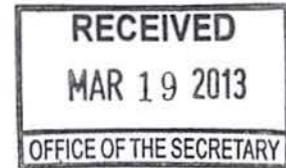




James E. Brown
Executive Vice President
General Counsel and Secretary



March 12, 2013

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Petition for Rulemaking and Request for Exemption from Provisions of the Securities Act of 1933 and Securities Exchange Act of 1934 for Cleared OTC Options (Commission File No. 4-644)

Ladies and Gentlemen:

The Options Clearing Corporation ("OCC") intends to begin clearing over-the-counter equity index options (the "OTC Options") in the near future.¹ To address regulatory issues raised by the clearing of these products, OCC on January 13, 2012 submitted a Petition for Rulemaking and Request for Exemption from Provisions of the Securities Act of 1933² and Securities Exchange Act of 1934³ for Cleared OTC Options (the "Original Petition")⁴ pursuant to Rule 192(a) of the Commission's Rules of Practice.⁵ OCC continues to believe very strongly that the requested relief is both entirely appropriate and consistent with relevant precedent, and that the failure to grant such relief would be anomalous and detrimental to important public

¹ On December 14, 2012, the Commission approved amendments to the By-Laws and Rules of OCC providing for clearing of OTC Options. Release No. 34-68434, Self-Regulatory Organizations; Options Clearing Corporation; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, and Notice of No Objection to Advance Notice, Modified by Amendment No. 1 Thereto, Relating to the Clearance and Settlement of Over-The-Counter Options (December 14, 2012); *See also* SR-OCC-2012-14 (filed with the Commission on August 30, 2012; amended on November 30, 2012);. As a condition of the Commission's approval of the foregoing rule changes, OCC has agreed that it will not begin clearing OTC Options until it implements certain enhancements of OCC's margin methodology for longer-tenor options. OCC is in the process of putting those enhancements in place and has provided commission staff with a draft of a proposed rule change with respect to the enhancements.

² 15 USC § 77a *et seq.* (the "Securities Act").

³ 15 USC § 78a *et seq.* (the "Exchange Act").

⁴ SEC Petition 4-644 (January 13, 2012).

⁵ 17 CFR § 201.192(a).

policy objectives reflected in the Dodd-Frank Wall Street Reform and Consumer Protection Act⁶ and Section 17A of the Exchange Act. OCC is therefore renewing its request and, in order to reflect developments that have taken place since OCC submitted the Original Petition, is submitting an amended and restated version of the petition (this “Revised Petition”) seeking relief similar to that sought in the Original Petition. This Revised Petition, like the Original Petition, is being submitted pursuant to Rule 192(a) of the Commission’s Rules of Practice⁷ and amends and restates in its entirety the Original Petition. We also continue to believe that the temporary exemptive relief requested in the Original Petition is appropriate for OTC Options.

As contemplated in SR-OCC-2012-14, OCC is prepared to initiate the issuance and clearance of OTC Options without the benefit of the requested exemptions in reliance on a private offering exemption. However, OCC believes, for the reasons discussed below, that continued reliance on a private offering exemption represents a continuing potential impediment to legal certainty and useful communication between OCC and potential end-users of cleared OTC Options.

Executive Summary of OCC’s Request

OCC is requesting that the Commission adopt exemptions from registration under the Securities Act and the Exchange Act for over-the-counter options cleared by a registered clearing agency that are parallel to existing exemptions for standardized options and security-based swaps in relevant respects.⁸ The Commission has long recognized that registration under the Securities Act and Exchange Act is unnecessary and inappropriate for derivative securities issued by registered clearing agencies because the disclosure regimes associated with such registrations are not relevant to investors in such derivatives securities, whose value is determined primarily by the underlying securities. Investors in OTC Options are not investing in the business of the clearing agency any more than are investors in standardized options or security-based swaps are doing so. No customer protection purpose would be served by subjecting such options to registration requirements or forcing OCC and its clearing members to rely upon a private offering exemption. The Commission has previously noted the difficulties associated with relying on such an exemption for cleared security-based swaps, and those observations are equally applicable in the present context. In our view, it would be inconsistent and without any rational policy basis to treat cleared OTC Options differently from all other derivative securities issued by registered clearing agencies by failing to adopt a parallel exemption.

Because cleared OTC Options are not retail products and are available only to investors that are “eligible contract participants” as defined in Section 3(a)(65) of the Exchange Act

⁶ Public Law 111-203 (July 21, 2010) (“Dodd-Frank”).

⁷ 17 CFR § 201.192(a).

