

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82576; File No. SR-OCC-2018-001)

January 24, 2018

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Proposed Rule Change Related to The Options Clearing Corporation's Fee Policy

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 18, 2018, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change by OCC would make certain revisions to OCC's Fee Policy to reduce the permitted implementation time for proposed changes to its Schedule of Fees. Under the proposed rule change, the Fee Policy would provide that any change to the Schedule of Fees resulting from a review of OCC's fees by the Board of Directors ("Board") as stipulated under the Fee Policy would be implemented no sooner than 30 days from the date of the filing of the proposed fee change with the Commission, rather than the minimum 60-day period provided for currently in the Fee Policy.

The Fee Policy is included as confidential Exhibit 5 to the filing. Material proposed to be added to the Fee Policy as currently in effect is marked by underlining and material proposed to be deleted is marked in strikethrough text. All terms with initial

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

capitalization that are not otherwise defined herein have the same meaning as set forth in the By-Laws and Rules.³

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The purpose of this proposed rule change is to amend OCC's Fee Policy⁴ to provide that any change to OCC's Schedule of Fees resulting from a review of OCC's

³ OCC's By-Laws and Rules can be found on OCC's public website: <http://optionsclearing.com/about/publications/bylaws.jsp>.

⁴ OCC's Fee Policy was adopted as part of OCC's plan for raising additional capital ("Capital Plan"), which was put in place in light of proposed regulatory capital requirements applicable to systemically important financial market utilities, such as OCC. See Exchange Act Release No. 34-74452 (March 6, 2015), 80 FR 13058 (March 12, 2015) (SR-OCC-2015-02); Exchange Act Release No. 34-74387 (February 26, 2015), 80 FR 12215 (March 6, 2015) (SR-OCC-2014-813) ("Approval Orders"). BATS Global Markets, Inc., BOX Options Exchange LLC, KCG Holdings, Inc., Miami International Securities Exchange, LLC, and Susquehanna International Group, LLP each filed petitions for review of the Approval Order, challenging the action taken by delegated authority. Following review of these petitions, on August 8, 2017, the U.S. Court of Appeals for the D.C. Circuit remanded the Approval Orders to the Commission to further analyze whether the Capital Plan is consistent with the Securities Exchange Act of 1934. Susquehanna Int'l Grp., LLP v. SEC, 866 F.3d 442 (D.C. Cir. 2017). While the Commission further analyzes the Capital Plan, it remains in effect as originally approved by the Commission. See id.

fees by the Board as stipulated under the Fee Policy⁵ would be implemented no sooner than 30 days following the filing of the revised Schedule of Fees as a proposed rule change with the Commission, rather than no sooner than 60 days after filing. Under Section 19(b)(3)(A)(ii) of the Securities Exchange Act of 1934, as amended (“Act”),⁶ a proposed rule change takes effect upon filing with the Commission if it is designated by OCC as establishing or changing a due, fee or other charge on any person. This proposed rule change, however, specifically concerns the time frame in which OCC permits itself to implement any proposed fee change under its Fee Policy.

In General, Article IX, Section 9 of OCC’s By-Laws requires that OCC’s fee structure be designed to: (1) cover OCC’s operating expenses plus a business risk buffer; (2) maintain reserves deemed reasonably necessary by OCC’s Board; and (3) accumulate an additional surplus deemed advisable by the Board to permit OCC to meet its obligations to its Clearing Members and the public.⁷ In connection with these requirements, OCC has adopted a Fee Policy under which the Board determines OCC’s fee structure. As part of the Fee Policy, the Board reviews the existing Schedule of Fees on a quarterly basis to determine its appropriateness. Central to the Board’s

⁵ OCC notes that authority to review and approve changes to OCC’s fees pursuant to the Capital Plan has been delegated to the Compensation and Performance Committee of the Board. See OCC Compensation and Performance Committee Charter, available at: http://www.optionsclearing.com/components/docs/about/corporate-information/performance_committee_charter.pdf.

⁶ See 15 U.S.C. 78s(b)(3)(A)(ii). Regarding any such proposed rule change that becomes immediately effective, however, the Commission also has certain conditional authority to summarily temporarily suspend the change and institute proceedings to determine whether to approve or disapprove it. See 15 U.S.C. 78s(b)(3)(C).

⁷ OCC notes that clauses two and three above would be invoked only at the discretion of OCC’s Board and in extraordinary circumstances.

determination of the appropriate level of fees is the requirement to cover OCC's operating expenses plus an additional amount referred to as a "Business Risk Buffer." The Business Risk Buffer is an amount of fee revenue that OCC targets above its anticipated operating expenses to allow for unexpected fluctuations in operating expenses, business capital needs, and regulatory capital requirements. Under the Fee Policy, OCC generally sets clearing fees at a level designed to cover operating expenses plus a Business Risk Buffer of 25%. In determining the proper level of fees to achieve this goal, the Board may rely on a recommendation of OCC staff that is based on an analysis of, among other things, year-to-date revenue and operating expenses and projected clearing volume and operating expenses.

