchange registered pursuant to section 6(a) of the [Exchange] Act or on a national securities association registered pursuant to section 15A(a) of the [Exchange] Act[.]” As previously noted, cleared OTC Options are not “standardized options” under the current definition. In the absence of amendment to Rule 12h-1(d), the OTC Options might be required to be registered pursuant to Section 12(g) of the Exchange Act if they were deemed to be held of record by the requisite number of persons.

Because there are currently many fewer than 500 clearing members of OCC, an amendment to Rule 12h-1(d) should not be required as a condition to the initiation of clearing of OTC Options if the Commission staff concurs in our view that each clearing member that carries positions for the benefit of customers is the “holder of record” for purposes of Section 12(g). Exchange Act Rule 12g5-1(a) provides that, “[f]or the purpose of determining whether an issuer is subject to the provisions of Sections 12(g) . . . of the [Exchange] Act, securities shall be deemed to be ‘held of record’ by each person who is identified as the owner of such securities on records of security holders maintained by or on behalf of the issuer,” subject to certain exceptions not applicable to the OTC Options. In adopting Rule 12g5-1, the Commission determined not to adopt a proposed provision that would have required issuers to look through the brokers, dealers and nominees listed on the books and records of the issuer as the record owners of the securities.³⁰ The staff has since concurred that securities registered in the name of The Depository Trust Company (“DTC”) or its nominee, Cede & Co., should be deemed to be held of record by the broker-dealer participants in the DTC system rather than the owners of the separate accounts carried with the broker-dealers for whose ultimate benefit such securities are held.³¹ We believe that the rationale underlying the Commission’s views with respect to securities held in “street name” through the DTC system should be equally applicable to the manner in which OCC currently records the ownership of options and the manner in which we intend to record the ownership of the OTC Options.

OCC will carry a proprietary account and an omnibus customers’ account for each clearing member that clears OTC options on behalf of customers. Although the OTC Options positions will be held in fungible bulk in omnibus customers’ accounts at the clearinghouse level (along with listed options), we note that, due to technical requirements applicable to the OTC

³⁰ 30 FR 484 (Jan. 14, 1965).

³¹ See Bay View Securitization Corporation, Bay View Auto Trusts, No Action Letter, January 15, 1998; 1998 SEC No-Act. LEXIS 33.

Options under OCC's license agreement with S&P, OCC will maintain separate customer identification codes to allow OCC to determine whether a given transaction in the customer account is an opening transaction or a closing transaction with respect to a customer with an existing position held by its clearing member and to ensure that minimum size requirements for the OTC Options are capable of being calculated at the individual customer level. Although OCC will have this information, it will nevertheless treat each clearing member as the record owner of the OTC Options for all other purposes in the same manner as with respect to listed options. Moreover, although OCC will be able to distinguish the number of positions carried for an individual customer, each customer will remain anonymous to OCC and OCC will not know the name or have other identifying information with respect any individual customer. Accordingly, we do not believe that the existence of a customer code for the very limited purposes described above should affect the conclusion that the clearing member remains the record holder of the OTC Options.

3. Basis for Exemptions: Amendment of Rules 238 and 12h-1

Securities Act Exemption. The Commission has long observed the incongruity of applying the registration requirements of the Securities Act to standardized options. In 2002, the Commission, proposing the registration exemptions now in force for standardized options, commented that:

Although our 1982 rulemaking streamlined and improved disclosure regarding standardized options, it continued to apply the Securities Act registration provisions to offers and sales of standardized options. This always has been somewhat anomalous because, in its role as an issuer, a registered clearing agency is fundamentally different than a conventional issuer that registers transactions in its securities under the Securities Act. For example, the purchaser of a standardized option does not invest in the clearing agency that registers transactions in standardized options. As a result, information about the registrant's business, its officers and directors, and its financial statements, is less relevant to investors in standardized options. In standardized options transactions, the investment risk is determined by the market performance of the underlying security rather than the performance of the clearing agency registrant.³²

