



DIVISION OF
TRADING AND MARKETS

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

November 18, 2019

Joseph P. Kamnik
Options Clearing Corporation
125 S. Franklin Street
Suite 1200
Chicago, IL 60606

Re: Options Clearing Corporation Request Regarding Certain Requirements Arising From Section 19(g)(1) of the Securities Exchange Act of 1934 and from Rules 17Ad-22(e)(3)(i), 17Ad-22(e)(ii) and 17Ad-22(e)(15) promulgated under the Securities and Exchange Act of 1934

Dear Mr. Kamnik:

In your letter dated October 22, 2019 (“Request”),¹ you request assurances that the Division of Trading and Markets (“Staff”) will not recommend that the Securities and Exchange Commission (“Commission”) take enforcement action against the Options Clearing Corporation (“OCC”) for noncompliance with Section 19(g)(1) of the Securities Exchange Act of 1934 (“Exchange Act”) and certain provisions of the Commission’s “Standards for Covered Clearing Agencies,” promulgated under the Exchange Act, resulting from the Commission’s February 13, 2019 order (“Disapproval Order”)² disapproving OCC’s proposed rule change concerning the implementation of its capital plan (“Capital Plan”). More specifically, you request the Staff not recommend the Commission take enforcement action with respect to the following provisions (collectively, “Items 1-5”):

- (1) The requirement of Exchange Act Rule 17Ad-22(e)(15) that OCC, as a covered clearing agency, establish, implement, maintain and enforce written policies and procedures reasonably designed to (I) determine the amount of liquid net assets funded by equity needed to comply with the requirements of Exchange Act Rule 17Ad-22(e)(15)(i) and (ii), and (II) maintain a viable plan, approved by its Board of Directors (“Board”), for raising additional equity should OCC’s equity fall close to or below the amount required under Rule 17Ad-22(e)(15)(ii);
- (2) The requirement of Exchange Act Rule 17Ad-22(e)(3)(i) that OCC, as a covered clearing agency, maintain a sound risk management framework for comprehensively managing the range of risks that arise in or are borne by OCC, to the extent that

¹ A copy of the Request is attached.

² Securities Exchange Act Release No. 85121 (Feb. 13, 2019), 84 Fed. Reg. 5157 (Feb. 20, 2019) (File No. SR-OCC-2015-02).

OCC's disapproved Capital Plan constituted the capital replenishment tool in OCC's Risk Management Framework Policy ("RMF Policy");

- (3) The requirement in Section 19(g)(1) of the Exchange Act that OCC, as a self-regulatory organization, comply with its own rules, to the extent that OCC's RMF Policy temporarily continues to reference OCC's disapproved Capital Plan (or aspects thereof);
- (4) The requirement of Exchange Act Rule 17Ad-22(e)(3)(ii) that OCC, as a covered clearing agency, maintain plans for the recovery and orderly wind-down of OCC necessitated by losses from credit losses, liquidity shortfalls, general business risk or any other losses, to the extent that elements of OCC's disapproved Capital Plan (or aspects thereof) were relied upon in OCC's Recovery and Orderly Wind-Down Plan ("RWD Plan"); and
- (5) The requirement in Section 19(g)(1) of the Exchange Act that OCC, as a self-regulatory organization, comply with its own rules, to the extent that OCC's RWD Plan temporarily continues to reference OCC's disapproved Capital Plan (or aspects thereof).

OCC requests that the staff position related to item (1) above expire on the earlier of either (I) the date of the Commission's approval of the proposed rule change and non-objection to an advance notice formalizing OCC's written policy reasonably designed to determine the amount of liquid net assets funded by equity needed to comply with the requirements of Exchange Act Rule 17Ad-22(e)(15)(i) and (ii), or (II) April 25, 2020. OCC states that OCC's liquid net assets will remain in excess of OCC's existing target capital requirement of \$247 million at all times, up to and including the expiration of the staff position.

Similarly, OCC requests that the staff position related to items (2) and (3) above expire on the earlier of (I) the date of the Commission's approval of the proposed rule change formalizing OCC's revised risk management framework in satisfaction of Rule 17Ad-22(e)(3)(i), or (II) April 25, 2020. With respect to the RMF Policy, OCC represents that it will submit to the Commission any proposed rule change needed to formalize a revised RMF Policy that is not inconsistent with the requirements of Rule 17Ad-22(e)(3)(i) as soon as practicable.

Finally, OCC requests that the staff position related to items (4) and (5) above expire on the earlier of (I) the date of the Commission's approval of the proposed rule change and non-objection to an advance notice formalizing OCC's revised RWD Plan in satisfaction of Rule 17Ad-22(e)(3)(ii), or (II) April 25, 2020. With respect to the RWD Plan, OCC represents that it will submit to the Commission any proposed rule changes and/or advance notice filings needed to formalize a revised RWD Plan that is not inconsistent with the requirements of Rule 17Ad-22(e)(3)(ii) as soon as practicable.

