THE FOUNDATION FOR SECURE MARKETS

Options Clearing Corporation
125 S. Franklin Street, Suite 1200
Chicago, IL 60606
312 322 6200 | theocc.com

October 7, 2022

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. S7-21-22, Clearing Agency Governance and Conflicts of Interest

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, as amended ("Exchange Act"). The Proposal would establish new requirements on registered clearing agencies for board and board committee composition, independence determinations for directors, management of conflicts of interest, and board oversight.

Summary

OCC believes that robust and transparent governance arrangements with relevant stakeholder input is necessary for effective registered clearing agency risk management. Over the last several years, OCC has taken steps to help ensure its governance framework provides robust management oversight and sound corporate decision-making in consideration of diverse viewpoints representing relevant stakeholders and informed by independent judgment.

As such, we generally support the Securities and Exchange Commission's ("SEC" or "Commission") objective of reducing the likelihood that conflicts of interest may influence the board of directors of a registered clearing agency. We believe the Commission's stated objective for the Proposal can be achieved by adopting, with certain slight modifications detailed below, the provisions of the Proposal that would impose requirements for: (i) the composition of the board, nominating committee, and any committee authorized to act on behalf of the board; (ii) policies and procedures regarding director conflicts of interest and director reporting of conflicts of interest; (iii) circumstances that would preclude a person from being an independent director; and (iv) the establishment of a risk management committee, in some cases with slight but important modifications[2] to the Proposal as discussed below. However, and for the reasons stated below, we believe the other elements of the Proposal are overly prescriptive and conflate the role of the Board with the role of management, and as such we do not support them. Furthermore, we are concerned that overly prescriptive requirements that impose obligations on directors that are better suited

[1] SEC Release No. 34- 95431; File No. S7-21-22 (Aug. 8, 2022), 87 FR 51812 (Aug. 23, 2022).

[2] We note below where we believe specific language in the Proposal would not align with OCC's governance structure. Since we do not believe this specific language is necessary to further the Commission's stated objective for the Proposal, we respectfully request this language be eliminated.

for management regarding relationships with service providers for critical services may (i) detract from, rather than enhance, sound governance frameworks that have developed across the landscape of registered clearing agencies, and (ii) discourage otherwise well-qualified directors from seeking nomination at registered clearing agencies. Finally, while more time would be necessary to conduct a deeper analysis, we also believe the potential cost of compliance with these complex and prescriptive elements of the Proposal, when taken cumulatively with current overlapping regulations, could be considerable. As a result, we encourage the Commission to recognize that there is "uncertainty about the theoretically best way to mitigate divergent incentives"[3] in the governance of clearing agencies and to follow its own guidance established from a prior release that "particular securities markets (e.g., equities, fixed income, and options) have their unique conventions, characteristics, and structure that are best addressed on a market-by-market basis."[4] Our specific comments and requests for clarification of the language and intent of certain of the Proposed Rules are provided in more detail below.

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 ("CFTC"). As a registered clearing agency under SEC jurisdiction, OCC clears transactions for exchange-listed options. As a registered derivatives clearing organization ("DCO") under CFTC jurisdiction, OCC clears transactions in futures and options on futures. OCC also provides central counterparty ("CCP") clearing and settlement services for securities lending transactions. 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 ("Dodd-Frank 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 options exchanges.[5]

OCC is governed by a Board of Directors ("Board") that is composed of nine directors representing OCC participants ("Participant Directors"), five directors representing OCC's owners ("Owner Directors"), and no less than five directors who are not affiliated with any national securities exchange, national securities association, designated contract market, futures commission merchant, or broker or dealer in securities ("Public Directors").[6] The Board may also include one employee of OCC ("Management Director"). The

[3] Proposal, at 51842 citing Albert J. Menkveld & Guillaume Vuillemey, The Economics of Central Clearing, 13 Ann. Rev. Fin. Econ. 153 (2021).

[4] Standards for Covered Clearing Agencies, 81 FR 70786, 70801 (2016). Here, the Commission stipulated a preference for flexible, principles-based regulation for clearing agencies, recognizing a one-size-fits-all approach could potentially restrict a clearing agency's ability to effectively monitor and manage risk. ("As a general matter, the Commission believes that using broadly prescriptive requirements that, on an absolute and ex ante basis, prohibit a covered clearing agency's use of particular tools makes it more difficult for a covered clearing agency to maintain flexibility . . . to address the ever-evolving challenges and risks inherent in the securities markets.").

[5] OCC's owner exchanges are the Chicago Board Options Exchange, Inc., International Securities Exchange, LLC, NASDAQ OMX PHLX, LLC, NYSE MKT LLC, and NYSE Arca, Inc. The NYSE exchanges are owned by a common parent and the International Securities Exchange is owned by NASDAQ. As a result, ownership is essentially consolidated to three entities, though each owner exchange appoints one director to the Board.

[6] See Board of Directors and Corporate Governance Principles, *available at* https://www.theocc.com/getmedia/99ed48a4-aa44-45ac-8dee-9399b479a1c8/board_of_directors_charter.pdf (last accessed October 7, 2022) and Fitness Standards for Directors, Clearing Members, and Others, *available at*

Governance and Nominating Committee is responsible for evaluating the candidacy of all Participant Directors and Public Directors nominated[7] to the Board. In conducting its evaluation of candidates for the Board, the Governance and Nominating Committee will consider: (i) characteristics it deems essential for effectiveness as a director, including such factors as integrity, independence, objectivity, sound judgment, and leadership; (ii) relevant expertise and experience in the skillsets approved by the Board from time to time; (iii) board-level experience; (iv) industry affiliations; (v) the standards set forth in OCC's Fitness Standards for Directors, Clearing Members, and Others;[8] and (vi) education or other certifications. The Board also strives to ensure diversity of representation among its members. When considering candidates for the Board, the Governance and Nominating Committee reviews available information about the expertise, qualification, attributes, and skills of prospects, as well as their gender, race, ethnicity, and other diversity characteristics.

The Board maintains six standing committees: (i) Audit; (ii) Compensation and Performance; (iii) Governance and Nominating; (iv) Regulatory; (v) Risk; and (vi) Technology. Each of the standing committees of the Board is composed of directors of the Board, must be chaired by a Public Director, and has been explicitly delegated the oversight of specific risks by the Board.[9] OCC also maintains additional stakeholder venues to share information with and solicit input from relevant stakeholders. One of these venues, the Financial Risk Advisory Council ("FRAC"),[10] is a forum for discussion of proposed financial risk management initiatives, including proposed changes related to models, stress testing, and backtesting, and default management testing results with participants and participants' customers. The Risk Committee charter codifies the feedback loop between the FRAC and the Board.[11] A more detailed explanation of OCC's current governance structure is provided in Appendix A.

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https://www.theocc.com/getmedia/40ab0b06-5e8a-441e-97e3-fab85d3cfe0b/fitness_standards.pdf (last accessed October 7, 2022). "Public Directors" are defined as directors who "are not affiliated with any national securities exchange, national securities association, designated contract market, futures commission merchant, or broker or dealer in securities." References to "Public Directors" throughout this comment will be capitalized to distinguish them from "independent directors" as defined in the Proposal.

[7] Under OCC's By-Laws and Stockholders' Agreement, Owner Directors are appointed to the Board by the respective owner. As such, the Governance and Nominating Committee does not conduct an evaluation of these candidates before they join the Board, but the electing owner is required to consider the Fitness Standards when making the appointment.

[8] See The Options Clearing Corporation: Fitness Standards for Directors, Clearing Members, and Others, *available at* https://www.theocc.com/getmedia/40ab0b06-5e8a-441e-97e3-fab85d3cfe0b/fitness_standards.pdf (last accessed October 7, 2022).

[9] The Board and all committee charters, each filed as rules with the Commission and the CFTC, are available at: https://www.theocc.com/company-information/documents-and-archives/board-charters (last accessed October 7, 2022).

[10] As of September 22, 2022, representatives from thirty-two firms, comprised of twenty-four OCC participants, four customers of participants (i.e., market-making or proprietary trading firms), and four exchanges. Interested parties may contact OCC for participation in the FRAC.

[11] See OCC Risk Committee Charter ("From time to time, the Committee may receive reports and guidance relating to financial risk issues from, among others, the OCC Financial Risk Advisory Council and, in the exercise of its fiduciary judgment, shall take such guidance into account in the performance of its functions and responsibilities.").

Regulatory Context of the Proposal

The SEC had previously proposed but did not adopt rules for clearing agency governance in 2010 and 2011. Proposed Regulation MC would have imposed limitations on ownership and minimum requirements for independent directors for security-based swap registered clearing agencies.[12] Proposed Rules 17Ad-25 and 17Ad-26 would have imposed additional requirements on registered clearing agencies to mitigate conflicts of interest and to establish standards for directors on boards and committees thereof.[13] The Commission has adopted several other rules pertaining to clearing agency governance requiring all registered clearing agencies to maintain and enforce written policies and procedures reasonably designed to: (i) have governance arrangements that are clear and transparent,[14] and (ii) clearly prioritize the safety and efficiency of the clearing agency, support the public interest and the objectives of owners and participants, establish that the board and senior management have appropriate experience and skills, specify clear and direct lines of responsibility, and consider the interests of participants' customers and other relevant stakeholders.[15] The SEC states the Proposed Rules build upon and strengthen these clearing agency governance requirements to "help balance the differing incentives of the registered clearing agencies, clearing members, and other key stakeholders."[16]

The CFTC has also proposed[17] governance requirements for derivatives clearing organizations for which the genesis was a series of recommendations made by the Central Counterparty (CCP) Risk and Governance Subcommittee and approved by the Market Risk Advisory Committee[18] on February 23, 2021.[19] These recommendations were themselves informed by recommendations for derivatives clearing organization governance requirements drafted by representatives of clearing members and end users.[20]

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[12] See Exchange Act Release No. 63107 (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010).