The Commission's reasoning is equally applicable to the OTC Options. The customizable terms of OTC Options and absence of exchange trading are irrelevant to these considerations. OCC believes that the substantial similarities between OTC Options and exchange-listed, standardized options as well as precedent established for CDS justifies amendment of Rule 238 to exempt cleared OTC Options. Exchange-traded FLEX Options with

³² Securities Act Release No. 33-8114 (July 25, 2002) at 68 FR 189. The Commission further noted that Exchange Act registration and reporting for standardized options was "burdensome" and noted that these requirements did not produce significant useful information for investors.

customizable terms similar to those proposed for cleared OTC Options are already included within the exemption provided to standardized options under Rule 238.

Only the absence of exchange trading distinguishes OTC Options from standardized FLEX options on the same and similar indices that are currently cleared by OCC, and the Commission has previously extended the same exemption under rule 239T to cleared CDS, which are not exchange-traded. Because of the substantial similarities to these precedents, cleared OTC Options should be afforded the same treatment.

Such an exemption would also be consistent with the proposed treatment of cleared security-based swaps. The Commission has proposed to exempt from the Securities Act (other than Section 17(a)) (and from registration under Sections 12(b) and 12(g) of the Exchange Act) security-based swaps that (1) are issued or to be issued by a registered or exempt clearing agency, and (2) the Commission has determined must be cleared or that are permitted to be cleared by the rules of the relevant clearing agency.³³ These proposed exemptions would require that the security-based swap be offered or sold in a transaction involving the clearing agency in its function as a central counterparty with respect to the security-based swap and that the security-based swap be sold to an ECP.³⁴ The clearing agency clearing the SB swap must also provide certain information on its public web site.³⁵ In the SB Swap Exemption Release, the Commission stated its belief that “the increased use of central clearing for security-based swaps should help to promote robust risk management, foster greater efficiencies, improve investor protection, and promote transparency in the market for security-based swaps.”³⁶ The Commission further stated, in relevant part, that, “[t]he provisions of the Dodd-Frank Act do not contain an exemption from Securities Act or Exchange Act registration . . . for security-based swaps, and we believe that compliance with the registration and qualification provisions of [the

³³ See SB Swap Exemption Release.

³⁴ See Proposed Rule 239(b), SB Swap Exemption Release.

³⁵ Proposed Rule 239(b)(3) would impose the following condition for exemption:

“(3) The eligible clearing agency posts on its publicly available Web site at a specified Internet address or includes in its agreement covering the security-based swap that the eligible clearing agency provides or makes available to its counterparty the following: (i) A statement identifying any security, issuer, loan, or narrow-based security index underlying the security-based swap; (ii) A statement indicating the security or loan to be delivered (or class of securities or loans), or if cash settled, the security, loan, or narrow-based security index (or class of securities or loans) whose value is to be used to determine the amount of the settlement obligation under the security-based swap; and (iii) A statement of whether the issuer of any security or loan, each issuer of a security in a narrow-based security index, or each referenced issuer underlying the security-based swap is subject to the reporting requirements of Sections 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m and 78o) and, if not subject to such reporting requirements, whether public information, including financial information, about any such issuer is available and where the information is available.”

SB Swap Exemption Release at 76 FR 34934.

³⁶ *Id.* at 34921.