Based on the Request, we understand the relevant facts to be as follows:

OCC is registered with the Commission as a clearing agency pursuant to Exchange Act Section 17A³ and Exchange Act Section 19(a).⁴ As a registered clearing agency, OCC is a self-regulatory organization (“SRO”) under the Exchange Act.⁵ As an SRO, OCC is subject to numerous requirements of the Exchange Act and the rules promulgated thereunder, including Section 19(g)(1) of the Exchange Act, which requires that every SRO comply with its own rules.⁶ OCC, as a registered clearing agency, is subject to the relevant requirements of Exchange Act Rule 17Ad-22.⁷ OCC is also a “covered clearing agency,” as defined by Exchange Act Rule 17Ad-22(a)(5).⁸ As a covered clearing agency, OCC is subject to certain enhanced standards under Rule 17Ad-22(e), including the following requirements:

- Exchange Act Rule 17Ad-22(e)(15),⁹ which generally requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage its general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialize, including by (I) determining the amount of liquid net assets funded by equity needed to comply with the requirements of Exchange Act Rule 17Ad-22(e)(15)(i) and (ii), and (II) maintaining a viable plan, approved by the clearing agency’s Board and updated annually, for raising additional equity should OCC’s equity fall close to or below the amount required under Rule 17Ad-22(e)(15)(ii);¹⁰
- Exchange Act Rule 17Ad-22(e)(3)(i),¹¹ which generally requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, including risk management policies, procedures, and systems designed to identify, measure, monitor, and manage the range of risks that arise in or are borne by the covered clearing agency, and that are subject to

³ 15 U.S.C. 78q-1.

⁴ 15 U.S.C. 78s.

⁵ See 15 U.S.C. 78c(a)(26).

⁶ 15 U.S.C. 78s(g).

⁷ 17 CFR 240.17Ad-22.

⁸ 17 CFR 240.17Ad-22(a)(5).

⁹ 17 CFR 240.17Ad-22(e)(15).

¹⁰ 17 CFR 240.17Ad-22(e)(15).

¹¹ 17 CFR 240.17Ad-22(e)(3)(i).

review on a specified periodic basis and approved by the board of directors annually; and

- Exchange Act Rule 17Ad-22(e)(3)(ii),¹² which generally requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, including plans for its recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk or any other losses.

OCC implemented its Capital Plan in 2015 shortly after the Division of Trading and Markets issued an order approving OCC's Capital Plan pursuant to authority delegated by the Commission.¹³ In March 2015, various parties petitioned the Commission for review of the delegated order. On February 11, 2016, the Commission issued an order setting aside the delegated order and approving OCC's Capital Plan ("Approval Order").¹⁴ On February 12, 2016, a petition for review of the Approval Order was filed in the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). On August 8, 2017, the D.C. Circuit issued an opinion concluding that the Commission's approval order failed to meet the standards of the Administrative Procedure Act and remanding the case to the Commission for further proceedings.¹⁵ On February 13, 2019, the Commission issued the Disapproval Order noting that as a result of the disapproval, OCC is no longer in compliance with Rule 17Ad-22(e)(15).¹⁶

Following the issuance of the Disapproval Order, OCC's management, its Board, and its shareholders evaluated OCC's capital position and took certain steps to ensure that OCC's liquid net assets are and will remain in excess of the \$247 million target capital requirement first established under the Capital Plan. First, OCC determined to retain the refund payments to Clearing Members and dividend payments to shareholders for 2018 that were permitted under the Capital Plan and would have been paid in 2019. Second, although OCC returned to its shareholders \$110 million of the initial \$150 million capital contribution the OCC shareholders provided to OCC in connection with the Capital Plan following the Disapproval Order, OCC's shareholders unanimously agreed to allow OCC to retain, on a temporary basis, \$40 million of the initial capital contribution to help ensure that OCC continues to maintain sufficient liquid net

¹² 17 CFR 240.17Ad-22(e)(3)(ii).

¹³ See Securities Exchange Act Release No. 74452 (Mar. 6, 2015), 80 Fed. Reg. 13058 (Mar. 12, 2015) (File No. SR-OCC-2015-02).

¹⁴ Securities Exchange Act Release No. 77112 (Feb. 11, 2016), 81 FR 8294 (Feb. 18, 2016) (SR-OCC-2015-02).

¹⁵ Susquehanna Int'l Grp., LLP v. SEC, 866 F.3d 442 (D.C. Cir. 2017).

¹⁶ Securities Exchange Act Release No. 85121 (Feb. 13, 2019), 84 Fed. Reg. 5157 (Feb. 20, 2019) (File No. SR-OCC-2015-02).

assets until such time as OCC is able to accumulate retained earnings sufficient to meet its anticipated cash-flow needs and the liquid net assets funded by equity requirement of Rule 17Ad-22(e)(15). Finally, on April 1, 2019, OCC increased its clearing fees to an amount designed to (1) generate sufficient revenue and maintain sufficient reserves to cover OCC's anticipated operating expenses and other expected cash outlays, including any unanticipated fluctuations in operating expenses, and (2) accumulate sufficient liquid net assets in reserve to facilitate compliance with Rule 17Ad-22(e)(15)(ii) and help ensure that OCC's liquid net assets do not fall close to or below the amount needed to comply therewith.¹⁷ OCC believes that, as a result of these steps, its liquid net assets will remain in excess of its existing target capital requirement of \$247 million.

Following the Disapproval Order, OCC does not have a written policy or procedure that establishes its target capital requirement as required by Rule 17Ad-22(e)(15)(i) and (ii), or a viable plan for raising additional equity should its equity fall close to or below the amount required by Rule 17Ad-22(e)(15)(ii), as required by Rule 17Ad-22(e)(15)(iii). In addition, OCC's RMF Policy and RWD Plan currently each contain invalid references to the Capital Plan.