[13] See Exchange Act Release No. 64017 (Mar. 3, 2011), 76 FR 14471 (Mar. 16, 2011).

[14] See 17 CFR § 240.17Ad-22(d)(8).

[15] See 17 CFR § 240.17Ad-22(e)(2).

[16] See Proposed Rule, *supra* note 1, at 51814.

[17] See Governance Requirements for Derivatives Clearing Organizations, 87 FR 49559 (Aug. 11, 2022) ("CFTC Proposal").

[18] The Market Risk Advisory Committee is a discretionary advisory committee established by the CFTC in accordance with the Federal Advisory Committee Act.

[19] MRAC CCP Risk and Governance Subcommittee, Recommendations on CCP Governance and Summary of Subcommittee Constituent Perspectives, available at https://www.cftc.gov/media/6201/MRAC_CCPRGS_RCCOG022321/download (last accessed October 7, 2022) ("MRAC Recommendations").

[20] See "A Path Forward for CCP Resilience, Recovery, and Resolution," *available at* https://www.jpmorgan.com/content/dam/jpm/cib/complex/content/news/a-path-forward-for-ccp-resilience-recovery-and-resolution/pdf-0.pdf (last accessed October 7, 2022). See also MRAC Recommendations ("Recommendations for improving DCOs' governance arrangements were initially drafted by a subset of MRAC members representing clearing members and end-users . . . ." OCC published its own white paper to further the dialogue on OCC governance titled "Optimizing Incentives, Resilience, and Stability in Central Counterparty Clearing: Perspectives on CCP Issues from a Utility Model Clearinghouse," *available at* https://www.theocc.com/getmedia/8583ada4-22fd-4f2a-a0de-1dd97d3a347f/GeneralUse_OCC_Whitepaper_Final-

While different than the Proposal in many respects, there are some common themes, including a proposed requirement for clearing agencies to maintain a risk management committee (i) with which the Board will consult, (ii) that is informed by independent opinion, and (iii) that includes representatives from stakeholders. As a dually regulated registered clearing agency and DCO that would be required to comply with both the Proposal and the CFTC Proposal, we strongly encourage the Commission to collaborate with the CFTC to avoid possible inconsistent interpretations and ensure clearing agency governance is both robust and efficient.

Proposed Rule 17Ad-25(b) and (f): Composition of the Board of Directors and Circumstances that Preclude Directors from Being Independent Directors

Proposed Rule 17Ad-25(b) would require a majority of the members of the board of directors of a registered clearing agency be independent (unless a majority of the voting rights issued as of the immediately prior record date are directly or indirectly held by participants, in which case at least 34 percent of the members of the board of directors must be independent) and that each registered clearing agency consider all the relevant facts and circumstances on an ongoing basis to affirmatively determine that a director does not have a material relationship with the registered clearing agency or an affiliate of the registered clearing agency and is not precluded from being an independent director under paragraph (f) of the Proposed Rule. Proposed Rule 17Ad-25(b) also would require a registered clearing agency to identify the relationships between a director, the registered clearing agency, and any affiliate thereof, evaluate whether any relationship is likely to impair the independence of the director in performing her duties, and document this determination in writing.

Proposed Rule 17Ad-25(f) would list circumstances that preclude a director from being an independent director (subject to a one-year lookback period). These circumstances would be:

(i) the director is subject to rules, policies, or procedures that might undermine her ability to operate unimpeded;
(ii) the director, or a family member, has an employment relationship with or otherwise receives compensation (other than as a director) from the registered clearing agency or an affiliate thereof, or the holder of a controlling voting interest of the registered clearing agency;
(iii) the director, or a family member, is receiving payments from the registered clearing agency or an affiliate thereof, or the holder of a controlling voting interest of the registered clearing agency, that reasonably could affect the independent judgment or decision-making of the director, other than (a) compensation for services as a director or (b) pension and other forms of deferred compensation for prior services not contingent on continued services;
(iv) the director, or a family member, is a partner in, or controlling shareholder of, any organization to or from which the registered clearing agency or an affiliate thereof, or the holder of a controlling voting interest of the registered clearing agency, is making or receiving payments for property or services other than (a) payments arising solely from investments in securities of the registered clearing agency or affiliate thereof, or (b) payments under non-discretionary charitable contribution matching programs;
(v) the director, or a family member, is employed as an executive officer of another entity where any executive officers of the registered clearing agency serve on that entity's compensation committee; or

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(vi) the director, or a family member, is a partner of the outside auditor of the registered clearing agency or any affiliate thereof, or an employee of the outside auditor who is working on the audit of the registered clearing agency or any affiliate thereof.

OCC generally supports Proposed Rules 17Ad-25(b) and (f), providing further clarification of Proposed Rule 17Ad-25(f)(4) is aligned with our comments herein. OCC disagrees that payments to or from a participant as fees for clearance and settlement services should preclude a director affiliated with that participant from being independent, as we discuss in further detail below.

I. Payments to or From Participants for Clearance and Settlement Services Should Include a De Minimis Exemption, and Payments for Clearing Fees Should Not Preclude Directors from being Independent

We agree in principle that directors, or their family members, who have a sufficient controlling interest in an organization to or from which OCC is making or receiving payments for property or services should under most circumstances be precluded from being an independent director. However, we believe the provision in Proposed Rule 17Ad-25(f)(4) is overbroad, and that the Commission should revise it by: (i) including a de minimis threshold for a payment to be exclusionary and (ii) stating explicitly that payment for clearing fees is exempted from this exclusion.[21] First, we are concerned that without a de minimis threshold, any agreement for services between a registered clearing agency and a market participant, no matter how small or inconsequential to the registered clearing agency or the market participant, could preclude a director representing that market participant from being independent. We do not believe the Commission intends to preclude a director from being independent if that director is employed by a firm to which a registered clearing agency pays a nominal sum for a small service. Second, clearing fees are a relatively inconsequential component of market participants' cost of business, and it is unlikely a director ***could*** influence a reduction in clearing fees for self-interested reasons if there are not compelling policy justifications for such a reduction, as clearing fee changes must be filed with the Commission as a rule before they are implemented.[22] We also note that, as a private company that operates as an industry utility, OCC may provide refunds of accrued clearing fees in the following year or implement a fee holiday at the end of the current year to manage OCC financial resources to its target capital requirement.[23] This process generally results in the cost of clearing remaining stable year over year irrespective of clearing fee rate at any one time unless OCC's target capital requirement increases and further insulates the cost of clearing from undue influence.

II. The Commission Should Clarify the Nature of the Director's Stake in the Participant that Would Preclude the Director from being Independent

[21] As an industry utility, OCC may take measures to reduce the cost of clearing generally, including through refunds, rebates, or a fee holiday. We believe these and any similar actions by a registered clearing agency to reduce the cost of clearing should be included within this exemption.

[22] We note that fee changes are eligible to be filed with the Commission as "immediately effective" filings, meaning they are not ordinarily subject to Commission review and approval. Such filings, however, are published by the Commission for public comment and are subject to suspension by the Commission if "it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act]." 15 U.S.C. § 78s(b)(3)(C).

[23] See, e.g., "OCC Clearing Fee Holiday," September 15, 2021, Information Memorandum number 49255, available at https://infomemo.theocc.com/infomemo/search-memo (last accessed October 7, 2022).

The Commission states in Proposed Rule 17-Ad-25(f)(4) that the preclusion from independence for a director associated with an organization to or from which the registered clearing agency makes payment applies to a director who is "a partner in, or controlling shareholder of," the organization. OCC requests that, if the Commission does not explicitly exempt payment for clearing fees from this preclusion, it further define "partner" in the adopting release to only refer, for these purposes, to a person with an equity ownership stake in the organization. OCC is aware that some firms use "partner" for titles irrespective of whether the person in the role has an ownership stake in the organization

Proposed Rule 17Ad-25(c): Nominating Committee

Proposed Rule 17Ad-25(c)(i) and (ii) would require registered clearing agencies to: (i) establish a nominating committee and a written evaluation process for evaluating nominees to the board of directors and (ii) require that a majority of the directors and the chair of the nominating committee be independent. Proposed Rule 17Ad-25(c)(iii) and (iv) would require registered clearing agencies to: (i) establish fitness standards specified by the nominating committee for serving as a director, documented in writing and approved by the board; (ii) include explicitly in the fitness standards that a candidate is ineligible if she is subject to a statutory disqualification; and (iii) require the nominating committee to document the outcome of the written evaluation process consistent with the fitness standards. Such written evaluation process would be required to: (i) take into account the nominee's experience, availability, and integrity; (ii) demonstrate that the board, taken as a whole, has a diversity of skills, knowledge, experience, and perspectives; (iii) demonstrate that the nominating committee has considered how the nominee would complement other directors such that, if elected, the board would represent viewpoints of varied stakeholders; (iv) demonstrate that the nominating committee has considered views of other stakeholders that might be impacted by the registered clearing agency's decisions; and (v) identify whether the nominee would meet the definition of independent director in the Proposal.