⁸ See Securities Act Rule 238, 17 CFR § 230.238, Rule 239, 17 CFR § 230.239, Exchange Act Rule 12h-1(d), 17 CFR § 240.12h-1(d) and Exchange Act Rule 12h-1(h), 17 CFR § 240.12h-1(h).

("ECPs"),⁹ as is the case with cleared security-based swaps, the exemption from Securities Act registration set forth in the Commission's recently adopted Rule 239 applicable to security-based swaps is the most relevant precedent for the requested exemption for cleared OTC Options. Like Rule 239, Rule 241 proposed herein would limit the exemption for OTC Options to transactions with ECPs. Under OCC's proposal, the OTC Options, like cleared security-based swaps, would not be designated as "standardized options" and would not be the subject of an options disclosure document pursuant to Commission Rule 9b-1.¹⁰ OCC's proposed exemption is set forth in Appendix A to this Revised Petition.

The actions we are requesting will further a central objective of Title VII of Dodd-Frank by facilitating the central clearing of OTC Options. Substitution of a central counterparty ("CCP") as buyer to each seller and seller to each buyer reduces counterparty risk inherent in uncleared OTC Options.¹¹ Central clearing decreases risk to end-users and limits systemic risk. Putting an appropriately safe and user-friendly regulatory regime in place should also encourage the repatriation of transactions in risk-management instruments now occurring predominantly outside the United States,¹² thus benefitting investors by subjecting the transactions to the Commission's oversight, including its authority to prevent fraud and manipulation. As the Commission has stated: "The operation of a well-regulated CCP can significantly reduce counterparty risks by preventing the failure of a single market participant from having a

⁹ Section 3(a)(65) was added by Dodd-Frank and incorporates by reference the definition of ECP set forth in Section 1a(18) of the CEA, as that definition was amended by Dodd-Frank.

¹⁰ 17 CFR § 240.9b-1.

¹¹ Although options on securities and indexes of securities were excluded from regulation as swaps or security-based swaps and therefore not included in the clearing mandate of Dodd-Frank, we believe such options were excluded under Dodd-Frank because they were not excluded from Commission regulation by Section 3A of the Exchange Act (as were security-based swaps) prior to the amendments made to the Exchange Act by Dodd-Frank. The exclusion of OTC Options from the "swap" and "security-based swap" definitions in Dodd-Frank therefore did not reflect a determination by Congress that clearing of OTC Options would not be beneficial and should not be encouraged.

¹² According to the Bank for International Settlements ("BIS"), the notional value of the global market in OTC equity-linked options was approximately \$4.4 trillion at the end of the first half of 2012 (the most recent period for which such data is available). Of this amount, approximately \$1.2 trillion constituted options on U.S. equities. BIS, Semiannual OTC derivatives statistics at end-June 2012, November 2012, Amounts outstanding of OTC equity-linked derivatives, by instrument and market (Table 22B), *available at* <http://www.bis.org/statistics/otcder/dt22b22c.pdf>. The Commission has noted that many U.S. broker-dealers "conduct some or all of their securities OTC derivatives activities from abroad." "In response to the concerns raised by firms seeking to conduct an OTC derivatives business in the United States, the Commission proposed to establish a form of limited broker-dealer regulation that would give the firm an opportunity to conduct business in a vehicle subject to modified regulation appropriate to the OTC derivatives markets." OTC Derivative Dealers – Final Rule, Release No. 34-40594, 63 FR 59362 at 59363 (Nov. 3, 1998). Under OCC's rules, transactions in cleared OTC Options will be effected through regularly registered broker-dealers and not OTC derivative dealers. Nevertheless, we believe that the clearing of OTC Options by OCC will further the Commission's objectives in repatriating some portion of the existing OTC options market. OCC has been working extensively with a group of sell-side firms, including most of the largest U.S. broker-dealers, who have expressed interest in clearing proprietary and customer transactions in OTC Options through OCC.

disproportionate effect on the overall market [.]”¹³ This statement is as true of OTC Options as it is with respect to credit default swaps (“CDS”) and other security-based swaps, which have been the subject of regulatory relief substantially similar to the relief requested herein.

While the OTC Options are not “swaps” or “security-based swaps,” and therefore will not be subject to any Dodd-Frank clearing mandate, OCC anticipates that it may clear security-based swaps in the future. OCC expects to apply the same basic procedures proposed for OTC Options to security-based swaps. It would therefore underscore the anomaly if cleared OTC Options and cleared security-based swaps were treated differently with respect to the regulatory relief requested herein.