Securities Act and Exchange Act] likely would be impracticable and frustrate the purposes of the Dodd-Frank Act.”³⁷ Although the OTC Options are not “security-based swaps” for purposes of Dodd-Frank, we believe that the same concerns over systemic and counterparty risk apply to the OTC Options and that the Commission’s rationale for proposing to exempt security-based swaps from Securities Act and Exchange Act registration should apply to the OTC Options.³⁸

By amending Rule 238 in the manner proposed, the applicability of the Securities Act to cleared OTC options would be preserved to the same extent as in the case of standardized options, cleared CDS and the proposed treatment for security-based swaps. The antifraud provisions of Section 17(a)³⁹ would remain applicable and the anti-evasion provision of paragraph (c) of Rule 238 with respect to issuers of securities underlying standardized options would be made applicable to cleared OTC Options as well.⁴⁰ (Of course, these provisions are inapplicable to index options because the underlying interest is an index of securities rather than a security.) Security futures are similarly exempt from most provisions of the Securities Act by statute,⁴¹ and the Commission has put in place temporary rules exempting cleared CDS from

³⁷ *Id.* at 34922.

³⁸ The SB Swap Exemption Release also proposes to exempt security-based swaps from the Trust Indenture Act of 1939 (the “Trust Indenture Act”) because, absent such an exemption, the Act “would require qualification of an indenture for security-based swaps considered to be debt.” As listed options cleared by OCC have not been considered to be debt securities and no exemption from the Trust Indenture Act has been deemed necessary with respect to such options, we do not believe that there is any need for such an exemption for cleared OTC Options.

³⁹ We have also proposed to amend Rule 238(b) to provide that the exemption in Rule 238 does not apply to the provisions of Section 17(a) of the Securities Act. As presently drafted, Rule 238(b) provides that the exemption does not apply to any part of Section 17. Rule 238 is in this respect inconsistent with Rules 239T, 240 and the Temporary CDS Rules, which preserve the applicability only of Section 17(a) and not the remainder of Section 17. We believe that the approach followed in the later-adopted rules is more technically appropriate, and we therefore respectfully suggest that the Commission may wish to conform Rule 238 to those other rules given the apparent absence of any reason for differences in this respect.

⁴⁰ Paragraph (c) of Rule 238 provides: “Any offer or sale of an option by or on behalf of the issuer of the securities underlying the option, an affiliate of the issuer, or an underwriter, will constitute a contract for sale of, sale of, offer for sale, or offer to sell the underlying securities as defined in section 2(a)(3) of the Act.” A similar anti-evasion provision relating to security-based swaps is contained in the definition of “sale” or “sell” in Section 2(a)(3) of the Securities Act, as amended by Dodd-Frank: “Any offer or sale of a security-based swap by or on behalf of the issuer of the securities upon which such security-based swap is based or is referenced, an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for sale, or offer to sell such securities.” Effectiveness of this provision has been delayed until the compliance date for final rules that the Commission adopts further defining the terms “security-based swap” and “eligible contract participant.” *See* Release No. 33-9231, Exemptions for Security-Based Swaps (July 1, 2011).

⁴¹ Section 3(a) of the Securities Act provides: “Except as hereinafter expressly provided, the provisions of [the Securities Act] shall not apply to any of the following classes of securities: . . . (14) Any security futures product that is—(A) cleared by a clearing agency registered under section 17A of the . . . Exchange Act . . . or exempt from registration under subsection (b)(7) of such section 17A; and (B) traded on a national securities exchange or a national securities association registered pursuant to section 15A(a) of the . . . Exchange Act”

most provisions of the Securities Act.⁴² Accordingly, our request for exemptions is fully consistent with the regulatory scheme that the Commission and/or the Congress has made applicable to other derivative securities that are issued and cleared by clearing organizations.

We also note that existing bilateral OTC options are ordinarily offered and sold pursuant to the private offering exemption of Securities Act Section 4(2) and, in certain cases, through reliance on the Regulation D “safe harbor” exemption. We believe that reliance on Section 4(2) and Regulation D with respect to cleared OTC options is not practical.⁴³ In addition, clearing organizations that clear OTC transactions in CDS need not rely on these exemptions and it would be anomalous for OCC to be required to do so due to the lack of any other suitable exemption.