OCC maintains fitness standards for OCC directors that have been reviewed and approved by OCC's Governance and Nominating Committee and the Board and that are consistent with the requirements of Proposed Rule 17Ad-25(c)(3).[24] These fitness standards state explicitly that a director must not be subject to a statutory disqualification as defined under Section 3(a)(39) of the Exchange Act.[25] As such, we generally support the provisions of Proposed Rule 17Ad-25(c) , with one recommended change.

I. The Nominating Committee Should Conduct a Written Evaluation Process Only for Candidates who are Nominated to the Board and Not Those That May Be Otherwise Appointed

We appreciate the SEC's objective of strengthening governance standards in the nomination process, but caution against limiting the ability of CCPs to establish a governance structure that is appropriate to their business model. As stated in Appendix A below, five directors on OCC's Board are appointed by OCC's owners. These directors are not technically nominated for directorship but rather each are appointed by an owner.[26] As a result, the Governance and Nominating Committee does not currently conduct a written

[24] See Fitness Standards for Directors, Clearing Members, and Others, *available at* https://www.theocc.com/getmedia/40ab0b06-5e8a-441e-97e3-fab85d3cfe0b/fitness_standards.pdf (last accessed October 7, 2022).

[25] See id.

[26] See OCC By-Laws, Article III, Section 6 ("The nominee of each Equity Exchange shall be elected as an Exchange

evaluation of these candidates against the fitness standards. Owner-electors are required by OCC's By-Laws to consider OCC's fitness standards for directors when electing their director representatives, and the Fitness Standards for Directors, Clearing Members, and Others applies to these directors once they are on the Board.[27] We believe this requirement in OCC's By-Laws is sufficient to meet the spirit of the Proposed Rule without adding unnecessary procedures that are not tailored to OCC's unique governing structure.

Proposed Rule 17Ad-25(d): Risk Management Committee

Proposed Rule 17Ad-25(d) would require registered clearing agencies to establish a risk management committee(s) to assist the board in overseeing risk management of the registered clearing agency. It would also require the risk management committee(s) to be reconstituted on a regular basis and at all times include representatives from the owners and participants of the registered clearing agency. Proposed Rule 17Ad-25(d) would also require the risk management committee(s) to provide a risk-based, independent, and informed opinion on all matters presented to it for consideration in a manner that supports the safety and efficiency of the registered clearing agency. OCC generally supports Proposed Rule 17Ad-25(d) other than the requirement to reconstitute the risk management committee(s), and has requests for clarification below.

I. "Risk Management Committee" Should be Clarified

As provided in more detail below in Appendix A, OCC's Board maintains several standing Board-level Committees that assist the Board with the oversight of management of specific risks and thus may reasonably qualify as "risk management committees" under the Proposal. OCC also maintains a "Risk Committee" that assists the Board in overseeing OCC's financial, operational, risk model, and third-party risk management and that is responsible for overseeing OCC's overall corporate risk management framework, including: (i) membership criteria and financial safeguards; (ii) member and other counterparty risk exposure assessments; (iii) liquidity requirements and maintenance of financial resources; (iv) risk modeling and assessments; and (v) default management planning. Since the scope of the "risk management committee" is not defined in the Proposal and the language of proposed 17Ad-25(d) provides for more than one, conceivably each of OCC's Board-level Committees could qualify as "risk management committees" for purposes of Proposed Rule 17Ad-25(d). OCC requests the Commission clarify whether the "risk management committee" for purposes of proposed 17Ad-25(d) is the clearing agency's Committee that is responsible for overseeing the registered clearing agency's overall corporate risk management framework or whether it would extend to each standing Board-level Committee that is responsible for overseeing any risk.

II. An Assessment, Rather Than a Reconstitution, of the Composition of the Risk Management Committee(s) Should Be Required

Proposed Rule 17Ad-25(d)(1) would require the membership of the risk management committee(s) to be reconstituted on a regular basis. We believe a forced reconstitution on a regular basis would frustrate the Commission's goal of ensuring the risk management committee(s) provides informed risk-based opinion on all matters brought to it, as registered clearing agencies may be required to remove directors from the risk management committee(s) with deep industry and subject matter experience to meet this requirement.

Director by the stockholder entitled to vote thereon at each annual meeting of stockholders.").

[27] See OCC By-Laws, Article III, Section 6, Interpretation and Policy .01 ("The Equity Exchanges shall use the criteria of the Fitness Standards for Directors, Clearing Members, and Others, as adopted or amended by the Board of Directors from time to time, in considering Exchange Director nominees for election to the Board.").

Registered clearing agencies often deal with complex, risk-based initiatives that demand familiarity with intricate details and the broader risk management ecosystem of OCC. A requirement that forces a registered clearing agency to replace well-informed risk management experts with directors relatively unfamiliar with a particular matter or the broader risk management framework would rob the registered clearing agency of critical risk management continuity.

While the Commission acknowledges in the Proposal that "the charter for a registered clearing agency's risk management committee could establish that the committee will conduct a review of its members on an annual basis, or other specified length of time, to assess whether the committee continues to be an accurate reflection of the clearing agency's owners and participants," it doesn't appear an assessment of the constitution of the Committee and a conclusion that it is appropriate would satisfy the Proposed Rule. If the objective of the Proposal is to help ensure that stakeholder interests are properly represented – and not to simply change the composition of the committee on a regular basis – OCC requests the Commission require registered clearing agencies maintain reasonably designed policies and procedures intended to assess the membership of the risk management committee(s) on a regular basis to determine whether reconstitution is required to properly represent those interests.

III. The Requirement for the Number of Owner and Participant Representatives on the Risk Committee Should be Clarified

OCC agrees with the Commission that the risk management committee(s) should have representation from owners and participants.[28] In several places in the Proposal,[29] the Commission states "multiple" representatives from owners and participants should be on the risk management committee(s), but proposed 17Ad-25(d) omits the word "multiple." OCC requests the Commission clarify that one representative from each of the owners and the participants of the registered clearing agency would satisfy the requirement of Proposed Rule 17Ad-25(d)(1).

IV. The Commission Should Clarify that a Risk Management Committee May Provide Independent Opinion Even if a Non-Independent Director Sits on the Committee

Proposed Rule 17Ad-25(d) would require the risk management committee to provide an "independent" opinion on all matters presented to it in a manner that supports the safety and efficiency of OCC. OCC requests the Commission to clarify that a risk management committee(s) may provide such an independent opinion so long as a majority of participating directors on the committee(s) are themselves independent. Absent this clarification, we are concerned that the presence of one director on the risk management committee(s) who is not independent – whether it be a Management Director, an Owner Director, or otherwise – would render the risk management committee(s) unable to provide independent opinion. Since the Proposed Rule recognizes the value of Owner Directors on the risk management committee(s) by requiring their representation, we do not believe the Commission intends for this result.

Proposed Rule 17Ad-25(i): Obligations of Board of Directors to Oversee Relationships with Service

[28] We note that Owner Directors are appointed by the respective owner to the Board. In the event no Owner Director has the requisite skillset to sit on the Risk Committee, the Governance and Nominating Committee and the Board would reserve the right not to have an Owner Director on the Committee.

[29] See e.g., Proposed Rule, *supra* note 1, at 51832 ("Proposed Rule 17Ad–25(d)(1) requires that the risk management committee at all times include **multiple** representatives from the owners and participants of the registered clearing agency.") (emphasis added).

Providers for Critical Services

Proposed Rule 17Ad-25(i) would require registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to enable the board of directors to:

(i) confirm and document that risks related to relationships with service providers for critical services are managed in a manner consistent with the clearing agency's risk management framework and review senior management's monitoring of relationships with service providers for critical services;
(ii) approve policies and procedures that govern the relationship with service providers for critical services;
(iii) review and approve plans for entering into third-party relationships where the engagement entails being a service provider for critical services to the registered clearing agency; and
(iv) through regular reporting to the board of directors by senior management, confirm that senior management takes appropriate actions to remedy significant deterioration in performance or address changing risks or material issues identified though ongoing monitoring.

OCC does not support Proposed Rule 17Ad-25(i), as we believe it is overbroad, unnecessarily prescriptive, and duplicative of long-standing director obligations extant in general corporate law and reinforced by current Commission regulation and OCC rules. We believe unnecessarily prescriptive requirements might entail unintended consequences that would make it more difficult for a registered clearing agency to recruit suitable directors and to ensure efficient and effective governance arrangements, itself a key Commission objective. We provide further support for this view below. Finally, though more time and clarity regarding the scope and application of the Proposed Rule 17Ad-25(i) are required to conduct a deeper analysis into the potential cumulative costs of compliance with it, we preliminarily believe such costs could be considerable.

I. Proposed Rule 17Ad-25(i) Would Impose Managerial Responsibilities on the Board

A fundamental tenet of corporate governance is that senior management, through the Chief Executive Officer and other senior employees of the company, is charged with operating the business and the Board is generally charged with overseeing the company's management and business strategies.[30] The functions a Board has direct responsibility for do not include the responsibilities that would be imposed on the Board of registered clearing agencies in Proposed 17Ad-25(i).[31] This oversight dynamic extends into the realm of risk management.[32] Proposed Rule 17Ad-25(i), however, would impose responsibilities on the Board akin to those that are squarely within the purview of management by effectively requiring the Board to manage the relationship with service providers for critical services.

