THE FOUNDATION FOR SECURE MARKETS

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May 22, 2023

VIA ELECTRONIC MAIL [*rule-comments@sec.gov*]

Ms. Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File No. S7-08-23, Electronic Submission of Certain Materials Under the Securities Exchange Act of 1934; Amendments Regarding the FOCUS Report

Dear Ms. Countryman:

The Options Clearing Corporation ("OCC") appreciates the opportunity to submit these comments on the above-referenced proposal ("Proposal" or "Proposed Rules")[1] under the Securities Exchange Act of 1934 ("Exchange Act"). The Proposal would amend certain filing requirements and required forms pursuant to the Exchange Act applicable to or used by, among others, registered clearing agencies and self-regulatory organizations ("SROs").

OCC supports and appreciates the Commission's efforts to reduce the burden on registrants by modernizing filing requirements and forms to make submission more streamlined and cost-effective. We commend the Commission for committing the time and resources to this rulemaking, which appropriately updates rules and forms to eliminate paper filing requirements, enhance the usability of data, and take advantage of contemporary communications technologies.

Three aspects of the Proposed Rules directly impact OCC: (i) changes to Exchange Act Rules 17ab2-1 and 24b-2 and to Form CA-1; (ii) amendments to Exchange Act Rule 19b-4 and the paper signature requirement in the instructions to Form 19b-4; and (iii) amendments to Rule 17a-22 (i-iii collectively, the "Relevant Proposed Rules"). While OCC is generally supportive of each of the Relevant Proposed Rules, certain aspects of the Proposal create potential ambiguity for registrants, contrary to the Commission's broad goal of building on the "practical and efficient" electronic filing alternatives provided by the staff of the Commission ("Staff") as a result of the COVID pandemic.[2] Below, we address each of the relevant provisions and, where appropriate, suggest certain clarifications to be included in any final rule.

About OCC

OCC, founded in 1973, is the world's largest equity derivatives clearing organization. OCC operates under the jurisdiction of both the SEC and the Commodity Futures Trading Commission. As a registered clearing agency under SEC jurisdiction, OCC clears transactions for exchange-listed options. OCC also provides central counterparty clearing and settlement services for securities

[1] RIN 3235-AL85 Electronic Submission of Certain Materials Under the Securities Exchange Act of 1934; Amendments Regarding the FOCUS Report (Mar. 15, 2023), 88 FR 23920 (Apr. 18, 2023) ("Release").

[2] Release at 10.

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lending transactions. OCC is a recognized third-country central counterparty in the European Union. In addition, OCC has been designated by the Financial Stability Oversight Council as a systemically important financial market utility ("SIFMU") under Title VIII of the Dodd- Frank Wall Street Reform and Consumer Protection Act. As a SIFMU, OCC is also subject to oversight by the Board of Governors of the Federal Reserve System. OCC operates as a market utility and is owned by five exchanges.

Comments on Proposed Rules

Below, OCC provides brief comments on each of the Relevant Proposed Rules. With respect to the changes to Form CA-1 and Rule 17ab2-1, and the amendments to Rule 17a-22, we also suggest clarification to enhance certainty and usability for registrants.

Form CA-1 and Exchange Act Rules 17ab2-1 and 24b-2

The Commission proposes to make a series of changes to Exchange Act Rules 17ab2-1 and 24b-2, and to Form CA-1 (collectively, "Form CA-1 Changes") for the overall purpose of requiring electronic filing of Form CA-1 and amendments thereto on the Commission's EDGAR system, rather than via paper filing; mandating the use of structured data for certain aspects of Form CA-1; and requiring the use of electronic, rather than physical, signatures. In addition, registrants would be required to provide an email address for "the person in charge of the registrant's clearing agency activities," in addition to other contact information already provided pursuant to Item 2 of Form CA-1 under the current rules ("Item 2 Email Requirement").

OCC filed its initial Form CA-1 in 1976.[3] However, OCC is required to file amendments to Form CA-1 when certain relevant information changes, including office addresses or the identity of certain senior personnel. Therefore, our comments focus primarily on those aspects of the Form CA-1 Changes relating to required amendments to Form CA-1.[4]

OCC supports the move to electronic filing of Form CA-1 and amendments thereto on EDGAR, and appreciates the conversion to an electronic signature requirement. Further, OCC does not anticipate that the proposed structured data requirements will present obstacles or be burdensome for registered clearing agencies filing routine amendments to Form CA-1.

With respect to the Item 2 Email Requirement, OCC appreciates the Commission's desire to "facilitate communication between the registrant and the Commission,"[5] and agrees it is appropriate to update the contact information with an email address for that purpose. However, we suggest that,

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[3] Final registration was granted in 1983, following the adoption of the Commission's clearing agency standards. *See* Depository Trust Co., *et al*, Exchange Act Rel. No. 20221, 48 FR at 45167 (Oct. 3, 1983).