Inapplicability of Rule 9b-1. While we believe that it would be possible for the Commission to designate OTC Options as “standardized options” under Exchange Act Rule 9b-1,⁴⁴ our current view is that such a designation is neither necessary nor appropriate. The principal purpose of Rule 9b-1 is to create a disclosure regime appropriate to options that are widely available for trading by the investing public. Cleared OTC Options are intended to provide a clearing solution for the existing OTC equity options market, which is limited to highly sophisticated investors. Accordingly, only ECPs will be eligible to enter into transactions in cleared OTC Options. Rule 9b-1 provides for an options disclosure document (“ODD”) for which the exchanges on which standardized options are listed and traded have ultimate responsibility, and there are no such exchanges involved in the trading of OTC Options. Rule 9b-1 would thus require substantial revision to make it applicable to OTC Options. Given the absence of retail participation in this market, we believe that the ODD framework is unnecessary and inappropriate. For these reasons, we believe that OTC Options should not be designated as “standardized options.”

⁴² See Securities Act Rule 239T, 17 CFR § 230.239T.

⁴³ While it is theoretically possible for OCC and its clearing members to rely on such an exemption for transactions in cleared OTC Options, we have concluded that attempted reliance on Section 4(2) and Regulation D would necessarily involve extremely cumbersome contractual provisions to allocate potential responsibilities and that avoidance of the prohibition against “general solicitation” could severely restrict the ability of OCC to communicate useful information regarding its clearing services to the public.

⁴⁴ When FLEX Options were proposed in the early 1990s, the Commission considered whether they were sufficiently uniform in their terms to be exempted from registration under the Securities Act and the Exchange Act as “standardized options” and concluded that they were. In its order under the Rule, the Commission stated, “Apart from the flexibility with respect to strike prices, settlement, expiration dates, and exercise style, all of the other terms of the Flex Options are standardized pursuant to OCC and [CBOE] rules. Standardized terms include matters such as exercise procedures, contract adjustments, time of issuance, effect of closing transactions, restriction on exercise under OCC rules, margin requirements, and other matters pertaining to the rights and obligations of holders and writers. In addition, Flex Options are similar to existing exchange-traded options based on the S&P 100 and 500 stock indexes because Flex Options are limited to these well-known underlying broad-based stock indexes.” Release No. 34-31920 (February 23, 1993).

For all of the foregoing reasons, we believe that OTC Options should be exempted from the Securities Act to the extent requested without being designated as “standardized options” subject to an ODD requirement. In accordance with Commission Rule 192(a), we have prepared suggested text for the proposed amendments as set forth in Appendix A.

Exemption from Exchange Act Section 12(g). Exchange Act Rule 12h-1(d) exempts standardized options from registration under the Exchange Act. We believe that registration of cleared OTC options pursuant to Exchange Act Section 12(g) and the related reporting requirements applicable to securities registered under that Section would be inappropriate for essentially the same reasons that Securities Act registration and disclosure is inappropriate. No purpose would be served by such registration, no such registration is required with respect to standardized options, security futures or CDS, and the Commission has proposed that no such registration should be required with respect to cleared security-based swaps.⁴⁵ Therefore no such registration should be required for cleared OTC Options. Even if the Commission staff agrees with our analysis, as discussed below, that the number of holders of record of cleared OTC Options would not exceed the registration threshold under Section 12(g), we believe that, for the sake of consistency, the avoidance of doubt, and in anticipation of any future change in the relevant facts that support this conclusion, Rule 12h-1(d) should be amended to apply to cleared OTC Options.⁴⁶ In accordance with Commission Rule 192(a), we have prepared suggested text for the proposed amendments as set forth in Appendix B.⁴⁷

⁴⁵ In the SB Swap Exemption Release, the Commission makes the following statement:

“[W]e preliminarily believe that requiring clearing agencies to register security-based swaps under the Exchange Act would not provide additional useful information or meaningful protection to investors with respect to the security-based swap. In addition, the other consequences of Exchange Act registration, such as requirements for ongoing periodic reporting and application of the proxy rules to the clearing agency, would not be meaningful in the context of security-based swaps. At the same time, requiring such registration likely would impose burdens on clearing agencies issuing security-based swaps. Therefore, we believe that subjecting the registered or exempt clearing agency to the requirements of the Exchange Act arising from Section 12(a) or 12(g) is not necessary or appropriate in the public interest.”