All of the rulemaking and/or exemptive relief we are currently requesting, as well as much additional exemptive relief that is not needed to implement OCC’s current proposal,¹⁴ has already been extended by the Commission on a permanent basis to other clearing organizations and market participants for the purpose of clearing OTC transactions in security-based swaps, which replaced relief previously extended on a temporary and expedited basis with respect to OTC transactions in CDS.¹⁵ The CDS and cleared security-based swap exemptions were patterned in large part on exemptions extended to standardized options in 2002.¹⁶ The exemptions requested herein would permit cleared OTC Options to be regulated in a similar manner.

We have included under item 5 below, at the request of the Commission staff, a summary comparing and contrasting the regulatory schemes under the federal securities laws and the Commission’s regulations applicable or proposed to be applicable to (i) standardized options, (ii) uncleared OTC options, and (iii) security-based swaps with the regulatory scheme we propose for cleared OTC Options. Our proposal incorporates appropriate elements of each of these other regulatory schemes.

Based upon the foregoing and the further discussion below, we respectfully request that the Commission take the following actions:

¹³ Release No. 33-8999, Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties To Clear and Settle Credit Default Swaps (January 14, 2009) at 74 FR 3968.

¹⁴ For example, exemptive relief was extended to permit clearing of CDS by entities not registered as clearing agencies and permitting persons not registered as broker-dealers under the Exchange Act to act as brokers and dealers with respect to CDS. Under OCC’s proposal, transactions in cleared OTC Options, like transactions in listed options, would be effected in the United States through registered broker-dealers and cleared by a clearing agency registered under the Exchange Act.

¹⁵ Release No. 33-9308, Exemptions for Security-Based Swaps Issued by Certain Clearing Agencies (April 5, 2012) (the “SB Swap Exemption Release”).

¹⁶ Release No. 33-8171, Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From the Registration Requirements of the Securities Exchange Act of 1934 (December 23, 2002) (the “Options Exemption Release”).

(1) ***Exemption from 1933 Act Registration.*** We request that the Commission adopt new Rule 241 under the Securities Act to exempt from all provisions of the Securities Act (other than Section 17(a)) over-the-counter options that are issued and cleared by a registered or exempt clearing agency in its function as a CCP, provided that such options are offered and sold only to ECPs. Proposed Rule 241, which is substantially similar to Rule 239¹⁷ under the Securities Act, is attached as Appendix A. We also request a temporary exemption such as formerly provided in Rule 239T¹⁸ with respect to CDS that was included among other interim temporary rules (the “Temporary CDS Rules”)¹⁹ approved by the Commission in 2009 to facilitate clearing of CDS.²⁰

(2) ***Exemption from Registration under Section 12 of the Exchange Act.*** Similarly, OCC requests that the Commission amend Rule 12h-1 under the Exchange Act to exempt from registration options that are issued and cleared by a registered or exempt clearing agency in its function as a CCP, provided that such options are offered and sold only to ECPs in reliance on proposed Rule 241 under the Securities Act. A markup of Rule 12h-1(j), which is substantially similar to Rule 12h-1(h)²¹ under the Exchange Act, is attached as Appendix B.

Discussion

1. Background Information

a. About OCC

Founded in 1973, OCC is the world’s largest clearing organization for financial derivatives. OCC clears securities options, security futures and other securities contracts subject to the Commission’s jurisdiction, and commodity futures and commodity options subject to the jurisdiction of the Commodity Futures Trading Commission (“CFTC”). OCC clears derivatives for all eleven U.S. securities options exchanges²² and six U.S. futures exchanges²³ and is the

¹⁷ 17 CFR § 230.239.

¹⁸ 17 CFR § 230.239T.

¹⁹ Release No. 33-8999 (January 14, 2009) (implementing the Temporary CDS Rules); Release No. 33-9063 (September 14, 2009) (extending the expiration date of the Temporary CDS Rules); Release No. 33-9158 (November 19, 2010) (further extending the expiration date of the Temporary CDS Rules).

²⁰ The Temporary CDS Rules remained in effect through April 16, 2012. Rule 239T (17 CFR § 230.239T) exempted cleared “eligible credit default swaps” from all provisions of the Securities Act other than anti-fraud provisions of Section 17(a). The Commission subsequently adopted new Rule 239, which exempts certain cleared security-based swaps from all provisions of the Securities Act, other than Section 17(a), including eligible CDS previously exempted under Rule 239T. See SB Swap Exemption Release.

²¹ 17 CFR § 240.12h-1(h).