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[30] See e.g., "Principles of Corporate Governance, Business Roundtable (2016) *available at* https://s3.amazonaws.com/brt.org/Principles-of-Corporate-Governance-2016.pdf (last accessed October 7, 2022) ("The board . . . oversees the CEO and senior management in operating the company's business.").

[31] These functions include certain discrete tasks as maintaining the relationship with the external auditor and setting senior management compensation.

[32] See e.g., "Principles of Corporate Governance, Business Roundtable (2016) *available at* https://s3.amazonaws.com/brt.org/Principles-of-Corporate-Governance-2016.pdf (last accessed October 7, 2022) ("The board should establish a structure for overseeing risk, delegating responsibility to committees, and overseeing the designation of senior management **responsible** for risk management") (emphasis added).

II. General Corporate Law Imposes Fiduciary Duties on Directors that Require them to Exercise Due Care and Loyalty in the Discharge of Their Oversight Responsibilities

General corporate law dictates that directors are fiduciaries of the corporation and as such must act in the best interest of it, including by exercising duties of care and loyalty to the corporation. The duty of care requires a director to make informed and deliberate decisions based on material information reasonably available to her. The duty of loyalty requires a director to act in good faith with an honest belief that the action is in the best interest of the company. While these principles generally apply to public companies incorporated in Delaware, the concept of director fiduciary duty extends beyond Delaware and is a bedrock principle of corporate governance. OCC has codified these principles in its Code of Conduct for OCC Directors.[33] Specifically, OCC directors are required to "be reasonably well-informed about the activities of OCC and to exercise independent judgment on all decisions," and to "act in good faith and in the best interests of OCC and not in their own interests or the interests of another entity or person."[34]

III. Current Commission Requirements Reinforce the General Corporate Law Fiduciary Duties

Current Commission requirements reinforce the duty of care and duty of loyalty by requiring registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to "provide for governance arrangements that . . . establish that the board of directors and senior management have appropriate experience and skills to discharge their duties and responsibilities [and] specify clear and direct lines of responsibility."[35] Collectively, these requirements ensure that directors will have clearly delineated responsibilities regarding the oversight of effective risk management at registered clearing agencies and the skills to discharge those responsibilities. The requirement that registered clearing agencies maintain governance arrangements with clear and direct lines of responsibility leads to the development of a governance framework wherein directors understand how to discharge their oversight responsibility for key clearing agency risks. As the Commission has stated: "[t]he Commission believes that [] accountability can help ensure that a covered clearing agency is well-positioned to fulfill its risk management obligations. For example, the Commission believes that a covered clearing agency should clearly define roles and responsibilities for addressing governance over financial risk (including credit risk, margin, and liquidity risk), operational risk, and other risks reflected in the covered clearing agency's risk management framework."[36]

OCC has incorporated these requirements into its governance framework, resulting in a clear delineation of which Board-level Committee is responsible for managing which corporate risks.[37] In the case of risks

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[33] Code of Conduct for OCC Directors, *available at* https://www.theocc.com/getmedia/2e042613-d3b3-40b6-b10a-80bd9e3baffb/director_code_of_conduct.pdf (last accessed October 7, 2022).

[34] See id.

[35] See 17 CFR § 240.17Ad-22(e)(2)(iv) and (v).

[36] Standards for Covered Clearing Agencies, 81 FR 70786, 70804 (2016).

[37] See e.g., Audit Committee Charter ("The [Board] has established an Audit Committee . . . to assist the Board in overseeing . . . OCC's compliance and legal risks.") *available at* https://www.theocc.com/getmedia/0a3ccbce-4481-42c5-86b1-8f44b50c0727/audit_committee_charter.pdf (last accessed October 7, 2022) and Compensation and Performance Committee Charter ("The [Board] has established a Compensation and Performance Committee . . . to

attendant to relationships with service providers for critical services, OCC's Risk Committee is responsible for the oversight of the sound management of those risks. The Risk Committee Charter provides:"[t]he Board of Directors . . . has established a Risk Committee to assist the Board in overseeing OCC's financial, collateral, risk model, and **third party** risk management processes" (emphasis added).[38] The responsibilities of the Risk Committee include that "[t]he Committee shall receive a quarterly report from management that provides information on the effectiveness of OCC's management of third party risks, including key linked vendor relationships."[39]

OCC strongly disagrees with Proposed Rule 17Ad-25(i) for the reasons stated above and respectfully requests the Commission decline to adopt it. If, notwithstanding the points above, the Commission adopts Proposed Rule 17Ad-25(i) or a version thereof, OCC makes the following comments for consideration.

IV. The Definition of "Service Provider for Critical Services" is Too Broad

While OCC believes a more principles-based approach is appropriate, if the Commission were to adopt prescriptive rules regarding the oversight of the management of risks that are attendant to relationships with service providers for critical services, OCC believes the proposed definition of "service provider for critical services" is too broad and inconsistent with other Commission rules. The Commission proposes "service provider for critical services" be defined as "any person that is contractually obligated to the registered clearing agency for the purpose of supporting **clearance and settlement functionality** or **any other purposes material** to the business of the registered clearing agency" (emphasis added).[40] This proposed definition is significantly broader than the definition used to define "SCI Systems," which defines such systems as those that "**directly** support . . . clearance and settlement" (emphasis added)[41] and further restricts SCI Systems to those that are production systems[42] and that are used with respect to securities.[43] OCC believes this definition in Regulation SCI appropriately scopes "SCI Systems" to those that are directly

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assist the Board in overseeing general business, regulatory capital, investment, corporate planning, compensation and human capital risks . . . .")*available at* https://www.theocc.com/getmedia/5d0d6d54-e436-435d-88fb-366ef76a10a5/performance_committee_charter.pdf (last accessed October 7, 2022).

[38] OCC Risk Committee Charter, *available at* https://www.theocc.com/getmedia/e71a4c1d-52dc-4c95-aeb1-98dab9159f41/risk_committee_charter.pdf (last accessed October 7, 2022).

[39] Id.

[40] Proposal, § 17Ad-25(a).

[41] Regulation SCI, 17 CFR § 242.1000. "Critical SCI Systems" are similarly limited to those that have a direct connection to clearance and settlement: "Critical SCI Systems means any SCI Systems . . .that directly support functionality relating to: clearance and settlement systems of clearing agencies . . . ." Id.

[42] The proposing release for Regulation SCI included language that would have explicitly scoped within the definition development or testing systems, but that language was removed from the adopting release. The Commission noted, "the reference to development and testing systems in the proposed definition of SCI system has been deleted." SEC Release No. 34-73639 (Nov. 19, 2014), 79 FR 72252, 72274 (Dec. 5, 2014).

[43] See id. ("[T]he Commission notes that it is revising the proposed definition of SCI systems to clarify that the term SCI systems encompasses only those systems that, with respect to securities, directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance . . . .")

related to clearance and settlement functions of the registered clearing agency, and that the broader definition in the Proposal would burden the Board with explicit responsibilities for service providers that are not, in fact, providing critical services. If the Commission adopts a rule regarding the oversight of relationships with service providers for critical services, OCC requests the Commission revise the definition of "service providers for critical services" to align it with the definition of SCI Systems.

V. Proposed Rule 17Ad-25(i)(4) Is Vague and Overly Prescriptive and Should be Revised

Proposed Rule 17Ad-25(i)(4) would impose a requirement that registered clearing agencies have written policies and procedures reasonably designed to enable the Board to confirm that senior management takes appropriate actions to remedy "significant deterioration in performance" or "address changing risks" though ongoing monitoring. First, unlike Proposed Rules 17Ad-25(i) (1) – (3),[44] the requirement herein does not appear to be limited to "service providers for critical services." In fact, we believe a plausible reading of Proposed 17Ad-25(i)(4) is that it could apply to "significant deterioration in performance," "changing risks," or "material issues" regarding the business of the registered clearing agency. OCC requests the Commission clarify that Proposed Rule 17Ad-25(i)(4) is intended to apply only to relationships with service providers for critical services.

OCC requests the Commission further revise Proposed Rule 17Ad-25(i)(4) to add a materiality threshold by stating that the Board would be required to confirm that senior management takes appropriate action to remedy "**material** changing risks." This change would ensure that the clearing agency's policies appropriately focus the board's attention on the most relevant changes in the performance of service providers for critical services. Adding a materiality threshold would have the added benefit of focusing the board on ensuring that management has appropriate processes in place to identify and elevate material changing risks.

Finally, service providers for critical services under the proposed definition may also be providing non-critical services to the registered clearing agency. OCC requests that the Commission acknowledge that service providers for critical services may also provide non-critical services to a registered clearing agency, and that provisions of Proposed Rule 17Ad-25(i) would not apply to risks that relate to non-critical services that are provided by critical service providers.

Proposed Rule 17Ad-25(j): Obligations of Boards of Directors to Solicit and Consider Viewpoints of Participants and Other Relevant Stakeholders

Proposed Rule 17Ad-25(j) would require a registered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to solicit, consider, and document its consideration of the view of participants and other relevant stakeholders regarding material developments in the clearing agency's governance and operations on a regular basis. OCC agrees that sound clearing agency governance practices would include consideration of the viewpoints of relevant stakeholders. However, we believe current Commission regulations and aspects of OCC's governance framework are appropriately designed to ensure relevant stakeholder input into the board decision-making process, while maintaining the board's critical independence and efficiency. As a result, we believe Proposed Rule 17Ad-25(j) is unnecessary and may run counter to the Commission's interest in strengthening clearing agency governance.