On August 9, 2019, OCC filed a proposed rule change, and related advance notice, proposing rule changes to formalize (a) OCC's rules to determine the amount of liquid net assets funded by equity needed to comply with the requirements of Exchange Act Rule 17Ad-22(e)(15)(i) and (ii), and (b) OCC's rules to maintain a viable plan, approved by its Board, for raising additional equity should OCC's equity fall close to or below the amount required under Rule 17Ad-22(e)(15)(ii) ("Capital Management Proposal").

Response:

Based on the facts and circumstances described in the Request and summarized above, without necessarily concurring with your conclusions or analysis, Staff would not recommend enforcement action to the Commission against OCC concerning the provisions described in Items 1-5, with respect to the time period beginning on the date of this letter and subject to the limitations discussed below.

In particular, Staff notes that:

- The staff position related to Item (1) above expires on the earlier of either (I) the date of the Commission's approval of the Capital Management Proposal, or (II) April 25, 2020.¹⁸

¹⁷ See Securities Exchange Act Release No. 85322 (Mar. 14, 2019), 84 Fed. Reg. 10377 (Mar. 20, 2019) (File No. SR-OCC-2019-01).

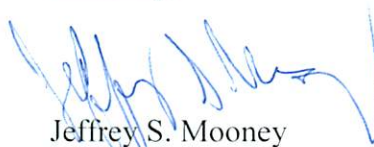
¹⁸ April 25, 2020 is the 260th day after August 9, 2019 and represents what OCC believes is the latest possible date by which the Commission could approve the Capital Management Proposal when factoring in time for the Commission's rejection review immediately upon filing, time for publication by the Office of the Federal Register once the rejection review is completed, and the maximum 240-day statutory review period, which commences upon publication in the Federal Register.

- OCC will ensure that its liquid net assets remain in excess of OCC's existing target capital requirement of \$247 million at all times, up to and including the expiration of the requested staff position.
- The staff position related to Items (2) and (3) above expires on the earlier of (I) the date of the Commission's approval of a proposed rule change (and non-objection to an advance notice, if applicable) formalizing OCC's revised risk management framework in satisfaction of Rule 17Ad-22(e)(3)(i), or (II) April 25, 2020.
- With respect to the RMF Policy, OCC will submit to the Commission any proposed rule change needed to formalize a revised RMF Policy that is not inconsistent with the requirements of Rule 17Ad-22(e)(3)(i) as soon as practicable.
- The staff position related to Items (4) and (5) above expire on the earlier of (I) the date of the Commission's approval of the proposed rule change and non-objection to an advance notice formalizing OCC's revised RWD Plan in satisfaction of Rule 17Ad-22(e)(3)(ii), or (II) April 25, 2020.
- With respect to the RWD Plan, OCC will submit to the Commission any proposed rule changes and/or advance notice filings needed to formalize a revised RWD Plan that is not inconsistent with the requirements of Rule 17Ad-22(e)(3)(ii) as soon as practicable.

The position of the Staff is based strictly on the facts and circumstances discussed in the Request, and any different facts or circumstances may require a different response. Furthermore, this response expresses the Staff's position regarding enforcement action only and does not purport to express any legal conclusions on the questions presented. The Staff expresses no view with respect to any other questions that the activities discussed above may raise, including the applicability of any other federal or state laws or regulations, or self-regulatory organization rules. This position is subject to modification or revocation at any time.

If you have any questions regarding this letter, please call me at (202) 551-5712 or Moshe Rothman at (202) 551-5645.

Sincerely,



Jeffrey S. Mooney
Associate Director

Attachment



**THE FOUNDATION
FOR SECURE
MARKETS**

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October 22, 2019

VIA ELECTRONIC MAIL

Mr. Jeffrey Mooney, Associate Director
Office of Clearance and Settlement, Division
of Trading and Markets
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

RE: Request for No-Action Relief from Certain Requirements Arising From Section 19(g)(1) of the Securities Exchange Act of 1934 and from Rules 17Ad-22(e)(3)(i), 17Ad-22(e)(ii) and 17Ad-22(e)(15) promulgated under the Securities and Exchange Act of 1934.

Dear Mr. Mooney:

We are writing to request that the staff of the Division of Trading and Markets (“Division”) of the U.S. Securities and Exchange Commission (“Commission”) confirm that it will not recommend that the Commission take enforcement action against The Options Clearing Corporation (“OCC”) for temporary noncompliance with certain provisions of the Commission’s “Standards for Covered Clearing Agencies,” promulgated under the Securities Exchange Act of 1934 (“Exchange Act”), as a result of the Commission’s February 13, 2019 order (“Disapproval Order”)¹ disapproving OCC’s proposed rule change concerning its Capital Plan.