²² OCC’s participant options exchanges include: BATS Options Exchange; BOX Options Exchange LLC; C2 Options Exchange, Inc.; Chicago Board Options Exchange, Inc.; International Securities Exchange; Miami

clearing agency for all standardized options listed on national securities exchanges in the United States. Since the Commission first permitted trading of standardized options in 1973, OCC has been deemed to be the issuer of the options it clears for purposes of both the Securities Act and the Exchange Act.²⁴ Until 2003, when Securities Act Rule 238 and Exchange Act Rule 12a-9 became effective, OCC registered the options it cleared under both statutes.²⁵

b. The OTC Options

OCC's By-Laws and Rules set forth OCC's procedures, policies and requirements with respect to the clearing of the OTC Options. As soon as practicable after Commission approval and OCC implementation of margin enhancements for longer-tenor options that are currently under discussion with Commission staff, OCC intends to clear OTC Options on equity indices published by Standard & Poor's Financial Services LLC ("S&P").²⁶ OCC may in the future clear OTC Options on other indices and on individual equity securities, subject to Commission approval of one or more additional rule filings.²⁷ Pursuant to OCC's rules, the OTC Options will have predominantly common terms and characteristics, but will also include certain terms negotiated by the parties. Transactions in the OTC Options will not be executed through the facilities of any exchange, but will instead be entered into bilaterally and submitted to OCC for clearance through one or more providers of trade affirmation services.²⁸ A complete description of the OTC Options and OCC's rules for clearing such options is set forth in SR-OCC-2012-14 and the Commission's release approving those rules.²⁹

International Securities Exchange, LLC; NASDAQ OMX BX, Inc.; NASDAQ OMX PHLX; Nasdaq Stock Market; NYSE Amex Options; and NYSE Arca Options.

²³ OCC's participant futures exchanges include: CBOE Futures Exchange; NYSE Liffe; NASDAQ OMX Futures Exchange; ELX Futures; OneChicago and NYSE Liffe US.

²⁴ SEC Release No. 34-9985 (February 1, 1973).

²⁵ Securities Act Release No. 33-8171 (December 23, 2002).

²⁶ OCC's license agreement with S&P currently allows OCC to clear OTC Options on three equity indices published by S&P: the S&P 500 Index, the S&P MidCap 400 Index and the S&P Small Cap 600 Index.

²⁷ Although OTC Options are not themselves subject to any listing standard of any national securities exchange, OCC does not intend to clear any OTC Option on any underlying interest or class of interests that is not eligible as an underlying interest for standardized options. In any event, OCC would be able to clear OTC Options only on those underlying interests or classes of underlying interests that have been approved for that purpose by the Commission through the usual rule-filing and approval process and Commission Rule 241(a)(2), as proposed, would limit the availability of the exemption to offers and sales of options that the Commission has determined are permitted to be cleared pursuant to OCC's rules.

²⁸ The initial provider of the trade affirmation services in connection with the OTC Options will be MarkitServ.

²⁹ See footnote 1.

c. Eligibility Criteria

OCC's rules require that the purchase and sale of OTC Options be limited to ECPs. To clear customer positions in OTC Options, OCC's clearing members must meet OCC's stringent membership criteria and (except in the case of non-U.S. securities firms as mentioned below) be registered with the Commission as broker-dealers pursuant to Section 15 of the Exchange Act. Clearing members that carry customer positions in OTC Options will be subject to all OCC rules governing cleared options generally, as well as all applicable rules of the Commission and of any self-regulatory organization of which they are members.

2. Regulatory Status of the OTC Options Absent Commission Action

a. Securities Act

Section 2(a)(1) of the Securities Act defines a "security" to include "any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities[.]" The OTC Options are therefore securities for purposes of the Securities Act. Consequently, any offer, sale, or delivery of an OTC Option would, in the absence of an exemption, be subject to the requirements of Section 5 of the Securities Act with respect to the filing and effectiveness of a registration statement and the delivery of a prospectus conforming to statutory standards. As OCC will be treated as the issuer of the OTC Options,³⁰ absent an exemption, this registration requirement would fall on OCC.