[4] We do not understand the Proposal to require clearing agencies that are already registered to re-file their entire Form CA-1 and all subsequent amendments, and instead only understand the Proposed Rules to apply to any future filings. *See, e.g.,* Release at 210-12 (estimating the receipt by the Commission of one new Form CA-1 and one amendment to Form CA-1 per year, across all impacted entities).

[5] Release at 67.

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in any final rule, the Commission clarify that a registrant may provide a designated email inbox (e.g. *SEC-Contact@registrant domain]*) in lieu of a specific person's business email address (e.g. *[name]@[registrant domain]*). The use of a designated email inbox would serve multiple purposes. First, a dedicated inbox could be monitored by or routed to multiple people at the registrant, which would decrease the chances for a response to a communication from the Staff to be delayed due to, e.g., an unforeseen absence of the individual identified in Item 2. Second, a dedicated email inbox would remain effective even during a transition at the clearing agency in the identity of the Item 2 contact person. Finally, given that the Commission is proposing that Form CA-1 and amendments will be publicly available on EDGAR, a dedicated email inbox would be more appropriate for both privacy and efficiency purposes, as it would avoid the risk of misuse (e.g., spamming) of the business email address of the individual identified in Item 2.[6] In light of the above, we believe the use of a dedicated email inbox should be acceptable and would enhance the effectiveness of the Proposed Rules.[7]

Form 19b-4 Amendments

Section 19(b) of the Exchange Act requires each SRO to file with the Commission copies of any proposed rule, or any proposed change in, addition to, or deletion from the rules of such SRO (collectively, a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. OCC is an SRO, and therefore subject to the requirements of Section 19(b). Exchange Act Rule 19b-4 generally requires an SRO to submit each proposed rule change by electronically filing Form 19b-4. The Commission proposes to remove the requirement under Rule 19b-4(j) that the signatory to an electronically submitted Form 19b-4 manually sign a signature page or other document authenticating, acknowledging, or otherwise adopting their signature that appears in the electronic filing, and retain that document for its records in accordance with Rule 17a-1. The Commission also proposes to make conforming changes to Form 19b-4 and the instructions thereto (all proposed changes described above, the "Form 19b-4 Amendments").

OCC makes frequent use of Form 19b-4, having made 25 filings or amendments to filings on the form since January 1, 2022. Given that the manual signature is entirely redundant to the electronic signature already required with the filing, the proposed Form 19b-4 Amendments will reduce the administrative burden on SROs and thereby increase efficiency without impacting the reliability of

[6] In the alternative, a clearing agency could presumably seek confidential treatment for some or all of the contact information included in Item 2 on Section X of amended Form CA-1, pursuant to proposed new Rule 24b-2(k). *See* Release at 169. OCC is supportive of the addition of new Section X and Rule 24b-2(k).

[7] While OCC is generally supportive of the addition of an email address to Item 2 as a means to facilitate communication between Staff and a registrant, we believe the Staff is already in possession of such information for all existing registrants, given the frequent interaction that occurs in the course of the Commission's oversight of registered clearing agencies. As such, we request that the Commission clarify in any final rule that registered clearing agencies are not required to file an amendment to Form CA-1 merely to add an email address in Item 2, but that they should include one in any future amendment to Form CA-1 required for any other reason. This would be consistent with the Commission's burden analysis in the Release (*see supra, fn. 5),* and would avoid imposing significant costs across the industry to provide the Commission with information already in its possession. *See generally* Release at 210 (estimating 60 hours of clearing agency staff time per amendment to Form CA-1).

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the required filings. Therefore, OCC agrees with the Commission that the manual signature retention requirement in the current version of Rule 19b-4 and Form 19b-4 should be removed.

Rule 17a-22 Amendments

As a registered clearing agency, OCC is subject to current Exchange Act Rule 17a-22, which requires that within 10 days after issuing, or making generally available, to its participants or to other entities with whom it has a significant relationship, such as pledgees, transfer agents, or SROs, any material (including, for example, manuals, notices, circulars, bulletins, lists or periodicals), a registered clearing agency shall file three copies of such material ("Supplemental Materials") with the Commission. Since 2020, registrants have been able to provide such Supplemental Materials to the Staff via email, pursuant to no-action relief provided by the Staff during the COVID pandemic.[8] The Proposal would amend Rule 17a-22 to: (i) replace the requirement to file supplementary materials with the Commission in paper form with a requirement to "prominently" post such materials on the clearing agency's publicly accessible website; (ii) reduce the timeframe for compliance with the rule from 10 days to 2 business days for the posting requirement; and (iii) remove the list of examples of entities with whom it might have a significant relationship (collectively, the "17a-22 Amendments").

OCC supports the 17a-22 Amendments, which are aligned with its existing practices. OCC issues a variety of notices, circulars, and similar materials in the form of "Information Memos" that it posts on its publicly available website at https://infomemo.theocc.com/infomemo/search, and thereby makes them generally available to relevant entities, including clearing members and other potentially impacted market participants. Pursuant to existing Rule 17a-22, OCC provides the Staff (via email, since 2020) with copies of each Information Memo within 10 days of when they are posted. OCC welcomes the Proposal's removal of this duplicative and administratively burdensome requirement.

