

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90960; File No. SR-OCC-2021-002)

January 21, 2021

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Revisions to Part 39 of the Commodity Futures Trading Commission Regulations

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 13, 2021, The Options Clearing Corporation (“OCC”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii)³ of the Act and Rule 19b-4(f)(6)⁴ thereunder so that the proposal was effective upon filing with the Commission. 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 amend Interpretation and Policy (“I&P”) .01 to OCC Rule 602 (Customer-Level Margin Requirement), add I&P .02 to OCC Rule 602 (Customer-Level Margin Requirement) and add I&P .01 to OCC Rule

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(6).

1103 (Notice of Suspension to Clearing Members) to achieve compliance with recent amendments to Part 39 of the Commodity Futures Trading Commission (“CFTC”)⁵ regulations and facilitate no-action relief issued by CFTC staff.⁶ The proposed changes to OCC Rules are included in Exhibit 5 of File No. SR-OCC-2021-002. Material proposed to be added to OCC’s Rules as currently in effect is underlined and material proposed to be deleted is marked in strikethrough text. All capitalized terms not defined herein have the same meaning as set forth in the OCC By-Laws and Rules.⁷

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.

⁵ Derivatives Clearing Organizations General Provisions and Core Principles, 85 Fed. Reg. 4800 (January 27, 2020).

⁶ CFTC Letter No. 19-17, Comm. Fut. L. Rep. ¶ 34,523 (July 10, 2019). See also CFTC Letter No. 20-28, Comm. Fut. L. Rep. ¶ 34,798 (September 15, 2020).

⁷ OCC’s By-Laws and Rules can be found on OCC’s public website: <https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules>.

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

(1) Purpose

The purpose of revised I&P .01 to OCC Rule 602 is to achieve compliance with recent amendments to CFTC Regulation 39.13(g)(8)(ii).⁸ Departing from the historical practice of establishing distinct minimum initial margin requirements for hedge and speculative customer accounts,⁹ revised CFTC Regulation 39.13(g)(8)(ii) provides that a derivatives clearing organization (“DCO”) shall establish a minimum initial margin requirement that clearing members must charge their customers with respect to each product and portfolio that is commensurate with the risk presented by each customer account.¹⁰ The revised regulation also provides DCOs reasonable discretion in establishing a higher minimum initial margin requirement that clearing members must collect for categories of customers determined by the clearing member to have heightened risk profiles.¹¹ As amended, I&P .01 to Rule 602 will allow OCC to achieve compliance with CFTC Regulation 39.13(g)(8)(ii) by requiring Clearing Members to determine which futures customers or categories of futures customers have heightened risk profiles and to collect, at a minimum, the amount of initial margin established by OCC for such customers or categories of customers from time to time. The proposal also

⁸ 85 Fed. Reg. at 4812 and 4856.

⁹ See, e.g. 85 Fed. Reg. at 4812.

¹⁰ 17 CFR 39.13(g)(8)(ii).

¹¹ Id.

eliminates the existing language in I&P .01 to OCC Rule 602 contemplating distinct margin requirements for customer hedge and speculative positions.¹²

OCC also proposes to adopt I&P .02 to OCC Rule 602 to facilitate no-action relief granted by the CFTC. By way of background, in 2011, the CFTC adopted Regulation 39.13(g)(8)(iii) requiring each DCO to prohibit the withdrawal of funds from a customer account unless the clearing member holds a sufficient amount of the customer's assets to cover its initial margin requirements with respect to products cleared by the DCO.¹³ In 2012, OCC adopted Rule 602(b) to satisfy this requirement.¹⁴ CFTC staff has issued time-limited no-action relief pursuant to which a DCO may allow a futures commission merchant ("FCM") clearing member to treat the separate accounts of a customer as accounts of separate entities for purposes of CFTC Regulation 39.13(g)(8)(iii), provided that the clearing member satisfies several conditions set forth in the letter.¹⁵ Proposed I&P .02 creates an exception to OCC Rule 602(b) that allows FCM

¹² OCC plans to distribute information used to calculate the minimum initial margin requirement for futures customer accounts and futures customer accounts with heightened risk profiles through a daily theoretical pricing file that is distributed to Clearing Members. OCC currently uses a similar approach for information used to calculate the minimum initial margin requirement for hedge and speculative positions of futures customers.