SB Swap Exemption Release at 76 FR 34928. Although the SB Swap Exemption Release also proposes (at 76 FR 34927) a new Rule 12a-10 to exempt cleared security-based swaps from Section 12(a) of Exchange Act, we do not believe that such relief is necessary for cleared OTC Options because they are not proposed to be traded on any national securities exchange and therefore would not be subject to registration under Section 12(a) in any event.

⁴⁶ Alternatively, the Commission could provide the requested exemption by adding an additional paragraph to Rule 12h-1 as is proposed to be done for security-based swaps. *See* Cleared SB Swap Exemption Release, 76 FR 34934.

⁴⁷ We are not requesting exemption from Sections 5 and 6 of the Exchange Act in connection with our clearance of the OTC Options. Certain clearinghouses for CDS have requested, and received, such exemptive relief in order to allow them to utilize a “forced trade” mechanism in which their clearing members are at times required to execute CDS trades at their quoted prices. As the Commission has pointed out, such mechanism involves the bringing together of buyers and sellers of CDS and absent an exemption such activity would cause the relevant clearinghouses to meet the definition of an “exchange” under the Exchange Act, triggering the applicability of

4. Request for Temporary Exemption

We anticipate that the Commission and staff, given the current extraordinary workload created by Dodd-Frank implementation as well as other ongoing responsibilities, may not be able to implement the amendments we request to Rules 238 or 12h-1(d) in time to allow OCC to begin clearing OTC Options in the first quarter of 2012. We are therefore requesting that the staff issue temporary exemptions pursuant to Section 28 of the Securities Act and Section 36 of the Exchange Act, granting temporary relief substantially similar to the corresponding relief provided with respect to eligible CDSs under the Temporary CDS Rules, as further described below. We request that this exemptive relief expire no sooner than June 30, 2012 to give the Commission and staff an appropriate amount of time to amend Rules 238 and 12h-1(d). As noted above, a request for a temporary amendment to Rule 12h-1(d) would be rendered unnecessary if the Commission staff concurs in our view that OCC's clearing members would be treated as the only record holders of the cleared OTC Options because record holders would in that case not exceed the threshold number to require registration under Section 12(g) in any event.

On January 14, 2009, the Commission approved interim final temporary rules providing exemptions under the Securities Act, Exchange Act and Trust Indenture Act for certain CDS to facilitate the operation of CCPs for CDS.⁴⁸ The Temporary CDS Rules exempted "eligible credit default swaps" from (a) all provisions of the Securities Act (other than the Section 17(a) anti-fraud provisions), (b) Sections 12(a) and 12(g) of the Exchange Act, and (c) all provisions of the Trust Indenture Act,⁴⁹ in each case provided certain conditions were met. The Temporary CDS Rules also amended Rule 146⁵⁰ to provide that, for purposes of Section 18(b)(3) of the Securities Act, the term "qualified purchaser" means any ECP, other than an ECP under Section 1(a)(12)(C)⁵¹ of the Commodity Exchange Act, that is sold an "eligible credit default swap" in reliance on Rule 239T.⁵² The Temporary CDS Rules were originally scheduled to expire on

Sections 5 and 6 of the Exchange Act. Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With the Pending Revision of the Definition of "Security" To Encompass Security-Based Swaps, and Request for Comment, 76 FR 39927 at 39935. As OCC does not intend to utilize any such "forced trade" mechanism, we do not believe exemption from Sections 5 and 6 to be necessary.

⁴⁸ See CDS Exemption Release.