While the Commission was explicit that "Rule 17a-22, as proposed to be amended, does not change the scope of supplemental materials to which the rule applies,"[9] OCC suggests the Commission clarify certain language in the Release in order to avoid ambiguity on this point. Specifically, the Release states that

> Any document that is made 'generally available' to a wide or diverse group of individuals or entities should be considered supplemental material and as such, posted to the clearing agency's website. Because of the 'generally available' component in Rule 17a-22, the Commission does not envision that documents of

[8] See generally, e.g., An Update on the Commission's Targeted Regulatory Relief to Assist Market Participants Affected by COVID-19 and Ensure the Orderly Function of our Markets (public statement by Chairman Jay Clayton, William Hinman, Director, Division of Corporation Finance, Dalia Blass, Director, Division of Investment Management, Brett Redfearn, Director, Division (Jan. 26, 2020, updated Jan. 5, 2021)), available at https://www.sec.gov/news/public-statement/update-commissions-targeted-regulatory-relief-assist-market-participants.

[9] Release at 91.

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> a confidential or sensitive nature, or that would cause harm if publicly disclosed, would fall within the scope of the rule. Accordingly, the Commission believes that amending Rule 17a-22 to require the posting of supplemental material on an internet website should not create concerns from a clearing agency's perspective regarding privacy or confidentiality of materials because such material would not be in scope of the rule. In the Commission's experience, most, if not all, of the filings required by current Rule 17a-22 are already being posted on a registered clearing agency's website.

As written, this language could be interpreted to mean that *any* materials provided to a clearing agency's members (i.e. a wide or diverse group of entities) would be considered "generally available" and therefore necessarily *not* confidential or sensitive and thus required to be publicly posted under the 17a-22 Amendments. We do not believe the Commission intended to suggest this outcome, which would be contrary to the Commission's interest in promoting the safety and security of the markets.

A clearing agency, in the regular course of business, generally provides a variety of materials to clearing members and other entities to whom it has a significant relationship, relating to a wide variety of matters relevant to the clearing agency. These materials may include information memoranda describing symbol changes, corporate actions impacting cleared products, anticipated outage information, and other administrative matters. While such materials are appropriate to post publicly on a freely available website, certain other materials provided to entities with whom a clearing agency arguably has a significant relationship – including materials distributed broadly to such entities – are nevertheless self-evidently not appropriate for public disclosure. For instance, a clearing agency may provide to participating exchanges instructions and technical information relating to connectivity, security practices, and the operation of systems that only participating exchanges may access. A clearing agency may also provide its members with, for example, directories with direct contact information for numerous employees within the clearing agency. Given the obvious sensitivities and confidentiality concerns relating to such information, we would not expect the Commission to view such materials as "generally available" under Rule 17a-22, despite being provided to a potentially large group of recipients. Therefore, we request that the Commission clarify that materials do not become "generally available" *solely* because they are provided to a wide or diverse group of entities.

Some of this ambiguity is created by the text of Rule 17a-22, which refers to "issuing, *or* making generally available" materials to relevant individuals or entities. 17 CFR § 240.17a-22 (emphasis added). The 17a-22 Amendments would not change that portion of the text of the rule. Neither the existing rule nor the proposed rule, as drafted, defines "generally available" to exclude documents of a confidential or sensitive nature that a clearing agency may provide to its clearing members or other participants as a group, even if those documents could cause harm if publicly disclosed. As noted above, we do not understand the Commission to interpret Rule 17a-22 to scope in confidential or other material that is not "generally available." To the extent the Commission agrees with our

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understanding, the Commission could also consider revising the text of Rule 17a-22 to remove the reference to "issuing," which appears duplicative.

The Commission's inclusion of "service providers" in the Release's discussion of entities with whom a clearing agency has a significant relationship for purposes of Rule 17a-22 provides further support for our understanding. A clearing agency's "service providers" could include, among many others, cybersecurity providers and cloud services providers, with whom the Commission would presumably expect the clearing agency to have sensitive and confidential communications. For such communications to fall outside of Rule 17a-22, there must therefore be a category of communications with even a wide group of service providers (or other relevant entities) that are not considered "generally available."

The Commission should therefore clarify that not all documents provided to entities with whom a clearing agency has a significant relationship are, through such provision, made "generally available," even when provided to those entities as a group. That is, the Commission should clarify that only those materials provided to entities with whom a clearing agency has a significant relationship that the clearing agency *also* makes "generally available" are subject to Rule 17a-22.

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We thank the Commission for the opportunity to provide comment on the Proposed Rules. If you have any questions, please do not hesitate to contact Megan Flaherty, at 312.322.6246, or mflaherty@theocc.com. We would be pleased to provide the Commission with any additional information or analyses that might be useful in determining the content of the final rules.

Sincerely,

Megan Malone Cohen

Megan Malone Cohen

General Counsel and Corporate Secretary