More specifically, OCC requests that, for the reasons and time periods specified in Section II. below, the Division not recommend the Commission take enforcement action with respect to the following:

- (1) The requirement of Exchange Act Rule 17Ad-22(e)(15) that OCC, as a covered clearing agency, establish, implement, maintain and enforce written policies and procedures reasonably designed to (I) determine the amount of liquid net assets funded by equity needed to comply with the requirements of Exchange Act Rule 17Ad-22(e)(15)(i) and (ii), and (II) maintain a viable plan, approved by its Board of Directors (“Board”), for raising additional equity should OCC’s equity fall close to or below the amount required under Rule 17Ad-22(e)(15)(ii);

¹ Securities Exchange Act Release No. 85121 (February 13, 2019), 84 FR 5157 (February 20, 2019) (SR-OCC-2015-02).

- (2) The requirement of Exchange Act Rule 17Ad-22(e)(3)(i) that OCC, as a covered clearing agency, maintain a sound risk management framework for comprehensively managing the range of risks that arise in or are borne by OCC, to the extent that OCC's disapproved Capital Plan constituted the capital replenishment tool in OCC's Risk Management Framework Policy ("RMF Policy");
- (3) The requirement in Section 19(g)(1) of the Exchange Act that OCC, as a self-regulatory organization, comply with its own rules, to the extent that OCC's RMF Policy temporarily continues to reference OCC's disapproved Capital Plan (or aspects thereof);
- (4) The requirement of Exchange Act Rule 17Ad-22(e)(3)(ii) that OCC, as a covered clearing agency, maintain plans for the recovery and orderly wind-down of OCC necessitated by losses from credit losses, liquidity shortfalls, general business risk or any other losses, to the extent that elements of OCC's disapproved Capital Plan (or aspects thereof) were relied upon in OCC's Recovery and Orderly Wind-Down Plan ("RWD Plan"); and
- (5) The requirement in Section 19(g)(1) of the Exchange Act that OCC, as a self-regulatory organization, comply with its own rules, to the extent that OCC's RWD Plan temporarily continues to reference OCC's disapproved Capital Plan (or aspects thereof).

I. Introduction and Background

OCC, founded in 1973, is the world's largest equity derivatives clearing organization. OCC clears security options, security futures and other securities contracts subject to the jurisdiction of the Commission, and OCC is registered with the Commission as a clearing agency pursuant to Exchange Act Section 17A² and Exchange Act Section 19(a).³

A. Applicable Statutory and Regulatory Provisions

As a registered clearing agency, OCC is a self-regulatory organization ("SRO") under the Exchange Act.⁴ As an SRO, OCC is subject to numerous requirements of the Exchange Act and the rules promulgated thereunder. As relevant to this request for no-action relief, as an SRO, OCC is subject to Section 19(g)(1) of the Exchange Act,⁵ which requires that every SRO shall comply with its own rules.

² 15 U.S.C. 78q-1.

³ 15 U.S.C. 78s.

⁴ See 15 U.S.C. 78c(a)(26).

⁵ 15 U.S.C. 78s(g).

OCC, as a registered clearing agency, is subject to the requirements of Exchange Act Rule 17Ad-22, generally.⁶ OCC is also a “covered clearing agency,” as defined by Exchange Act Rule 17Ad-22(a)(5).⁷ As a covered clearing agency, OCC is specifically subject to certain enhanced standards under Rule 17Ad-22(e) (collectively, the “CCA Rules”).⁸ As relevant to this request for no-action relief, as a covered clearing agency, OCC is subject to the following requirements:

- Exchange Act Rule 17Ad-22(e)(15),⁹ which requires generally that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage its general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialize, including by (I) determining the amount of liquid net assets funded by equity needed to comply with the requirements of Exchange Act Rule 17Ad-22(e)(15)(i) and (ii), and (II) maintaining a viable plan, approved by the clearing agency’s Board and updated annually, for raising additional equity should OCC’s equity fall close to or below the amount required under Rule 17Ad-22(e)(15)(ii).¹⁰
- Exchange Act Rule 17Ad-22(e)(3)(i),¹¹ which requires generally that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, including risk management policies, procedures, and systems designed to identify, measure, monitor, and manage the range of risks that arise in or are borne by the covered clearing agency, and that are subject to review on a specified periodic basis and approved by the board of directors annually.
- Exchange Act Rule 17Ad-22(e)(3)(ii),¹² which requires generally that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, including plans for its recovery and orderly wind-down of the covered

⁶ 17 CFR 240.17Ad-22.

⁷ 17 CFR 240.17Ad-22(a)(5).

⁸ 17 CFR 240.17Ad-22(e).

⁹ 17 CFR 240.17Ad-22(e)(15).

¹⁰ 17 CFR 240.17Ad-22(e)(15).

¹¹ 17 CFR 240.17Ad-22(e)(3)(i).

¹² 17 CFR 240.17Ad-22(e)(3)(ii).

clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk or any other losses.

B. Commission Disapproval of OCC's Capital Plan

On March 6, 2015, the Division of Trading and Markets issued an order approving OCC's Capital Plan pursuant to authority delegated by the Commission.¹³ In March 2015, BATS Global Markets, Inc., BOX Options Exchange, LLC ("BOX"), KCG Holdings, Inc. ("KCG"), Miami International Securities Exchange, LLC, MIAX PEARL, LLC (together "MIAX"), and Susquehanna International Group, LLP ("SIG") petitioned the Commission for review of the delegated order. On February 11, 2016, the Commission issued an order setting aside the delegated order and approving OCC's Capital Plan.¹⁴ On February 12, 2016, BOX, KCG, MIAX, and SIG filed a petition for review in the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), challenging the Commission's approval order as inconsistent with the Exchange Act and the Administrative Procedure Act. On August 8, 2017, the D.C. Circuit issued an opinion concluding that the Commission's approval order failed to meet the standards of the Administrative Procedure Act and remanding the case to the Commission to reevaluate the Capital Plan.¹⁵

OCC implemented its Capital Plan in 2015 after the issuance of the first delegated approval order. Neither the Commission nor the D.C. Circuit stayed the implementation of the plan on review, and the D.C. Circuit did not vacate the Commission's approval order on remand. The Capital Plan therefore remained in effect during this time.