[44] The phrase "service providers for critical services" appears in the title for Proposed Rule 17Ad-25(i), does not appear in the introductory clause, appears again in Proposed Rules 17Ad-25(i)(1) – (3), and does not appear in 17Ad-25(i)(4).

I. Current Commission Regulations Are Sufficient to Achieve the Commission's Stated Purpose of Proposed Rule 17Ad-25(j)

First, under existing rules, all registered clearing agencies are already required to establish, implement, maintain, and enforce written policies and procedures reasonably designed to . . . [c]onsider the interests of participants' customers, securities issuers and holders, and other relevant stakeholders of the [] clearing agency."[45] In adopting this principles-based requirement, the Commission explicitly recognized the importance of providing clearing agencies the necessary flexibility to determine how best to include various stakeholders within its governance process.[46] OCC believes the existing rules already ensure that clearing agencies implement a robust mechanism for relevant stakeholders to provide input into the board decision-making process.

In furtherance of the goal of considering the viewpoints of relevant stakeholders in corporate initiatives, OCC has established a multi-pronged governance framework that affords relevant stakeholders the opportunity to provide their viewpoints on relevant risk management issues. First, OCC is required by its By-Laws to have nine directors representing participants on its Board.[47] Each of these representatives must be an employee of a participant, and OCC is required to assure that not all participant directors are representatives of the largest clearing member organizations based on the prior year's volume and that participant directors represent a mix of clearing member organizations that are primarily engaged in agency trading on behalf of retail customers or individual investors.[48] Second, OCC is required by its By-Laws to have five Public Directors on its Board.[49] These Public Directors are not affiliated with any national securities exchange, national securities association, designated contract market, futures commission merchant, or broker or dealer in securities, and generally take into consideration viewpoints of market participants beyond those with direct representation on the Board. Finally, OCC has established the FRAC as a forum to discuss proposed financial risk management initiatives, including proposed changes relating to models, stress testing, and backtesting, and default management testing results with participants and participants' customers. The Risk Committee charter codifies the feedback loop between the FRAC and the Board.[50]

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[45] 17 CFR § 17Ad-25(e)(2)(vi).

[46] See Standards for Covered Clearing Agencies, 81 FR 70786, 70807 ("[i]n light of the variation of business models across covered clearing agencies, the Commission believes each covered clearing agency generally should consider how best to involve members and other relevant stakeholders in the decision-making of the covered clearing agency, provided that each covered clearing agency's decision-making process is designed to be consistent with the fair representation, investor protection, and public interest requirements of the [Exchange Act].").

[47] See Article III, Section 1 of the By-Laws ("The Board of Directors of the Corporation shall be composed of nine Member Directors . . . ."). A vacancy need not be filled immediately but must be filled by a director representing a participant.

[48] See The Options Clearing Corporation: Fitness Standards for Directors, Clearing Members, and Others, *available at* https://www.theocc.com/getmedia/40ab0b06-5e8a-441e-97e3-fab85d3cfe0b/fitness_standards.pdf (last accessed October 7, 2022).

[49] See Article III, Section 1 of the By-Laws ("The Board of Directors of the Corporation shall be composed of . . . no less than five Public Directors . . . .").

[50] See OCC Risk Committee Charter. ("From time to time, the Committee may receive reports and guidance relating to financial risk issues from, among others, the OCC Financial Risk Advisory Council and, in the exercise of its fiduciary

Collectively, OCC believes these measures help ensure the board considers the viewpoints of all relevant stakeholders in its decision-making process.

OCC also notes that all registered clearing agencies are subject to Exchange Act Rule 19b-4, which already imposes the requirement that proposed changes to registered clearing agency rules or proposed changes to procedures or operations that could materially affect the level or nature of risk presented by OCC must be published by the Commission for public review and comment. As the Commission stated in the adopting release for the Standards for Covered Clearing Agencies: "existing requirements for registered clearing agencies under Exchange Act Rule 19b-4 provide a mechanism for publishing notice of proposed rule changes, which in general must be approved by board action or under authority delegated by the board, to clearing members, the relevant stakeholders, the Commission, and the public. Designated clearing agencies are further required to submit advance notices under the Clearing Supervision Act, which provides another mechanism for disclosure."[51]

II. The Commission Should Limit its Requirements to Solicitation, Consideration, and Documentation of Material Developments that Could Affect the Level or Nature of Risk Presented by the Registered Clearing Agency

Finally, if the Commission were to adopt a requirement imposing obligations on the Board to solicit, consider, and document viewpoints of participants and other relevant stakeholders, such a requirement should be tailored to address those changes that represent a risk to the clearing agency's core clearance and settlement operations. The Commission could accomplish that goal by altering the language of the Proposed Rule to narrow the scope of changes from those that represent "material developments in [] governance or operations" to those that "could materially affect the level or nature of risk presented by the registered clearing agency." "Governance" or "operations" is both overly broad and vague. By way of example, under the Proposed Rule, it is unclear whether a registered clearing agency would be required to solicit, consider, and document views from participants and relevant stakeholders before executing on any of the following measures, which represent core functions for which the Board is required to exercise its considered discretion in the interests of the corporation:

- Hiring a new member of the senior management team;
- Establishing a new management-level committee with authority to make recommendations to the board;
- Selecting a new director;
- Selecting a new outside auditor; or
- Determining the scope of its internal audit plan.

The Commission should limit the requirement for a registered clearing agency to solicit, consider, and document participant and relevant stakeholder input for registered clearing agency matters to material matters relating to risk management. This would be consistent with the existing requirements for registered clearing agencies that are systemically important financial market utilities to submit to the Commission for public notice and comment any changes to operations or procedures that could materially affect the level or

judgment, shall take such guidance into account in the performance of its functions and responsibilities.").

[51] Standards for Covered Clearing Agencies, 81 FR 70786, 70805.

nature of risk presented by the registered clearing agency.[52]

Dual Registrant Concerns

As noted above, there are circumstances in which the Proposal and the CFTC Proposal appear to rely on contradictory premises and in which compliance with both the Proposal and the CFTC Proposal would be impossible without construction of a cumbersome and inefficient governance structure[53] that could inhibit – rather than promote – furtherance of the sound principles on which each proposal is based. We encourage the Commission and the CFTC to collaborate to ensure that governance for dual registrants remains efficient and that clearing agencies and DCOs are subject to similar requirements. Some of the areas in which there may be misalignment between the Proposal and the CFTC Proposal that could cause inefficient governance arrangements at registered clearing agencies are:

Topic Areas	Proposal	CFTC Proposal	Potential Conflict
Role of the Risk Management Committee(s)	"Each registered clearing agency must establish a risk management committee (or committees) to assist the board of directors in overseeing the risk management of the registered clearing agency." Proposal, 17Ad-25(d).	"Establish one or more risk management committees and require the board of directors to consult with, and consider and respond to input from, the risk management committee(s) . . ." CFTC Proposal, 39.24(b)(11).	The Proposal appears to assume the Risk Management Committee will be a committee of the Board ("to assist the board of directors in overseeing . . .") whereas the CFTC Proposal appears to assume the risk management committee will be a body outside of the board governance framework (" . . . require the board of directors to consult with . . .")
Risk Management Committee Composition	"The membership of each risk management committee must . . . include representatives from owners and participants."	"A risk management committee includes representatives from clearing members and customers of clearing members."	The requirement that risk management committee(s) include representatives

[52] See 17 CFR § 240.19b-4(n).

[53] We note that Commission regulation requires clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to "provide for governance arrangements that are clear and transparent [and] clearly prioritize the safety and **efficiency** of [the clearing agency]" (emphasis added). 17 CFR § 240.17Ad-22(e)(2)(i)-(ii).

	Proposal, 17Ad-25(d)(1).	CFTC Proposal, 39.24(b)(11)(ii).	from different constituencies suggests the anticipated role and function of the risk management committee(s) may not be the same.
Risk Management Committee Reconstitution/Rotation	"The membership of each risk management committee must be reconstituted on a regular basis . . ." Proposal, 17Ad-25(d)(1).	"Membership of a risk management committee is rotated on a regular basis." CFTC Proposal, 39.24(b)(11)(iii).	If dual registrants were required to rotate membership of their Risk Committee, they would not be able to ensure adequate representation on the Committee for all stakeholders at any given point in time.

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We thank the Commission for the opportunity to provide comments on the Proposal and we encourage the Commission to consider – as it has in other recent registered clearing agency regulation – a flexible, principles-based approach to clearing agency governance that would take into account the strong existing framework that OCC has implemented, and would enable registered clearing agencies to maintain sound and robust governance frameworks that achieve the Commission's important objective while preserving necessary board independence and efficiency. If you have any questions, please do not hesitate to contact Megan Cohen at [redacted] or [redacted]. We would also 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,

Joseph P. Kamnik
Senior Special Advisor and Regulatory Counsel

Appendix A: OCC's Governance Structure

Board Duties and Oversight Responsibility

The Board maintains six standing committees: the Audit Committee, the Compensation and Performance Committee, the Governance and Nominating Committee, the Regulatory Committee, the Risk Committee, and the Technology Committee. Each committee is responsible for specific oversight functions outlined in the committee charter, each of which is reviewed by the respective committee annually and filed with the SEC and the Commodity Futures Trading Commission as a rule. OCC's management is ultimately accountable to the Board. OCC's internal audit and compliance functions report directly to the Audit Committee, and the corporate risk function reports directly to the Risk Committee, ensuring those critical second- and third-line functions are independent from management. The Board composition is intended to ensure consideration of all interested stakeholders, and OCC's nominating process for potential new directors reflects this goal.