Listed options are exempted from registration with the Commission under the Securities Act by Securities Act Rule 238, which applies only to "standardized options" as defined in Exchange Act Rule 9b-1. Standardized options are those options that are issued by a registered clearing agency and traded on a registered national securities exchange. Thus, the OTC Options will not be "standardized options" as currently defined. Without the exemption under proposed Securities Act Rule 241, offers and sales of OTC Options could be made only pursuant to an effective registration statement or under a different exemption from registration.³¹

b. Exchange Act

Section 3(a)(10) of the Exchange Act defines a "security" to include "any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities [.]" The OTC Options are therefore securities for purposes of the Exchange Act. Section 12(g) of the Exchange Act requires the registration of any class of equity securities if, on the last day of any fiscal year, the class is held of record by at least 2000 persons, or 500 persons who are not accredited investors (as defined in Rule 501 of Regulation D), and the issuer has

³⁰ See discussion below in Section 3 concerning OCC's role as the issuer of OCC-cleared options.

³¹ For example, as we have previously discussed with Commission staff, absent adoption of proposed Rule 241 or similar exemptive relief, OCC intends to rely on Rule 506 under Regulation D for exemption from Securities Act registration.

total assets exceeding \$10,000,000.³² Section 12(g)(5) of the Exchange Act defines a class of securities to “include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges.” While it is not clear that all OTC Options on the same underlying interest would constitute a single “class” of securities for purposes of Section 12(g), we do not think it is necessary to address the issue at this time, and will assume for purposes of our analysis that all OTC Options cleared by OCC on the same underlying security or group or index of securities will constitute a single class for purpose of Section 12(g).

Exchange Act Rule 12h-1(d) exempts issuers from registration under Section 12(g) with respect to “[a]ny standardized option, as that term is defined in Rule 9b-1(a)(4), that is issued by a clearing agency registered under section 17A of the [Exchange] Act and traded on a national securities exchange registered pursuant to section 6(a) of the [Exchange] Act or on a national securities association registered pursuant to section 15A(a) of the [Exchange] Act[.]” As previously noted, cleared OTC Options are not “standardized options” under the current definition. Without the exemption under proposed Exchange Act Rule 12h-1(j), the OTC Options might be required to be registered pursuant to Section 12(g) of the Exchange Act if they were deemed to be held of record by the requisite number of persons.

Because there are currently many fewer than 2000 (or even 500) clearing members of OCC, an amendment to Rule 12h-1 will not be required as a condition to the initiation of clearing of OTC Options because each clearing member that carries positions for the benefit of customers should be deemed to be the “holder of record” for purposes of Section 12(g) under existing authority. Exchange Act Rule 12g5-1(a) provides that, “[f]or the purpose of determining whether an issuer is subject to the provisions of Sections 12(g) . . . of the [Exchange] Act, securities shall be deemed to be ‘held of record’ by each person who is identified as the owner of such securities on records of security holders maintained by or on behalf of the issuer,” subject to certain exceptions not applicable to the OTC Options. In adopting Rule 12g5-1, the Commission determined not to adopt a proposed provision that would have required issuers to look through the brokers, dealers and nominees listed on the books and records of the issuer as the record owners of the securities.³³ The staff has since concurred that securities registered in the name of The Depository Trust Company (“DTC”) or its nominee, Cede & Co., should be deemed to be held of record by the broker-dealer participants in the DTC system rather than the owners of the separate accounts carried with the broker-dealers for whose ultimate benefit such securities are held.³⁴ The rationale underlying the Commission’s views with respect to securities held in “street name” through the DTC system is equally applicable to the manner in which OCC

³² Exchange Act Rule 12g-1 also sets the asset test at \$10,000,000.

³³ Release No. 34-7492, 30 FR 483 (Jan. 14, 1965).

³⁴ See Bay View Securitization Corporation, Bay View Auto Trusts, No Action Letter, January 15, 1998; 1998 SEC No-Act. LEXIS 33.

currently records the ownership of options and the manner in which we will record the ownership of the OTC Options.³⁵

3. Basis for Exemptions: Proposed Rule 241 and 12h-1(j)

Securities Act Exemption. The Commission has long observed the incongruity of applying the registration requirements of the Securities Act to OCC-cleared options. In 2002, the Commission, proposing the registration exemptions under Rule 238 now in force for standardized options, commented that:

Although our 1982 rulemaking streamlined and improved disclosure regarding standardized options, it continued to apply the Securities Act registration provisions to offers and sales of standardized options. This always has been somewhat anomalous because, in its role as an issuer, a registered clearing agency is fundamentally different than a conventional issuer that registers transactions in its securities under the Securities Act. For example, the purchaser of a standardized option does not invest in the clearing agency that registers transactions in standardized options. As a result, information about the registrant's business, its officers and directors, and its financial statements, is less relevant to investors in standardized options. In standardized options transactions, the investment risk is determined by the market performance of the underlying security rather than the performance of the clearing agency registrant.³⁶