⁴⁹ No exemption from the Trust Indenture Act should be needed for cleared OTC Options, as they are not debt securities.

⁵⁰ See 17 CFR § 230.146(c)T.

⁵¹ Section 1(a)(12) was renumbered 1(a)(18) by Dodd-Frank.

⁵² Section 18(a) of the Securities Act preempts state and local securities laws with respect to "covered securities." Section 18(b)(3) provides that securities are "covered securities" with respect to offers and sales of such securities to "qualified purchasers," as defined by the Commission. On December 16, 2011, we submitted a request for interpretive guidance to the Division of Corporation Finance and the Division of Trading and Markets. This request sought confirmation that certain OCC-issued "standardized options" (which does not include the OTC Options for the reasons stated herein) are "equal in seniority" to standardized options that are listed on national securities exchanges named in Section 18(b)(1)(A) of the Securities Act and Rule 146(b) and would therefore be "covered

September 25, 2009, but they have been subsequently extended and currently are scheduled to expire on April 16, 2012.⁵³

In adopting the Temporary CDS Rules, the Commission expressed concerns about the systemic risks posed by CDS given “the possible inability of parties to meet their obligations as counterparties and the potential resulting adverse effects on other markets and the financial system.” The Commission also expressed concern about operational risks, risks of manipulation and fraud and regulatory arbitrage risks. As the Commission expressly recognized in adopting the Temporary CDS Rules, and as Congress has implicitly recognized by making central clearing of OTC derivatives a central element of Title VII of Dodd-Frank, CCPs mitigate these risks. In November 2008, the President’s Working Group on Financial Markets also stated that the implementation of a CCP for CDS was a top priority and, in furtherance of that recommendation, the Commission, the Federal Reserve Board of Governors and the CFTC signed a Memorandum of Understanding that established a framework for consultation and information sharing on issues related to CCPs for CDS. We believe the rationale for the development of CCPs for CDS is applicable to the development of CCPs for other OTC derivatives, including OTC Options. The operation of an experienced, financially sound and well-regulated CCP in a given market can substantially reduce systemic risk. Adopting the requested temporary exemptive relief will facilitate a clearing solution for OTC Options while allowing further time for the consideration of permanent exemptions.

5. Comparison of Regulatory Schemes for Cleared OTC Options, Uncleared OTC Options, Standardized Options and Security-Based Swaps

Uncleared OTC Options. As discussed above, existing OTC options on equity securities and indexes of such securities are “securities” for purposes of the federal securities laws, and are offered and sold in reliance on transactional exemptions from registration under the Securities Act, such as Section 4(2) and Regulation D. To comply with available exemptions, the sale of such OTC options is ordinarily restricted to persons who are both accredited investors (as defined in Section 2(a)(15) of the Securities Act) and ECPs. Such options are generally sold by registered broker-dealers unless an exclusion from the definition of “broker” or “dealer” is applicable or an exemption applies.⁵⁴ There is no prescribed disclosure regime applicable to these products under the federal securities laws other than the information requirements under Rule 502 of Regulation D if the seller seeks to rely on the Regulation D safe harbor and the

securities” pursuant to Section 18(b)(1)(C). We intend to submit a similar request confirming that the OTC Options will be “covered securities” under Section 18(b)(1)(C). Accordingly, if this interpretation is issued, there would be no need to request that the Commission amend Rule 146 to provide that purchasers and offerees of the OTC Options be deemed “qualified purchasers” for purposes of Section 18(b)(3).

⁵³ See Release No. 33-9063 (September 14, 2009) (extending the expiration date of the Temporary CDS Rules); Release No. 33-9158 (November 19, 2010) (further extending the expiration date of the Temporary CDS Rules); Release No. 33-9232 (July 1, 2011) (further extending the expiration date of the Temporary CDS Rules).