OCC is owned equally by five of the options exchanges for which it provides clearance and settlement services. OCC's ownership structure and its diverse Board representation – which includes Participant Directors, Owner Directors, Public Directors, and the option of a Management Director[54] – ensures the consideration of a diverse and wide range of perspectives on OCC's Board that covers the viewpoints of all interested stakeholders of the clearinghouse. The oversight of OCC's business and affairs is vested in the Board, which has specific oversight responsibilities described in the Board Charter and Corporate Governance Principles.[55] The Board may discharge these responsibilities directly or indirectly by delegating it to one of six standing Board Committees (described further below). These functions include:

- Overseeing OCC's governance structure and processes to ensure that the Board is positioned to fulfill its responsibilities effectively and efficiently, including by regularly assessing the performance of the Board and of each director;
- Overseeing OCC's processes and framework for comprehensively managing the range of risks that arise in or are borne by OCC, including risk management policies, procedures, and systems designed to identity, monitor, and manage such risks consistent with the risk appetite and risk tolerances approved by the Board;
- Overseeing OCC's technology infrastructure, resources, and capabilities to ensure resiliency with regard to OCC's provision of its clearance, settlement, and risk management services;
- Overseeing OCC's business strategies, including the expansion of clearance and settlement services to new business lines and product types, to ensure they reflect the interests of stakeholders and are consistent with the public interest;
- Reviewing and approving major corporate plans and actions, including capital expenditures, the annual budget and corporate plan, financial objectives, operating capital and capital structure, and fee structure;
- Ensuring that the Board and senior management have the appropriate experience and skills to discharge their respective responsibilities;
- Ensuring clear and direct lines of responsibility and communication between the Board and senior

[54] OCC may but need not have a Management Director.

[55] The Options Clearing Corporation Board of Directors Charter and Corporate Governance Principles, *available at* https://www.theocc.com/getmedia/99ed48a4-aa44-45ac-8dee-9399b479a1c8/board_of_directors_charter.pdf (last accessed October 7, 2022).

management;
- Ensuring risk management and internal audit personnel have sufficient authority, resources, independence from management, and access to the Board;
- Overseeing management's activities in managing and operating OCC;
- Assigning responsibility and accountability for risk decisions and overseeing the establishment of policies addressing decision-making in crises and emergencies;
- and
- Determining disqualifications from Board service and making appointments to fill Board vacancies.

Board Committees

Audit Committee

The Audit Committee assists the Board in overseeing OCC's financial reporting process, system of internal control, compliance and legal risks, and auditing, accounting, and compliance processes. The Audit Committee is also responsible for overseeing the facilitation of open communication amongst the external auditors, OCC's corporate finance department, OCC's compliance department, and the Board.

Compensation and Performance Committee

The Compensation and Performance Committee assists the Board with overseeing OCC's general business, regulatory capital, investment, corporate planning, compensation and human capital risks, as well as executive management succession planning and performance assessment. The Compensation and Performance Committee is also responsible for overseeing the annual corporate performance report and corporate budget, including their alignment with OCC's business strategy.

Governance and Nominating Committee

The Governance and Nominating Committee assists the Board in overseeing OCC's corporate governance processes, including: (i) assessing that OCC's governance arrangements are clear and transparent; (ii) establishing the qualification necessary for Board service to ensure the Board is able to discharge its duties; (iii) identifying and recommending to the board candidates eligible for service as Public Directors and participant directors; and (iv) resolving certain conflicts of interest. The Governance and Nominating Committee also regularly reviews and, as necessary, recommends to the Board improvements to the Board's Code of Conduct, including the conflict of interest policy therein.[56]

Regulatory Committee

The Regulatory Committee assists the Board in overseeing OCC's compliance with its regulatory obligations and adherence to applicable regulatory guidance and standards. The Regulatory Committee also oversees OCC's Regulatory Compliance Oversight Group, an OCC management-level working group.

Risk Committee

The Risk Committee assists the Board in overseeing OCC's financial, operational, risk model, and third-party

[56] Code of Conduct for OCC Directors, available at https://www.theocc.com/getmedia/2e042613-d3b3-40b6-b10a-80bd9e3baffb/director_code_of_conduct.pdf (last accessed October 7, 2022).

risk management. The Risk Committee oversees OCC's overall corporate risk management framework, including: (i) membership criteria and financial safeguards; (ii) member and other counterparty risk exposure assessment; (iii) liquidity requirements and maintenance of financial resources; (iv) risk modeling and assessments; and (v) default management planning. It also reviews the performance of (i) OCC's corporate risk management and model validation programs and (ii) OCC's Chief Risk Officer, who reports directly to the Risk Committee.

Technology Committee

The Technology Committee assists the Board overseeing OCC's information technology and operational strategy, infrastructure, resources, and risks. This includes: (i) overseeing major information technology and operational related strategies, projects, and technology architecture decisions; (ii) monitoring whether OCC's information technology programs effectively support OCC's objectives and strategies; and (iii) monitoring OCC's information technology and operational risk management efforts, the security of OCC's information systems, and the physical security of information security assets.

Director Independence Assessments and Board Self-Assessments

OCC conducts independence assessments of all directors other than Management Directors (if any are serving on the Board) on an annual basis.[57] Relationships between directors, as well as relationships between directors and OCC, are considered by the Board in its independence assessments. OCC currently maintains a robust process to identify relationships between a director or a nominee and OCC or an affiliate that would preclude the director or nominee from being an independent director. This process includes a the requirement that nominees complete a questionnaire ("Director Independence Questionnaire") eliciting information that is generally aligned with director independence standards of registered listing stock exchanges and related Commission rules for independent audit committees.[58] Existing directors are required to: (i) provide responses to the Director Independence Questionnaire on an annual basis and (ii) identify and disclose matters that may involve conflicts of interest or that may be reasonably perceived by others to raise questions about conflicts of interest on an ongoing basis.[59]

Director Obligations and Fitness Standards

Each director is required to act with due care, honestly, in good faith, and in the best interests of OCC and follow guidelines agreed on by the board regarding how it will govern and conduct itself.[60] Each director has a responsibility to be reasonably well-informed about the activities of OCC and to exercise independent judgment on all decisions. Directors are expected to regularly attend meetings of the Board and of the committee(s) on which the director sits and may attend meetings by video or teleconference if unable to

[57] Management Directors are known not to be independent from OCC.

[58] In some cases, OCC's questions are stated more broadly than applicable independence tests to help ensure they capture all potentially relevant information to enable to the board to make an informed judgment about director independence.

[59] See Code of Conduct for OCC Directors, *available at* https://www.theocc.com/getmedia/2e042613-d3b3-40b6-b10a-80bd9e3baffb/director_code_of_conduct.pdf (last accessed October 7, 2022).

[60] Id.

attend in person. Directors are expected to have read materials provided in advance of a meeting and are entitled to reasonably rely on briefing materials and reports provided by management, a Board committee, OCC's independent auditors, and any other advisors retained by OCC, the Board, or a Board committee.

Directors are also required to act in good faith, in the best interests of OCC, and not in their own interests or the interests of another entity or person (including their employer). Directors must strictly avoid using OCC assets or opportunities for their own benefit or the benefits of others if such use is not also in OCC's best interests.

As fiduciaries of OCC, directors are required to keep in strict confidence the information they receive in their capacity as directors unless they have express authority from OCC to do otherwise, the information is in the public domain, or otherwise in possession of the director without restriction. Before sharing materials marked confidential and received in conjunction with their role as an OCC director with colleagues within their firm, directors should consult with the OCC Chief Legal Officer and consider potential harm to OCC from sharing the information, including whether sharing the information might present a risk that an attorney-client privileged communication could be waived. If authorized to share confidential information with colleagues at their firm, OCC directors must use reasonable care to protect the information from further dissemination or disclosure by (i) limiting to the smallest number possible the persons with whom they share the information, (ii) only sharing the information with colleagues who themselves are subject to a duty (through express agreement or firm policy) to keep the information confidential, and (iii) informing the recipients of the confidential and sensitive nature of the information and the recipients' obligation to treat the information as confidential and protected and to limit their use of it to assisting the OCC director in her service on the OCC board. Directors may share non-confidential information with a limited number of persons in her firm who have expertise on the matter to be considered by the board if the director believes sharing such information would not harm OCC and the recipient of the information agrees to protect it from further dissemination or disclosure.

No director may serve on the Board who: (i) is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act; (ii) may be refused registration under Section 8a(2) of the Commodity Exchange Act; or (iii) has a history of serious disciplinary offenses, including but not limited to those that would be disqualifying under Commodity Futures Trading Commission Rule 1.63.