OCC believes that the current 60-day implementation period under the Fee Policy (i) increases the difficulty of projecting appropriate fee levels needed to cover OCC's operating expenses plus the Business Risk Buffer given the amount of time that passes between OCC's analysis and the implementation of the fee change, (ii) increases the risk that by the time the fee change is implemented, the extended delay in implementation may result in revenues that diverge further from the target the Business Risk Buffer (either higher or lower), and (iii) increases the impact of a fee change due to the delayed implementation timing.⁸ As a result, OCC may need to make more frequent and/or more dramatic changes to its Schedule of Fees in order to maintain its target Business Risk Buffer, resulting in less stability in fees for OCC's participants. OCC believes that

⁸ OCC notes that, as a practical matter, it typically implements changes to its Schedule of Fees on the first of the month. As a result, the actual delay in implementing a proposed fee change may be significantly longer than 60 days depending on the timing of Board approval of any fee change and subsequent filing of the associated proposed rule change.

reducing the 60-day implementation period to 30 days would allow for fee adjustments that are based on revenue and expense data that is more current, and therefore projections that are more accurate. OCC believes the proposed rule change would therefore improve its ability to set fees at an appropriate level to meet its requirements under the Capital Plan while still providing adequate notice to its participants of any proposed fee changes.

(2) Statutory Basis

Section 17A(b)(3)(D) of the Act⁹ requires that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants. In addition, Rule 17Ad-22(e)(21)¹⁰ requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to be efficient and effective in meeting the requirements of its participants and the markets it serves. OCC believes the proposed rule change is consistent with Section 17A(b)(3)(D) of the Act¹¹ and the rules thereunder because allowing earlier implementation of changes to OCC's Schedule of Fees would ensure that the fees charged to Clearing Members are based on based on revenue and expense data that is more current, and therefore projections that are more accurate. As a result, OCC believes it would be able to implement fee changes that are more accurately calibrated to meet the requirements of its Fee Policy and Capital Plan, which in turn would foster the equitable allocation of reasonable dues, fees and other charges among Clearing Members. OCC also believes that the proposed rule change is consistent with Rule 17Ad-22(e)(21)¹²

⁹ 15 U.S.C. 78q-1(b)(3)(D).

¹⁰ 17 CFR 240.17Ad-22(e)(21).

¹¹ 15 U.S.C. 78q-1(b)(3)(D).

¹² 17 CFR 240.17Ad-22(e)(21).

because the shortened implementation period would improve OCC's ability to implement a Schedule of Fees that is based on revenue and expense data that is more current and indicative of OCC's business, and therefore, the change would enhance OCC's ability to be cost-effective in meeting the requirements of its Clearing Members.

(B) Clearing Agency's Statement on Burden on Competition

Section 17A(b)(3)(I) of the Act¹³ requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the Act. OCC believes that the proposed rule change would not have any impact or impose a burden on competition. The proposed changes to the Fee Policy would not disadvantage or favor any particular user in relationship to another user because the potential for earlier implementation of changes to the Schedule of Fees would apply equally to all Clearing Members and market participants. Moreover, the proposed rule change would continue to allow for a notification period of at least 30 days following the filing of a revised Schedule of Fees with the Commission before such a proposed fee change could be implemented. As a result, OCC believes that the proposed rule change would not have any impact or impose a burden on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments on the proposed rule change were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

¹³ 15 U.S.C. 78q-1(b)(3)(I).

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

OCC respectfully requests that the Commission approve the proposed rule change on an accelerated basis pursuant to Section 19(b)(2)(C)(iii) of the Act.¹⁴ OCC believes that good cause exists for the Commission to accelerate the effectiveness of the proposed rule change because the proposed changes to the Fee Policy would improve OCC's ability to implement fee changes that are more accurately calibrated to meet the requirements of its Fee Policy and Capital Plan. As describe above, OCC believes that the current 60-day implementation period under the Fee Policy (i) increases the difficulty of projecting appropriate fee levels needed to cover OCC's operating expenses plus the Business Risk Buffer given the amount of time that passes between OCC's analysis and the implementation of the fee change, (ii) increases the risk that by the time the fee change is implemented, the extended delay in implementation may result in revenues that diverge further from the target the Business Risk Buffer (either higher or lower), and (iii) increases the impact of a fee change due to the delayed implementation timing. As a result, OCC may need to make more frequent and/or more dramatic changes to its Schedule of Fees in order to maintain its target Business Risk Buffer,

¹⁴ 15 U.S.C. 78s(b)(2)(C)(iii).

resulting in less stability in fees for OCC's participants. OCC believes that reducing the 60-day implementation period to 30 days would allow for fee adjustments that are based on revenue and expense data that is more current, and therefore projections that are more accurate and fee levels that are generally more stable. Accordingly, OCC believes the proposed rule change promotes OCC's ability to comply with its obligations under the Act to be efficient and effective in meeting the requirements of its participants and the markets it serves.

While the proposed rule change would reduce the 60-day notification period prior to implementing fee changes under the Fee Policy, any proposed fee change would still require at least a 30-day notification period prior to implementation and would continue to be subject to the Commission's rule filing process, including the notice and public comment period. OCC believes that the proposed 30-day implementation period, along with the Commission's rule filing process, would continue to provide Clearing Members and other market participants with appropriate and adequate notice of fee changes so that they are able to take any necessary action to prepare for the proposed fee change. Moreover, participants would continue to have an opportunity to comment on any fee changes prior to such fee change being implemented, and the Commission would continue to review all such fee changes as part of the proposed rule change process. OCC notes that the proposed rule change would not alter the manner in which OCC determines potential fee changes under its Fee Policy or the applicability of any such fee changes to its Clearing Members and market participants.

For all of the reasons above, OCC requests that the Commission approve the proposed rule change on an accelerated basis because there is good cause consistent with the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-OCC-2018-001 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-OCC-2018-001. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld

from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's website at <https://www.theocc.com/about/publications/bylaws.jsp>.

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-OCC-2018-001 and should be submitted on or before [insert date 15 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

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Assistant Secretary

¹⁵ 17 CFR 200.30-3(a)(12).