On February 13, 2019, the Commission issued the Disapproval Order.¹⁶ In the Disapproval Order, the Commission noted that, as a result of the disapproval, OCC is no longer in compliance with Rule 17Ad-22(e)(15). Following the issuance of the Disapproval Order, OCC's management, its Board, and the Stockholder Exchanges have evaluated OCC's capital position. OCC determined to retain the refund and dividend payments for 2018 that would have been paid in 2019. OCC's Stockholder Exchanges unanimously agreed to allow OCC to retain, on a temporary basis, \$40 million of the initial \$150 million capital contribution from the Capital Plan to help ensure that OCC continues to maintain sufficient liquid net assets until such time as OCC is able to accumulate retained earnings sufficient to meet its anticipated cashflow needs and the liquid net assets funded by equity requirement of Rule 17Ad-22(e)(15). On April 1, 2019, OCC increased its clearing fees to (1) generate sufficient revenue and maintain sufficient reserves to cover OCC's anticipated operating expenses and other expected cash outlays, including any unanticipated fluctuations in operating expenses, and (2) accumulate sufficient liquid net assets in reserve to facilitate compliance with Rule 17Ad-22(e)(15)(ii) and help ensure that OCC's liquid net assets do not fall close to or below the

¹³ Securities Exchange Act Release No. 74452 (Mar. 6, 2015), 80 FR 13058 (Mar. 12, 2015) (SR-OCC-2015-02).

¹⁴ Securities Exchange Act Release No. 77112 (Feb. 11, 2016), 81 FR 8294 (Feb. 18, 2016) (SR-OCC-2015-02).

¹⁵ *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017).

¹⁶ Securities Exchange Act Release No. 85121 (Feb. 13, 2019), 84 FR 5157 (Feb. 20, 2019) (SR-OCC-2015-02).

amount needed to comply therewith.¹⁷ As a result of these steps, OCC believes that its liquid net assets will remain in excess of OCC's existing target capital requirement of \$247 million.¹⁸

However, the disapproval of the Capital Plan leaves OCC without a written policy or procedure that establishes its target capital requirement in satisfaction of the requirements of Rule 17Ad-22(e)(15)(i) and (ii). The disapproval of the Capital Plan also leaves OCC without a viable plan for raising additional equity should its equity fall close to or below the amount required by Rule 17Ad-22(e)(15)(ii), as required by Rule 17Ad-22(e)(15)(iii).

The disapproval of the Capital Plan leaves OCC's RMF Policy with invalid references to the Capital Plan as the tool by which OCC maintained high quality liquid assets to remain a going concern after business losses, and the tool by which OCC would replenish its capital after losses arising from general business risk. The disapproval of the Capital Plan also leaves OCC's RWD Plan with several invalid references to the Capital Plan or to certain of its component parts, including: (i) referencing the Capital Plan's replenishment requirement as one of OCC's identified recovery tools, (ii) referencing the Capital Plan's "Hard Trigger Threshold" as one of OCC's "recovery triggers," (iii) referencing the deployment of replenishment capital as a recovery tool in one of OCC's recovery scenarios addressing general business and operational risks, and (iv) assuming as part of OCC's wind-down plan that OCC would cross the Hard Trigger Threshold and recapitalize in an amount sufficient to fund OCC's resolution.

II. Relief Requested and Analysis

For the reasons provided below, OCC requests the Division provide the following no-action relief:

A. No-Action Relief from the Requirements in Rule 17Ad-22(e)(15)

1. Request for No-Action Relief from the Requirements in Rule 17Ad-22(e)(15)

As discussed above, in its Disapproval Order the Commission noted that, as a result of the disapproval, it believes OCC is no longer in compliance with Rule 17Ad-22(e)(15). Specifically, the disapproval of the Capital Plan leaves OCC without a written policy or procedure that establishes its target capital requirement in satisfaction of the requirements of Rule 17Ad-22(e)(15)(i) and (ii). The disapproval of the Capital Plan also leaves OCC without a viable plan for raising additional equity should its equity fall close to or below the amount required by Rule 17Ad-22(e)(15)(ii), as required by Rule 17Ad-22(e)(15)(iii).

¹⁷ See SR-OCC-2019-01.

¹⁸ OCC's target capital requirement of \$247 million was approved by OCC's Board at a regularly scheduled meeting in December 2018. As a result of the Disapproval Order, OCC's process for determining its target capital requirement is not presently filed as a rule with the SEC.