In adopting registration exemptions under Rule 239 for security-based swaps in 2012, the Commission reaffirmed that:

[A] clearing agency's role as a CCP and an issuer of security-based swaps, similar to a clearing agency's role with respect to standardized options, is fundamentally different from a conventional issuer that registers transactions in its securities under the Securities Act. For example, the purchaser of a security-based swap does not, except in the most formal sense, make an investment decision regarding the clearing agency. Rather, the security-based swap investment decision is based on the referenced security, loan, narrow-based security index, or issuer. In this circumstance, coupled with the other conditions to the Securities Act exemption,

³⁵ Customer OTC Options positions will be held in omnibus customers' accounts at the clearinghouse level. Due to S&P license requirements, OCC will maintain separate customer identification codes to allow OCC to determine whether transactions are opening or closing transactions and to calculate minimum size requirements for individual customers. OCC will nevertheless treat each clearing member as the record owner of the OTC Options for all other purposes in the same manner as with respect to listed options and each customer will remain anonymous to OCC. Accordingly, we do not believe that the existence of a customer code for such limited purposes should affect the conclusion that the clearing member is the record holder of the OTC Options.

³⁶ Securities Act Release No. 33-8114 (July 25, 2002) at 68 FR 189. The Commission further noted that Exchange Act registration and reporting for standardized options was "burdensome" and noted that these requirements did not produce significant useful information for investors.

we do not believe that Securities Act registration of the offer and sale of security-based swaps by a clearing agency in its function as a CCP to eligible contract participants is necessary.³⁷

The Commission's reasoning with respect to standardized options and cleared security-based swaps is equally applicable to the OTC Options. The limited ability to customize a small sub-set of terms of OTC Options and the absence of exchange trading of the OTC Options are irrelevant to these considerations. OCC believes that the substantial similarities between OTC Options and exchange-listed, standardized options exempted under Rule 238 as well as precedent established by the cleared security-based swaps exemption under Rule 239 strongly support the adoption of proposed Rule 241 to exempt cleared OTC Options.

Exchange-traded FLEX Options with customizable terms similar to those proposed for cleared OTC Options are already included within the exemption provided to standardized options under Rule 238. Only the absence of exchange trading distinguishes OTC Options from standardized FLEX options on the same and similar indices that are currently cleared by OCC, and the Commission has adopted the same exemption under Rule 239 for cleared security-based swaps, including eligible CDS previously exempted under Rule 239T, which are not exchange-traded. Because of the substantial similarities to these precedents, cleared OTC Options should be afforded the same treatment.

The exemption under proposed Rule 241 would be consistent with the treatment of cleared security-based swaps under Rule 239. The Commission has exempted from the Securities Act (other than Section 17(a)) (and from registration under Sections 12(b) and 12(g) of the Exchange Act) security-based swaps that (1) are issued or to be issued by a registered or exempt clearing agency, and (2) the Commission has determined must be cleared or that are permitted to be cleared by the rules of the relevant clearing agency.³⁸ These exemptions require that the security-based swap be offered or sold in a transaction involving the clearing agency in its function as a central counterparty with respect to the security-based swap and that the security-based swap be sold to an ECP.³⁹ The clearing agency clearing the security-based swap must also provide certain information on its public web site.⁴⁰ The Commission has stated its

³⁷ See SB Swap Exemption Release, at 77 FR 20540.

³⁸ See SB Swap Exemption Release.

³⁹ See Rule 239(b), SB Swap Exemption Release.

⁴⁰ Rule 239(b)(3) imposes the following condition for exemption:

“(3) The eligible clearing agency posts on its publicly available Web site at a specified Internet address or includes in its agreement covering the security-based swap that the eligible clearing agency provides or makes available to its counterparty the following: (i) A statement identifying any security, issuer, loan, or narrow-based security index underlying the security-based swap; (ii) A statement indicating the security or loan to be delivered (or class of securities or loans), or if cash settled, the security, loan, or narrow-based security index (or class of securities or loans) whose value is to be used to determine the amount of the settlement obligation under the security-based swap; and (iii) A statement of whether the issuer of any security or loan, each issuer of a security in a narrow-based security index, or each referenced issuer underlying the security-based

belief that “the increased use of central clearing for security-based swaps should help to promote robust risk management, foster greater efficiencies, improve investor protection, and promote transparency in the market for security-based swaps.”⁴¹ In the SB Swap Exemption Release, the Commission further stated, in relevant part, that, “[t]he provisions of Title VII [of the Dodd-Frank Act] do not contain an exemption from Securities Act or Exchange Act registration . . . for security-based swaps. However, we believe that compliance by the clearing agency with the registration and qualification provisions of [the Securities Act and Exchange Act] likely will be impracticable and frustrate the purposes of Title VII.”⁴² Although the OTC Options are not “security-based swaps” for purposes of Dodd-Frank, we believe that the benefits of central clearing in reducing systemic and counterparty risk as well as the Commission’s rationale for proposing to exempt security-based swaps from Securities Act and Exchange Act registration apply with equal force to the OTC Options.⁴³