¹³ Derivatives Clearing Organization General Provisions and Core Principles, 76 Fed. Reg. 69334, 69374 (November 8, 2011).

¹⁴ See File No. SR-OCC-2012-006.

¹⁵ CFTC Letter No. 19-17, Comm. Fut. L. Rep. ¶ 34,523 (July 10, 2019) (granting time-limited no-action relief with respect to CFTC Regulation 39.13(g)(8)(iii) until June 30, 2021). See also CFTC Letter No. 20-28, Comm. Fut. L. Rep. ¶ 34,798 (September 15, 2020) (extending the time-limited no-action relief with respect to CFTC Regulation 39.13(g)(8)(iii) until December 31, 2021).

Clearing Members that satisfy the conditions established by the CFTC to treat separate futures customer accounts as accounts of separate entities for purposes of OCC Rule 602(b).

Finally, the proposed rule change adds I&P .01 to OCC Rule 1103, which specifies that OCC will publish a public notice of a decision to suspend a Clearing Member on its website as soon as reasonably practical. OCC is adopting this I&P to achieve compliance with CFTC Regulation 39.16(c)(2)(ii), which requires each DCO to adopt rules describing the actions a DCO will take upon a default,¹⁶ which must include posting a public notice of a declaration of default on the DCO's website.¹⁷

OCC proposes to make the revisions to the I&Ps to OCC Rules 602 and 1103 described above effective on January 27, 2021. This effective date aligns to the compliance date for the revisions to Part 39 of the CFTC regulations.¹⁸

(2) Statutory Basis

Section 17A(b)(3)(F)¹⁹ of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities and derivatives transactions and protect investors and the public interest. OCC believes that the proposed rule change is consistent with Section 17A(b)(3)(F) of

¹⁶ CFTC Regulation 39.16(c)(2)(ii) also requires DCOs to adopt rules providing for the prompt transfer, liquidation, or hedging of the customer or house positions of the defaulting clearing member, as applicable. Chapter XI of OCC's Rules addresses this portion of CFTC Regulation 39.16(c)(2)(ii).

¹⁷ 17 CFR 39.16(c)(2)(ii). See also 85 Fed. Reg. at 4815-16 and 4857.

¹⁸ See 85 Fed. Reg. at 4800.

¹⁹ 15 U.S.C. 78q-1(b)(3)(F).

the Act.²⁰ As noted above, the proposed revision to I&P .01 to Rule 602 protects investors and the public interest by more clearly describing which accounts are subject to increased initial margin requirements. The addition of .02 to OCC Rule 602 will promote the prompt and accurate clearance and settlement of transactions by accommodating no-action relief that is intended to help Clearing Members and their customers realize operational efficiencies for separate accounts. The proposed addition of I&P .01 to OCC Rule 1103 promotes the public interest by specifying that OCC will publish a public notice of a decision to suspend a Clearing Member on its website. The proposal also enables OCC to satisfy certain requirements set forth in Part 39 of the CFTC regulations and provides for a well-founded, clear, transparent and enforceable legal basis for its activities in accordance with SEC Rule 17Ad-22(e)(1).²¹ The proposed rule change is not inconsistent with the existing rules of OCC, including any other rules proposed to be amended.

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

Section 17A(b)(3)(I) of the Act²² requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. OCC does not believe that the proposed rule change would have any impact or impose a burden on competition. Although this proposed rule change affects Clearing Members, their customers, and the markets that OCC serves, OCC believes that the proposed rule change would not disadvantage or favor any particular user of OCC's

²⁰ 15 U.S.C. 78q-1(b)(3)(F).

²¹ 17 CFR 240.17Ad-22(e)(1).

²² 15 U.S.C. 78q-1(b)(3)(I).

services in relationship to another user because the proposed amendments apply equally to all users of OCC. OCC also notes that two of the proposed revisions to OCC Rules are designed to achieve compliance with amendments to Part 39 of the CFTC Regulations, and, in adopting these amendments, the CFTC identified no anticompetitive effects.²³ Given that the revisions to I&P .01 to OCC Rule 602 and I&P .01 to OCC Rule 1103 are narrowly tailored to achieve compliance with regulatory requirements for which no anticompetitive effects have been identified, OCC does not believe that these amendments would have any impact or impose a burden on competition. The addition of I&P .02 to OCC Rule 602 is intended to facilitate no-action relief related to an existing market practice and is not expected to have any impact on the competitive landscape.