Addressing Director Conflicts of Interest

Each director is required to appropriately address actual, potential, or apparent conflicts of interest and promptly report any violations of the Code of Conduct for OCC Directors to the Chairman of the board or OCC's Chief Legal Officer.[61] A conflict of interest is present whenever the interests of OCC compete with the interests of a director (or nominee), the director's employer, or any other party with which a director is affiliated. A conflict of interest is also present whenever a director's corporate or personal interests are such that they could be reasonably viewed as affecting the director's objectivity in fulfilling her duties to OCC. Conflicts between the best interests of OCC and the direct or indirect personal or financial interests of a director may arise from time to time. Neither OCC nor any director may enter into any transaction or arrangement that involves a conflict of interest except per OCC's Code of Conduct for OCC Directors and its Related Party Transactions Policy. OCC will not enter into or continue to proceed with a transaction giving rise to a conflict of interest unless the transaction has been approved or ratified by the Governance and

[61] See Code of Conduct for OCC Directors, *available at* https://www.theocc.com/getmedia/2e042613-d3b3-40b6-b10a-80bd9e3baffb/director_code_of_conduct.pdf (last accessed October 7, 2022).

Nominating Committee.

When entering into business relationships, OCC directors must consider whether a conflict of interest may arise that could be avoided. Public Directors, specifically, are counseled to avoid entering into business relationships that could give rise to conflicts of interest or could be perceived to undermine their objectivity or independence. This limitation on direct business relationships does not extend to arms-length relationships with an entity with which another director is affiliated as an employee, officer, or director that OCC's Governance and Nominating Committee determines poses an immaterial risk of conflict. OCC may enter into a transaction or other arrangement, and the board may otherwise approve any other matter that requires board approval, when a director has a conflict of interest providing the nature and relevant facts regarding the conflict known at the time are disclosed at a duly held meeting of the board or a board committee at which a quorum is present and a majority of directors who have no conflict of interest in the transaction or arrangement approve the transaction or arrangement.

Directors are expected to err on the side of caution and immediately bring to the attention of the Chairman of the board and to OCC's Chief Legal Officer any matters that may involve conflicts of interest or that may be reasonably perceived by others to raise questions about potential conflicts of interest. Directors are required to disclose relationships that may arise with OCC due to business affiliations or business or family relationships with OCC's officers, employees, and other directors that could give risk to a conflict or to a perception of a conflict. Finally, directors are required to complete an annual questionnaire that elicits information to disclose relationships that may give rise to conflicts of interest. Responses to these questionnaires are reviewed by OCC's Chief Legal Officer. Directors are required to promptly disclose for review any relevant change in circumstances, such as a change in employment or acceptance of a position on another board that could give rise to conflicts of interest or to the perception of conflicts of interest.

The Chairman of the board and OCC's Chief Legal Officer will evaluate conflict disclosures and make other necessary inquiries to determine the extent and nature of any conflicts of interest. If any director believes she may have a conflict of interest in a matter to be acted upon by the board or a board committee on which she sits, the director shall disclose the conflict to the Chairman and OCC's Chief Legal Officer prior to discussion or presentation of such matter and where possible in advance of the meeting. The director should also consider whether it is advisable under the circumstances to recuse herself from the discussion and/or vote and shall recuse herself if requested by the Chair of the meeting. The Governance and Nominating Committee considers all facts regarding a conflict of interest and, in consultation with the Chairman and the Chief Legal Officer, shall resolve any questions or disputes regarding a conflict of interest, including any question or dispute about whether a recusal is appropriate. The Governance and Nominating Committee also has the authority to raise and address any issue related to the identity and handling of a conflict of interest involving a member of the board, whether or not that issue has been raised by anyone else.

Appendix B: Response to Selected Commission Questions

This Appendix provides OCC's responses to specific questions posed by the Commission in the Proposal.

I. Board Composition and Requirements for Independent Directors

(4) What is the appropriate percentage of independent directors on the board of a registered clearing agency? Does the requirement for a majority of directors to be independent directors support the goals discussed in this proposal? Would another threshold be more effective at addressing diverging views among owners, participants, and other relevant stakeholders in the registered clearing agency? For example, would a requirement that one-third of the directors be independent (which has been adopted by European jurisdictions) provide the benefits of independent directors without any of the potential drawbacks? Please explain.

OCC believes a requirement that one-third of directors of the Board be independent would be sufficient to ensure potentially divergent views of owners, participants, and other relevant stakeholders are fully considered by the Board of the registered clearing agency without any of the potential drawbacks of too many independent directors.

(5) Is the application of director independence requirements appropriate for all registered clearing agencies, or should there be distinctions made among registered clearing agencies based on certain factors, such as organizational structure or products cleared? If so, what factors are relevant and why? Would these proposed rules apply to all types of organizational structures in a consistent manner, or would they impede a registered clearing agency from changing its organizational structure into a more innovative or efficient structure?

As noted in this letter, OCC believes there are meaningful differences between a registered clearing agency that is a market utility and a registered clearing agency that is for-profit such that the former is likely, by its nature, to have a governance framework that ensures consideration of viewpoints from interested stakeholders without prescriptive director independence requirements.

(11) The Commission requests comment on whether the proposed approach to board composition and board member independence may raise compliance issues with respect to being registered with the Commission and the CFTC or a non-US regulatory authority."

OCC notes the CFTC also has proposed prescriptive governance requirements for DCOs. As both a registered clearing agency and a DCO, OCC would be required to comply with both the governance requirements of the Proposal and of the CFTC Proposal. There are a few instances in which the Proposal and the CFTC Proposal may present challenges for dual registrants to construct governance frameworks compliant with both:

- The Proposal provides that the risk management committee(s) are to "assist the board of directors in overseeing" the risk management of the registered clearing agency. The CFTC Proposal would requirement the board to "consult with, and consider and respond to input from" the risk management committee(s). OCC believes the Commission contemplates the "risk management committee(s)" described in the Proposal to be committees of the board – similar to OCC's current Risk Committee – whereas the CFTC

contemplates the "risk management committee(s)" described in the CFTC Proposal to be advisory or consultatory bodies outside of the formal governance framework of the DCO, similar to OCC's FRAC.

- The Proposal would require risk management committee(s) to include representatives from owners and participants. The CFTC Proposal would require risk management committee(s) to include representatives from participants and customers of participants. OCC believes this this is further evidence that the Commission contemplates the "risk management committee(s)" to be committees on the board, while the CFTC conceives of them to be advisory or consultatory bodies outside of the formal governance framework of the DCO.

- The Proposal would require the membership of each risk management committee to be reconstituted on a regular basis. The CFTC Proposal would require the membership of each risk management committee to be rotated on a regular basis.

(12) The Commission requests comment on whether the requirement to undergo a broad consideration of facts and circumstances when determining whether a board member is independent is sufficiently clear. Is there additional guidance needed on what sources could be consulted or what types of relationships could be considered?

OCC believes additional guidance is needed on what types of relationships could be considered when determining whether a board member is independent. As stated in this letter, OCC believes the Commission should state explicitly that payment of fees from a participant to a registered clearing agency (or payment from a registered clearing agency to a participant through rebate or refund of fees paid) do not qualify as "payments for property or services" under Proposed Rule 17Ad-25(f)(4).

(14) Should the Commission permit directors who have material relationships with participants (such as being an employee of a participant), other than those relationships that are explicitly precluded in Rule 17Ad-25(f), to meet the definition of independent director, or should these relationships be precluded as well? Should the Commission be more restrictive, as is proposed in paragraph (f)(2), with respect to compensation and payments received from the registered clearing agency or its affiliates, rather than participants? Why or why not?

Yes, the Commission should permit directors who have material relationships with participants to meet the definition of "independent director" in the Proposed Rules. Particularly for registered clearing agencies that are not owned by participants, they are precisely the stakeholders whose viewpoints the Proposed Rules are intended to protect. We also wish to clarify that a director may have a relationship *to the participant* within the scope of the independence exclusions and not be precluded from being an independent director of the registered clearing agency by virtue of those relationships (other than those relationships that are explicitly precluded in Rule 17Ad-25(f)).

(15) The Commission is soliciting comment on how to view participant clearing fees or other payments from participants that generate revenue for the clearing agency as a potential scenario that precludes director independence. Is it sufficiently clear in the text of proposed Rule 17Ad-22(f)(4) that revenues from participants are covered under the scope of this

prohibition? Should the Commission treat revenues from participants differently from other sources of revenues or expenditures? Should the Commission create a carve out for lower levels of revenues in order to promote the opportunity for partners or controlling shareholders of small participants to be able to qualify as an independent director, such as by creating a minimum threshold of payments covered by this provision? Why or why not?

We strongly believe that payments from participants to a registered clearing agency for clearing fees should not be a potential scenario that precludes director independence. Revenues from participants by way of clearing fees should be treated differently than other payments to or from the clearing agency and a participant for the following reasons: (i) clearing fees are established through rule filings with the Commission; (ii) clearing fees apply equally to all participants of the clearing agency; and (iii) clearing fees are paid by all users of the service of clearing.

II. Nominating Committee

(20) Should the Commission be more prescriptive in requiring that certain types of stakeholders, such as smaller participants and customers, be afforded a right of participation in the board of a clearing agency? Why or why not? If so, which types of stakeholders? Please explain with specific information.

No, the Commission should not be more prescriptive in requiring that certain types of stakeholders, such as smaller participants and customers, be afforded a right of participation on the board of a registered clearing agency. Registered clearing agencies required by the Exchange Act to ensure a fair representation of owners and participants in the selection of directors and in the administration of their affairs. This current requirement plus the "independent director" requirement of the Proposed Rule is sufficient to ensure the viewpoints of all participants are adequately considered.