In order to return to compliance with Rule 17Ad-22(e)(15)(i) and (ii), OCC must, among other things, prepare a written policy that establishes OCC's target capital requirement – absent any considerations for refund or dividend payments – in satisfaction of the requirements of Rule 17Ad-22(e)(15)(i) and (ii), have such policy approved by OCC's management and Board and ultimately have any necessary proposed rule change and advance notice filings approved by the Commission. OCC has prepared its written policy and obtained management and Board approval. The remaining step entails obtaining the Commission's ultimate approval of such proposed rule change and advance notice.

In order to return to compliance with Rule 17Ad-22(e)(15)(iii), OCC must, among other things, assess its anticipated future capital position as a result of the Disapproval Order, evaluate the impact of any adopted fee change, develop and evaluate a plan for raising additional equity, consider the appropriateness of such plan against the requirements of the Exchange Act and rules promulgated thereunder, obtain approval of any proposed plan to raise additional equity from OCC's Board and ultimately obtain approval of any proposed rule change and advance notice filings from the Commission. OCC has already completed its assessment of its future capital position and implemented a corresponding fee change, developed and evaluated a plan for raising additional equity, considered the appropriateness of the plan against Exchange Act requirements and obtained necessary Board approval. The remaining step entails obtaining the Commission's ultimate approval of such proposed rule change and advance notice.

For this reason, OCC is requesting no-action relief from the requirements of Rule 17Ad-22(e)(15) that OCC, as a covered clearing agency, establish, implement, maintain and enforce written policies and procedures reasonably designed to (I) determine the amount of liquid net assets funded by equity needed to comply with the requirements of Exchange Act Rule 17Ad-22(e)(15)(i) and (ii), and (II) maintain a viable plan, approved by its Board, for raising additional equity should OCC's equity fall close to or below the amount required under Rule 17Ad-22(e)(15)(ii). With respect to each of these requirements, OCC requests that the period of the requested no-action relief begin on the date of issuance of the Disapproval Order and expire on the earlier of:

- (I) The date of the Commission's approval of the proposed rule change and non-objection to an advance notice formalizing OCC's written policy reasonably designed to determine the amount of liquid net assets funded by equity needed to comply with the requirements of Exchange Act Rule 17Ad-22(e)(15)(i) and (ii), or
- (II) April 25, 2020.¹⁹

¹⁹ April 25, 2020 is the 260th day after August 9, 2019, the date on which OCC filed a proposed rule change, and related advance notice, proposing rule changes to formalize (y) OCC's rules to determine the amount of liquid net assets funded by equity needed to comply with the requirements of Exchange Act Rule 17Ad-22(e)(15)(i) and (ii), and (z) OCC's rules to maintain a viable plan, approved by its Board, for raising additional equity should OCC's equity fall close to or below the amount required under Rule 17Ad-22(e)(15)(ii) ("Capital Management Proposal"). The 260-day period represents that maximum period for the Commission to approve

OCC would continue to ensure that its liquid net assets remain in excess of OCC's existing target capital requirement of \$247 million at all times, up to and including the expiration of the requested no-action relief.

2. No-Action Relief is Necessary and Appropriate

OCC believes that granting the requested no-action relief for the period requested is consistent with the public interest, protection of investors and purposes of Section 17A of the Exchange Act. In proposing Rule 17Ad-22(e)(15), the Commission explained that the requirements therein are "designed to help mitigate the potential impairment of a covered clearing agency's status as a going concern resulting from general business losses."²⁰ The Commission further explained that the requirements in Rule 17Ad-22(e)(15) are "appropriate because [they] would help mitigate the risk of a disruption in clearance and settlement services that might result from general business losses."²¹ The Commission also reinforced the importance of maintaining resources to allow for the execution of a covered clearing agency's recovery and orderly wind-down plan.²² None of the Commission's stated justifications for proposing Rule 17Ad-22(e)(15) are directly implicated by OCC's request for no-action relief.

As stated above, OCC's management, its Board and Stockholder Exchanges have evaluated OCC's capital position and have taken steps designed to ensure that OCC's liquid net assets will remain in excess of OCC's existing target capital requirement of \$247 million, which amount was itself conservatively determined.²³ Importantly, the disapproval of the Capital Plan does not impact the prefunded financial resources that OCC maintains for purposes of addressing potential losses that might arise from the default of its largest clearing member family in extreme but plausible market conditions, as required by Exchange Act Rule 17Ad-22(e)(4)(iii).²⁴ Accordingly, OCC is not facing any potential impairment to its financial stability as a going concern as a result of the

OCC's proposed rule change (including the maximum periods for publication of the proposed rule change by the Commission and Office of the Federal Register).

²⁰ Standards for Covered Clearing Agencies, 79 Fed. Reg. 29508, 29548 (May 22, 2014).

²¹ 79 Fed. Reg. at 29548.

²² *Id.*

²³ OCC's target capital requirement was determined based on a number of considerations, including: (i) a baseline amount that is the greater of six months of projected operating expenses or the amount determined by the Board to ensure a recovery or orderly wind-down of critical operations and services; (ii) a value linked to OCC's risk of potential business or operational losses; and (iii) the level of annual expenses from OCC's budget (excluding one-time expenses). In determining the appropriate level of OCC's target capital requirement, OCC's Board considered quantitative analyses based on a number of assumptions and projections, including: (i) projected average daily contract volumes consistent with the assumptions used in OCC's 2019 annual budget; (ii) projected expenses and known cash flows based on OCC's 2019 budget; (iii) an operating margin based on an analysis of five-year historical volumes; (iv) the retention of refund and dividend payments for 2018; (v) the retention of \$40 million of the initial capital contribution from the shareholder exchanges; and (vi) known capital needs to replace and modernize OCC's technology infrastructure.