By adopting Rule 241 in the manner proposed, the applicability of the Securities Act to cleared OTC options would be preserved to the same extent as in the case of standardized options and cleared security-based swaps, including cleared CDS. The antifraud provisions of Section 17(a)⁴⁴ would remain applicable and an anti-evasion provision substantially similar to Rule 238(c) with respect to issuers of securities underlying standardized options would be made applicable to cleared OTC Options as well through proposed Rule 241(e).⁴⁵ (Of course, these

swap is subject to the reporting requirements of Sections 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m and 78o) and, if not subject to such reporting requirements, whether public information, including financial information, about any such issuer is available and where the information is available.”

SB Swap Exemption Release at 77 FR 20549.

⁴¹ Release No. 33-9222, Exemptions for Security-Based Swaps Issued by Certain Clearing Agencies (June 9, 2011) at 76 FR 34921 (Proposing Release).

⁴² SB Swap Exemption Release at 77 FR 20538.

⁴³ The SB Swap Exemption Release also exempts security-based swaps from the Trust Indenture Act of 1939 (the “Trust Indenture Act”) because, absent such an exemption, the Trust Indenture Act “requires qualification of an indenture for security-based swaps considered to be debt.” As listed options cleared by OCC have not been considered to be debt securities and no exemption from the Trust Indenture Act has been deemed necessary with respect to such options, we do not believe that there is any need for such an exemption for cleared OTC Options.

⁴⁴ We have proposed that the exemption in Rule 241 would not apply to the provisions of Section 17(a) of the Securities Act. We note that Rule 238(b) provides that the exemption does not apply to any part of Section 17. However, Rule 238 is in this respect inconsistent with the Rules 240 and 239, which preserve the applicability only of Section 17(a) and not the remainder of Section 17. We believe that the approach followed in the later-adopted rules is more technically appropriate, and we therefore respectfully request that the Commission adopt Rule 241 as proposed in order to conform Rule 241 to the later adopted rules.

⁴⁵ Paragraph (c) of Rule 238 provides: “Any offer or sale of a standardized option by or on behalf of the issuer of the securities underlying the standardized option, an affiliate of the issuer, or an underwriter, will constitute a contract for sale of, sale of, offer for sale, or offer to sell the underlying securities as defined in section 2(a)(3) of the Act.” A similar anti-evasion provision relating to security-based swaps is contained in the definition of “sale” or “sell” in Section 2(a)(3) of the Securities Act, as amended by Dodd-Frank: “Any offer or sale of a security-based swap by or on behalf of the issuer of the securities upon which such security-based swap is based or is referenced,

provisions are inapplicable to index options because the underlying interest is an index of securities rather than a security.) Security futures are similarly exempt from most provisions of the Securities Act by statute,⁴⁶ and Rule 239 exempts cleared security-based swaps from most provisions of the Securities Act.⁴⁷ As with Rule 239, proposed Rule 241(b)(2) would limit the exemption for OTC Options to transactions with ECPs. Accordingly, our request for exemption is fully consistent with the regulatory scheme that the Commission and the Congress have made applicable to other derivative securities that are issued and cleared by clearing agencies.

We also note that existing bilateral OTC options are ordinarily offered and sold pursuant to the private offering exemption of Securities Act Section 4(a)(2) and, in certain cases, through reliance on the Regulation D “safe harbor” exemption. We believe that reliance on Section 4(a)(2) and Regulation D with respect to cleared OTC options is less appropriate than adopting Rule 241 in the manner proposed, particularly as long as the prohibition against general solicitation and advertising remains with respect to Rule 506. As you are aware, Congress, in enacting the Jumpstart Our Business Startups Act (the “JOBS Act”),⁴⁸ instructed the Commission to eliminate the prohibition against general solicitation and advertising in connection with offers and sales of securities conducted pursuant to Rule 506. Although the Commission has proposed implementing regulations,⁴⁹ as of the date of this Revised Petition the Commission has not yet enacted those regulations. Although OCC’s rules contemplate that OCC will rely on Rule 506 with respect to the OTC Options,⁵⁰ and OCC intends to so rely if the relief requested herein is not granted or is delayed beyond the anticipated launch date for the OTC Options, OCC believes that Rule 506 – with or without a prohibition against general solicitation and advertising – is not the most appropriate exemption for OTC Options. As long as the prohibition against general solicitation and advertising remains in place, OCC will not be able to freely communicate useful information regarding its clearing services to the public and OTC options market participants. We also note that the Commission’s proposed rules implementing

an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for sale, or offer to sell such securities.”