⁵⁴ See Exchange Act §§ 3(a)(4), (5), and Section 206 of the Gramm-Leach-Bliley Act (Public Law 106-102; 15 USC § 78C) pursuant to which, among other things, banks are permitted to engage in certain activities with respect to “identified bank products” without broker-dealer registration.

purchaser is not an accredited investor. Uncleared OTC options are bilateral agreements between the parties, and such agreements are generally not carried in accounts of customers at a registered broker-dealer.

Standardized Options. In contrast to uncleared OTC options, “standardized options” are listed on national securities exchanges and cleared by OCC. They are exempt from the provisions of the Securities Act, other than Section 17, by Rule 238, and from registration under Section 12 of the Exchange Act pursuant to Rules 12a-9 and 12h-1(d).⁵⁵ Standardized options are subject to Rule 9b-1, which prescribes the content of the ODD and requires delivery of the ODD to options customers. Standardized options are securities carried in accounts of OCC clearing members on OCC’s books and in securities accounts on the books of OCC clearing members and other broker-dealers for their public customers. Customers need not meet accredited investor or ECP standards to trade standardized options, which are available for trading by retail customers. We believe it would be anomalous for the Commission to require registration of the OTC Options (the purchase of which is restricted to ECPs) under the Securities Act and Exchange Act, while no such registration is required with respect to standardized options (which are a retail product).

Security-Based Swaps. With respect to security-based swaps, the Commission’s regulatory scheme is not yet fully in place, although the Commission has proposed to exempt cleared security-based swaps from all provisions of the Securities Act (other than Section 17(a)) and from registration under Section 12 of the Exchange Act.⁵⁶ Section 15F of the Exchange Act, as amended by Dodd-Frank, creates a new regime for registration and regulation of “security-based swap dealers” and “major security-based swap participants.” This regime would not apply to cleared OTC Options. The Commission has adopted the Temporary CDS Rules as described above to allow the Commission and industry time to adopt and adapt to the new regulatory scheme. In addition, the Commission has adopted Rule 240, which exempts from the Securities Act (other than Section 17(a)) any security-based swap that is a security-based swap agreement as defined in Section 2A of the Securities Act as in effect prior to July 16, 2011 and entered into between ECPs.

Cleared OTC Options. As described above, OCC’s proposed regulatory scheme for OTC Options would draw elements from each of the above-described regimes as follows: As in the case of uncleared OTC options, there would be no prescribed disclosure regime applicable to cleared OTC Options. However, the requested exemptions from Securities Act and Exchange Act registration provisions would eliminate the need for reliance on private offering exemptions just as is the case under existing, temporary or proposed rules for standardized options, cleared CDS and cleared security-based swaps, respectively. As is the case for cleared CDS, proposed in

⁵⁵ Note that we are not requesting exemption of the OTC Options from Section 12(a) of the Exchange Act in a manner similar to the exemption of standardized options under Rule 12a-9, because the OTC Options will not be traded on any exchange and therefore will not be required to be registered pursuant to Section 12(a).

⁵⁶ See SB Swap Exemption Release.

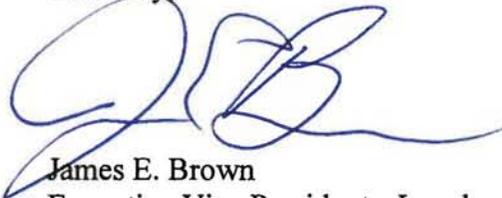
the case of security-based swaps and consistent with market practice for uncleared OTC options, purchases and sales of cleared OTC Options would be restricted to ECPs. Rule 9b-1 by its terms is inapplicable to OTC Options, and there would therefore be no ODD. As in the case of standardized options and as proposed with respect to security-based swaps, cleared OTC Options would be exempted from all provisions of the Securities Act other than anti-fraud provisions in Section 17. As in the case of standardized options, positions in cleared OTC Options would be carried in securities accounts of registered broker-dealers, except for positions held through non-U.S. clearing members. Accordingly, as in the case of standardized options, the Commission's Rules 8c-1, 15c2-1 and 15c3-3 would apply. When carried in accounts of FINRA members, cleared OTC Options would be subject to FINRA rules.