²⁴ 17 C.F.R. 240.17Ad-22(e)(4)(iii).

Disapproval Order nor is there any threat of a disruption to OCC's clearance and settlement services.²⁵

In addition to OCC's confidence in its position of financial stability as a going concern, OCC anticipates that it also will maintain, notwithstanding the disapproval of the Capital Plan, sufficient capital to ensure a recovery or orderly wind-down of its critical operations and services as contemplated by its RWD Plan.²⁶ Accordingly, OCC's ability to fund its RWD Plan is not jeopardized.

With respect to the relief requested in Section II., A., 1., OCC is requesting a period of no-action relief that is necessary to obtain the Commission's ultimate approval of such proposed rule change and advance notice. OCC believes that the period of relief requested is the minimum necessary to facilitate OCC's return to compliance with Rule 17Ad-22(e)(15).

For the reasons above, OCC believes that granting the requested period of no-action relief would not be inconsistent with the purpose of prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds and ultimately will inure to the benefit of clearing members and market participants.²⁷

B. No-action Relief Concerning Impact to OCC's RMF Policy and RWD Plan

As discussed above, OCC has identified that the Disapproval Order impacts OCC's RMF Policy by invalidating the references to the Capital Plan as the tool by which OCC maintained high quality liquid assets to remain a going concern after business losses, and the tool by which OCC would replenish its capital after losses arising from general business risk. OCC also has identified that the Disapproval Order impacts OCC's RWD Plan by invalidating all references to the Capital Plan or to certain of its component parts, including (i) referencing the Capital Plan's replenishment requirement as one of OCC's identified recovery tools, (ii) referencing the Capital Plan's "Hard Trigger Threshold" as one of OCC's "recovery triggers," (iii) referencing the deployment of replenishment capital as a recovery tool in one of OCC's recovery scenarios addressing general

²⁵ OCC has not previously experienced material losses from general business or operational risks, let alone losses that could possibly threaten its financial stability as a going concern or potentially disrupt its clearance and settlement services.

²⁶ Consistent with the discussion in Section II., A. 1., above, this statement is not intended to suggest that OCC presently satisfies the requirement to maintain a plan to raise additional equity under Rule 17Ad-22(e)(15)(iii).

²⁷ Furthermore, OCC believes that this request for no-action relief satisfies the elements for relief requested by the Commission in its Disapproval Order. In its Disapproval Order, the Commission explained that exemptive relief requested by OCC would be expected to include a detailed explanation of (i) the relief being sought, (ii) why the requested relief is necessary, (iii) the time period for which OCC is seeking relief and an explanation of its appropriateness, and (iv) any limitations or conditions that OCC believes would be appropriate to impose in connection with the requested relief. See Securities Exchange Act Release No. 85121 (February 13, 2019), 84 FR 5157 (February 20, 2019) (SR-OCC-2015-02).

business and operational risks, and (iv) assuming as part of OCC's wind-down plan that OCC would cross the Hard Trigger Threshold and recapitalize in an amount sufficient to fund OCC's resolution.

The RMF Policy and the RWD Plan each became inaccurate wherever they referenced the Capital Plan (or aspects thereof) immediately upon the issuance of the Disapproval Order. The RMF Policy and the RWD Plan also discuss, to varying degrees, OCC's compliance with Rule 17Ad-22(e)(15); therefore, both documents will remain materially incomplete in that regard until such time as OCC can complete the steps necessary to return to compliance with Rule 17Ad-22(e)(15) (discussed in Section II., A., above).

For these reasons, OCC is requesting the following relief:

1. Request for No-Action Relief from the Requirements in Rules 17Ad-22(e)(3)(i) and (ii) and from Section 19(g)(1)

OCC is requesting no-action relief from the requirement of Exchange Act Rule 17Ad-22(e)(3)(i) that OCC, as a covered clearing agency, maintain a sound risk management framework for comprehensively managing the range of risks that arise in or are borne by OCC, to the extent that OCC's disapproved Capital Plan constituted the capital replenishment tool in OCC's RMF Policy. OCC requests that the period of the requested no-action relief begin on the date of issuance of the Disapproval Order and expire on the earlier of:

- (I) The date of the Commission's approval of the proposed rule change formalizing OCC's revised risk management framework in satisfaction of Rule 17Ad-22(e)(3)(i),
or
- (II) April 25, 2020.²⁸

OCC would submit to the Commission any proposed rule change needed to formalize a revised RMF Policy that is not inconsistent with the requirements of Rule 17Ad-22(e)(3)(i) as soon as practicable.

Similarly, OCC is requesting no-action relief from the requirement of Exchange Act Rule 17Ad-22(e)(3)(ii) that OCC, as a covered clearing agency, maintain plans for the recovery and orderly wind-down of OCC necessitated by losses from general business risk or any other losses intended to be addressed by the requirements of Exchange Act Rule 17Ad-22(e)(15)(iii), to the extent that elements of OCC's disapproved Capital Plan (or aspects thereof) were relied upon by

²⁸ April 25, 2020 is the first business day following the 260th day after August 9, 2019, the date on which OCC filed the Capital Management Proposal. The changes necessary to address inconsistencies between the rules proposed in the Capital Management Proposal and the RMF Policy would be conditional on the approval of the Capital Management Proposal.