While OCC does not believe that the proposal would have any impact or impose a burden on competition, if any such impact or burden to competition were to exist, the proposed amendments would still be necessary to achieve compliance with applicable regulatory requirements and accommodate no-action relief granted by the CFTC. The amendments are appropriate, because they are narrowly tailored to achieve compliance with CFTC Regulations and facilitate no-action relief. Accordingly, OCC does not believe that the proposed rule change would have any unnecessary or inappropriate impact or 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.

²³ See 85 Fed. Reg. at 4849-50.

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

Because the foregoing proposed rule change does not:

(i) significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such

shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act²⁴ and Rule 19b-4(f)(6)²⁵ thereunder.

OCC has requested that the Commission waive the 30-day operative delay under Rule 19b-4(f)(6)(iii)²⁶ so that the proposed rule changes may become effective and operative effective on January 27, 2021. OCC states that the proposal is intended to achieve compliance with amendments to Part 39 of the CFTC Regulations, which become effective on that date. Accordingly, OCC believes that the prompt implementation of these changes would be consistent with the public interest and the protection of investors.

In adopting CFTC Regulation 39.13(g)(8)(ii), the CFTC noted that the amendment was consistent with an existing interpretation permitting DCOs to establish initial margin requirements based on the type of customer account and by applying prudential standards that result in FCMs collecting initial margin commensurate with the

²⁴ 15 U.S.C. 78s(b)(3)(A).

²⁵ 17 CFR 240.19b-4(f)(6).

²⁶ 17 CFR 240.19b-4(f)(6)(iii).

risk presented by each customer account.²⁷ OCC does not believe that the amendment to I&P .01 and addition of I&P .02 to Rule 602 would significantly affect the protection of investors or the public interest as these changes simply conform the language of OCC's Rules to the applicable CFTC Regulation and prior interpretive guidance and facilitate no-action relief that has been granted with respect to an existing practice. Finally, the addition of I&P .01 to OCC Rule 1103 would not significantly affect the protection of investors or the public interest as it codifies OCC's longstanding practice of posting a notice of a Clearing Member default to its website. The proposed rule change would not impose any significant burden on competition because, as described above, the requirements apply to all Clearing Members, do not disadvantage or favor any particular user of OCC's services in relationship to another user and achieve compliance with applicable regulatory requirements for which the CFTC identified no anticompetitive effects.

The Commission believes that delaying the operation of the proposed rule change for 30 days would impede OCC's ability to comply with the CFTC rules by January 27, 2021 because a 30-day delay from the date of filing would require that the proposed rule change not become operative until February 12, 2021. The Commission believes, therefore, that waiving the 30-day operative delay would facilitate OCC's ability to

²⁷ See 85 Fed. Reg. at 4812 citing CFTC Letter No. 12-08 (Sept. 14, 2012). In the relevant section CFTC Letter No. 12-08 provided, “[A] DCO may continue the practice of establishing customer initial margin requirements based on the type of customer account and by applying prudential standards that result in FCMs collecting customer initial margin at levels commensurate with the risk presented by each type of customer account. This is the case even if the differentiation between accounts is not stated specifically in terms of ‘hedge’ and ‘non-hedge’ accounts.” See CFTC Letter 12-08 at 8.

comply with the CFTC's rules in a timely manner. Moreover, the Commission believes that the proposed rule change would not significantly affect the protection of investors or the public interest or impose a significant burden on competition because the changes would conform OCC's rules to existing practices as described above. The Commission designates the proposed rule change as operative on January 27, 2021.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change 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 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-2021-002 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-OCC-2021-002. 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/Company-Information/Documents-and-Archives/By-Laws-and-Rules>.

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-2021-002 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁸

J. Matthew DeLesDernier
Assistant Secretary

²⁸ 17 CFR 200.30-3(a)(12).