6. Conclusion

OCC believes that the proposed rule changes and exemptive relief described herein will provide substantial benefits to participants in the markets for OTC Options in a manner that will be appropriate in the public interest and consistent with the protection of investors. We urge the Commission to consider adopting the rule changes and issuing the requested exemptive relief to be effective no later than the date when the Commission approves OCC's proposed rules for clearing OTC Options.⁵⁷ If you have any questions or comments or require further information regarding the contents of this letter, please do not hesitate to contact me at (312) 322-6855 or jbrown@theocc.com, or James R. McDaniel, a partner with Sidley Austin LLP, our outside counsel, at (312) 853-2665 or jmcdaniel@sidley.com.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'JB', with a long horizontal flourish extending to the right.

James E. Brown
Executive Vice President - Legal

⁵⁷ As noted above, OCC submitted its OTC Options rules to the Commission on December 20, 2011 and submitted a revised rule filing on January 3, 2012.

Ms. Elizabeth M. Murphy

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January 13, 2012

cc: Mary L. Schapiro, Chairman, SEC
Elisse B. Walter, Commissioner, SEC
Luis A. Aguilar, Commissioner, SEC
Troy A. Paredes, Commissioner, SEC
Daniel M. Gallagher, Commissioner, SEC
Robert W. Cook, SEC
Meredith Cross, SEC
Tamara Brightwell, SEC
Michael J. Reedich, SEC
Andrew Schoeffler, SEC
Brian A. Bussey, SEC
Thomas Kim, SEC
Amy Starr, SEC
Heather Seidel, SEC
Haime Workie, SEC
Jerry Carpenter, SEC
Catherine Moore, SEC
Wayne P. Luthringshausen, OCC
Michael McClain, OCC

APPENDIX A⁵⁸

Proposed Amendment to Securities Act Rule 238

Rule 238 – Exemption for Standardized Options Issued by Clearing Agencies

- (a) *Exemption.* Except as expressly provided in paragraphs (b) and (c) of this section, the Act does not apply to any ~~standardized option, as that term is defined by Rule 9b-1(a)(4),~~ that is:
- (1) Issued by a clearing agency registered under section 17A of the Securities Exchange Act of 1934; and **either**
 - (2) **(1)** Traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 or on a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934; **or**
 - (2) Entered into between eligible contract participants, as defined in Section 3(a)(65) of the Securities Exchange Act of 1934.**
- (b) *Limitation.* The exemption provided in paragraph (a) of this section does not apply to the provisions of section 17**(a)** of the Act.
- (c) *Offers and sales.* Any offer or sale of an option by or on behalf of the issuer of the securities underlying the option, an affiliate of the issuer, or an underwriter, will constitute a contract for sale of, sale of, offer for sale, or offer to sell the underlying securities as defined in section 2(a)(3) of the Act.

⁵⁸ Additions are indicated in **bold/underline text** and deletions are indicated in ~~strikethrough text~~.

APPENDIX B⁵⁹

Proposed Amendment to Exchange Act Rule 12h-1(d)

Rule 12h-1 – Exemptions from Registration under Section 12(g) of the Act

- (d) Any ~~standardized option, as that term is defined in Rule 9b-1(a)(4),~~ that is issued by a clearing agency registered under section 17A of the Act and **either (1)** traded on a national securities exchange registered pursuant to section 6(a) of the Act or on a national securities association registered pursuant to section 15A(a) of the Act; **or (2) purchased by an eligible contract participant, as defined in Section 1a(18) of the Commodity Exchange Act;** and

⁵⁹ Additions are indicated in **bold/underline text** and deletions are indicated in ~~strikethrough text~~.