OCC's RWD Plan. OCC requests that the period of the requested no-action relief begin on the date of issuance of the Disapproval Order and expire on the earlier of:

- (I) The date of the Commission's approval of the proposed rule change and non-objection to an advance notice formalizing OCC's revised RWD Plan in satisfaction of Rule 17Ad-22(e)(3)(ii), or
- (II) April 25, 2020.²⁹

OCC would submit to the Commission any proposed rule changes and/or advance notice filings needed to formalize a revised RWD Plan that is not inconsistent with the requirements of Rule 17Ad-22(e)(3)(ii) as soon as practicable.

Finally, OCC is requesting no-action relief from the requirement of Section 19(g)(1) of the Exchange Act that OCC, as a self-regulatory organization, comply with its own rules, to the extent that OCC's RMF Policy and RWD Plan temporarily continue to reference OCC's disapproved Capital Plan (or aspects thereof) during the period between the issuance of the Disapproval Order and the expiration of the no-action relief requested for each in this Section II., B., 1.

In each case, OCC believes that the requested period of no-action relief is appropriate because it aligns with the requested period of relief from Rule 17Ad-22(e)(15)(iii). As stated above, OCC returning to compliance with Rule 17Ad-22(e)(15)(iii) is a dependency for OCC's RMF Policy and RWD Plan satisfying the requirements of Rule 17Ad-22(e)(3)(i) and Rule 17Ad-22(e)(3)(ii), respectively.

2. No-Action Relief is Necessary and Appropriate

OCC believes that granting the requested no-action relief is consistent with the public interest, protection of investors and the purposes of Section 17A of the Exchange Act. In proposing Rule 17Ad-22(e)(3), the Commission explained that the requirements therein are designed to encourage "a broader, more comprehensive approach to risk management" and to "facilitate the development of mechanisms to better prioritize, manage and monitor risks, and to measure the covered clearing agency's risk tolerance and capacity."³⁰ The policies, procedures and plans required by proposed Rule 17Ad-22(e)(3) should be "designed holistically...and work effectively together in order to mitigate the risk of financial losses to covered clearing agencies' members and

²⁹ April 25, 2020 is the first business day following the 260th day after August 9, 2019, the date on which OCC filed the Capital Management Proposal. The changes necessary to address inconsistencies between the rules proposed in the Capital Management Proposal and the RWD Plan would be conditional on the approval of the Capital Management Proposal.

³⁰ 79 Fed. Reg. at 29522-29523.

participants in the markets they serve.”³¹ None of the Commission’s stated justifications for proposing Rule 17Ad-22(e)(3) are directly implicated by OCC’s request for no-action relief.

As stated above, OCC’s RMF Policy and RWD Plan have only been impacted to the extent that either references the Capital Plan (or aspects thereof); the remainder of each document, which has been approved as a rule by the Commission, remains valid and effective. OCC believes that, together, the extant portions of these documents provide the exact type of holistically designed, broad and comprehensive approach to risk management that the Commission intended in proposing Rule 17Ad-22(e)(3). Nothing in the requested relief would jeopardize the ability of OCC to continue to maintain and enforce the unaffected sections of the RMF Policy or the RWD Plan.

With respect to the affected sections of the RMF Policy and the RWD Plan, OCC believes the requested period of no-action relief represents the minimum period necessary for the evaluation of any plan for compliance with Rule 17Ad-22(e)(15)(iii) and the ultimate approval of any necessary proposed rule change and advance notice filings by the Commission. Granting no-action relief for the period necessary to obtain the Commission’s ultimate approval of such proposed rule change and advance notice would not be inconsistent with the purpose of prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds and ultimately will inure to the benefit of clearing members and market participants. Since OCC returning to compliance with Rule 17Ad-22(e)(15)(iii) is a dependency for OCC’s RMF Policy and RWD Plan satisfying the requirements of Rule 17Ad-22(e)(3)(i) and Rule 17Ad-22(e)(3)(ii), respectively, OCC believes that similar periods of relief are necessary.

For the reasons above, OCC believes that granting the requested period of no-action relief would not be inconsistent with the purpose of prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds and ultimately will inure to the benefit of clearing members and market participants.³²

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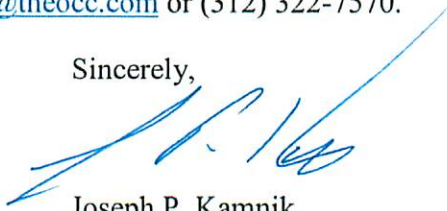
³¹ 79 Fed. Reg. at 29523.

³² *Supra* note 27.

Mr. Jeffrey Mooney
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If you should have any further questions or require additional information, please do not hesitate to contact the undersigned at jkamnik@theooc.com or (312) 322-7570.

Sincerely,



Joseph P. Kamnik
Chief Regulatory Counsel

cc: Brett Redfearn, Director, Division of Trading and Markets
Christian Sabella, Deputy Director, Division of Trading and Markets
Moshe Rothman, Assistant Director, Office of Clearance and Settlement, Division of Trading
and Markets