III. Risk Management Committee

(25) Is the proposed requirement that the registered clearing agency's risk management committee be a committee of the board a more effective way to structure the risk management committee than requiring that the risk management committee be an external committee, such as a management committee or an advisory committee? Why or why not? If not, should the risk management committee be structured to represent more participants, regardless of whether those participants are represented on a clearing agency's board? Why or why not?

Yes, the proposed requirement that the registered clearing agency's risk management committee be a committee of the board is a more effective way to structure the risk management committee than requiring it to be an external advisory committee to the board. We believe there are significant advantages to this structure rather than one where the risk management committee is an advisory committee to the board, including ensuring that the Board takes the committee's viewpoints into appropriate perspective.

(26) The Commission is not specifying whose responsibility it is to determine the matters presented to the risk management committee for consideration. Should the Commission be

more prescriptive and specify whose responsibility it is to make such determinations? If so, should the Commission require the risk management committee to designate thresholds or identify the types of risk management related matters that warrant consideration by the committee? Why or why not? Please explain.

No, the Commission should not specify whose responsibility it is to determine the matters presented to the risk management committee for consideration. Matters that require risk management committee consultation should be determined in accordance with the ambit of the committee(s) as provided by the committee(s') charter(s).

(28) Should the Commission require the risk management committee to include at all times a specific percentage or number of representatives from small participants of the clearing agency in addition to representatives from the owners and participants more generally, as proposed? Why or why not? If so, what percentage or number? Please explain with specific information.

No, the Commission should not require the risk management committee to include at all times a specific percentage or number of representatives from small participants of the registered clearing agency. Registered clearing agencies are required to ensure a fair representation of owners and participants in the selection of directors and in the administration of its affairs. Additionally, OCC's Fitness Standards for Directors, Clearing Members, and Others requires the Board to consider a balanced representation among clearing members and to develop a mix of Participant Directors that includes representatives of Participants that are primarily engaged in agency trading on behalf of retail customers or individual investors. The "fair representation" requirement, the "independent director" requirement in the Proposal, and OCC's own requirements are sufficient to ensure that viewpoints of all participants, irrespective of size, are adequately considered. Finally, we note that participation on a risk management committee is a substantial investment of time and resources for a senior person at a potentially small firm, and it should not be made solely to meet a prescriptive Commission requirement.

(30) The Commission requests comment on whether the requirement that a risk management committee "reconstitute" its membership on a regular basis is sufficiently clear. Is there additional guidance needed on what "reconstitute" means? Is it sufficiently clear that the term "reconstitute" refers to the membership of the risk management committee and not to the form of the committee? Why or why not? Should the Commission instead require that the membership be "rotated"? Please explain.

OCC believes the requirement that a risk management committee "reconstitute" its membership on a regular basis is sufficiently clear, and OCC disagrees with it for the reasons stated elsewhere in this letter. OCC would also strongly oppose a more prescriptive requirement that membership of the risk management committee be rotated. A registered clearing agency's risk management ecosystem is detailed and complex, and changes to it often are made only after significant development of initiatives at the management level, discourse with the industry, and further discussion with the Commission. During the course of the evolution of a critical initiative, Risk Management Committee members may be consulted and be required to provide input on the initiative, necessarily informed by their familiarity with it. A requirement that the Risk Management Committee rotate on a regular basis could rob a registered clearing agency of the ability to include expertise provided by familiarity with both

the registered clearing agency's risk management practices and the specific history of pending initiatives.

IV. Board Obligation to Oversee Service Providers for Critical Services

(38) Is the definition of "service provider for critical services" sufficiently clear and properly scoped? Why or why not? Please explain and include alternative definitions, if possible.

No. The proposed definition of "service provider for critical services" is overly broad and ambiguous. The phrase "supporting clearance and settlement functionality" without a modifier could potentially capture virtually all non-trivial service providers to registered clearing agencies, particularly if clearance and settlement services is the only or primary service offering of the registered clearing agency. As stated in this letter, Regulation SCI contains a similar definition but limits the scope to those systems that "directly support . . . clearance and settlement" (SCI system) or those that "directly support functionality relating to clearance and settlement systems of clearing agencies" (Critical SCI system). If, notwithstanding this letter, the Commission adopts final rules that include a version of Proposed Rule 17Ad-25(i), OCC requests the Commission revise the definition to: "any person that is contractually obligated to the registered clearing agency for the purpose of providing services that directly support clearance and settlement functionality or any other purposes material to the business of the registered clearing agency."

(39) In requiring registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to enable the board to oversee relationships with service providers of critical services, should the Commission provide specific guidance regarding the means and measures by which the board performs such oversight responsibilities? Why or why not?

The Commission may provide guidance regarding the means by which the board may perform the oversight responsibilities described in Proposed Rule 17Ad-25(i). However, if the Commission were to provide this guidance, OCC strongly encourages the Commission to state explicitly in final rules that a lack of evidence of following the guidance is not evidence that written policies and procedures a registered clearing agency maintains as compliance for Proposed Rule 17Ad-25(i) are unreasonably designed.

(40) In requiring registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to confirm and document that risks related to relationships with service providers for critical services are managed in a manner consistent with its risk management framework, should the Commission require—rather than provide as guidance, as currently formulated—that the board confirm and document the risks through a self-assessment as discussed above? Why or why not?

OCC does not believe that the Commission should require that the board confirm and document through a self-assessment that risks related to relationships with service providers for critical services are managed in a manner consistent with its risk management framework. However, OCC does believe that the Commission should state explicitly that a properly executed self-assessment similar to the Annex F described in the Proposed Rule is evidence of compliance with Proposed Rule 17Ad-25(i).

V. Obligation to Formally Consider Stakeholder Viewpoints

(41) The Commission understands that some registered clearing agencies have established multiple groups or fora to target specific topics or types of participants when sharing and soliciting information. What should a registered clearing agency consider when determining to establish one versus multiple fora for soliciting viewpoints? Why? How should it select the types of stakeholders or market participants from whom it solicits information? Are there particular topics for which a group or fora should be required under the rule? Are there any merits in limiting the number of different groups or fora to avoid overly fragmenting the discussion of topics and solicitation of viewpoints? Please explain with specific examples, if possible.

A registered clearing agency should consider the scope of its stakeholders and the most efficient way to generate meaningful feedback across stakeholders when designing its framework for the solicitation of stakeholder viewpoints. Registered clearing agencies with several groups of stakeholders that may not hold overlapping interests (for example, issuers and liquidity providers) should consider multiple fora to increase efficiency but should be mindful when certain issues would benefit from a diverse cross-section of feedback to which other stakeholder groups could respond in real time.

(42) Should the rule include specific requirements applicable to committees, working groups, or other fora when established by a clearing agency? Please explain.

As noted in this letter, we believe a principles-based approach that would permit registered clearing agencies to comply with the final rules in accordance with the unique characteristics of each specific registered clearing agency is preferable to specific requirements for committees, working groups, or other fora.

(43) The proposed rule would require that a registered clearing agency solicit viewpoints regarding material developments in its governance and operations. Does limiting the topics for soliciting viewpoints to "material" aspects of a clearing agency's governance and operations provide for the appropriate scope of topics for which a clearing agency should solicit viewpoints? Why or why not? Should the rule limit the topics for soliciting viewpoints only to risk management? Why or why not? Conversely, should the set of topics be expanded to include topics such as participation requirements, products cleared, fees, new technologies, services, or other topics relevant to participants and other stakeholders? Please explain with specific examples, if possible.

OCC believes the requirement should be limited to the solicitation of viewpoints from stakeholders only on matters that could materially affect the level or nature of risk presented by the registered clearing agency. We believe that governance of the registered clearing agency (as long as it complies with state law and regulatory requirements, including those imposed by any final rules here) should be within the sole discretion of the registered clearing agency.

(44) The proposed rule would require that the registered clearing agency solicit viewpoints on a recurring basis. How frequently should a registered clearing agency solicit viewpoints? Should the requirement apply on an annual basis, a quarterly basis, or some other frequency?

How should a clearing agency balance the frequency of its outreach against the obligation to document its consideration of viewpoints received?

A registered clearing agency should be required to solicit viewpoints from stakeholders at least semiannually. While OCC believes it is critical that there be recurring solicitation of viewpoints from stakeholders on registered clearing agency matters, OCC also believes a more prescriptive requirement than at least two times annually could cause registered clearing agencies to solicit viewpoints of stakeholders for trivial or inconsequential matters solely to meet a prescriptive requirement.

(45) Does the proposed rule interact with the board's fiduciary duty to the clearing agency? If so, how? Please explain with specific information.

Yes, the Proposed Rule interacts with each director's fiduciary duty to the Board. As stated in this letter, OCC directors already have duties of loyalty and care to OCC. The duty of loyalty already requires directors to act in good faith and in the best interests of OCC and not their own interests or the interests of any other person. Conceivably, a matter may be in the best interest of OCC but not in the best interest of one of the stakeholder groups for which the Board may be required to consider its viewpoints. It is unclear how consideration of the viewpoints of stakeholders in this case could cause a director to alter her view on a matter if she believes, taking into account the viewpoints of stakeholders, that the best interest of OCC and viewpoints of stakeholders are not aligned.