⁴⁶ Section 3(a) of the Securities Act provides: “Except as hereinafter expressly provided, the provisions of [the Securities Act] shall not apply to any of the following classes of securities: . . . (14) Any security futures product that is—(A) cleared by a clearing agency registered under section 17A of the . . . Exchange Act . . . or exempt from registration under subsection (b)(7) of such section 17A; and (B) traded on a national securities exchange or a national securities association registered pursuant to section 15A(a) of the . . . Exchange Act”

⁴⁷ See Securities Act Rule 239, 17 CFR § 230.239.

⁴⁸ Public Law 112-106 (April 5, 2012).

⁴⁹ Release No. 33-9354, Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings (Sept. 5, 2012).

⁵⁰ Among other things, OCC’s rules governing OTC Options require counterparties to OTC Options to be both ECPs and accredited investors. OTC Options must be cleared through a clearing member that is registered with the Commission as a broker-dealer or is one of the small number of clearing members that are “non-U.S. securities firms” (as defined in OCC’s By-Laws), and OCC’s rules include a deemed representation from each clearing member that submits a transaction in OTC Options for clearing that any customer for whose account the transaction is effected qualifies as an ECP and accredited investor. OCC also has the authority to require its clearing members to refrain from any general solicitation or general advertising in connection with transactions in OTC Options.

the JOBS Act would require that OCC take “reasonable steps to verify” that all purchasers of OTC Options are accredited investors.⁵¹ As described in greater detail in a comment letter submitted by OCC on the Commission’s JOBS Act proposal,⁵² which is attached as Appendix C, we believe the lack of clarity surrounding what steps would be considered “reasonable” in verifying the status of purchasers as accredited investors may undermine the usefulness of Rule 506. Clearing agencies that clear OTC transactions in security-based swaps do not need to rely on Section 4(a)(2) and Regulation D. It would be entirely anomalous for OCC to be required to continue to rely on these provisions with respect to cleared OTC Options.

Inapplicability of Rule 9b-1. While we believe that it would be possible for the Commission to designate OTC Options as “standardized options” under Exchange Act Rule 9b-1,⁵³ our current view is that such a designation is neither necessary nor appropriate. The principal purpose of Rule 9b-1 is to create a disclosure regime appropriate to options that are widely available for trading by the investing public. Cleared OTC Options are intended to provide a clearing solution for the existing OTC equity options market, which is limited to highly sophisticated investors. Rule 9b-1 provides for an options disclosure document (“ODD”) for which the exchanges on which standardized options are listed and traded have ultimate responsibility, and there are no such exchanges involved in the trading of OTC Options. Rule 9b-1 would thus require substantial revision to make it applicable to OTC Options. Given the absence of retail participation in this market, we believe that the ODD framework is unnecessary and inappropriate.

For all of the foregoing reasons, we believe that OTC Options should be exempted from the Securities Act to the extent requested without being designated as “standardized options” subject to an ODD requirement. In accordance with Commission Rule 192(a), we have prepared suggested text for the proposed Rule 241 as set forth in Appendix A. In order to maintain consistency regarding exemptions for derivative securities that are issued and cleared by clearing agencies, proposed Rule 241 is substantially similar to Rule 239, with certain modifications related to the characteristics of OTC options. For example, an anti-evasion provision substantially similar to Rule 238(c) with respect to issuers of securities underlying standardized options would be made applicable to cleared OTC Options. Consistent with the definition of

⁵¹ *Id.* at 77 FR 54467.

⁵² See Letter from James E. Brown, Executive Vice President and General Counsel of OCC, to Elizabeth M. Murphy, Secretary Securities and Exchange Commission (October 4, 2012).

⁵³ When FLEX Options were proposed in the early 1990s, the Commission considered whether they were sufficiently uniform in their terms to be exempted from registration under the Securities Act and the Exchange Act as “standardized options” and concluded that they were. In its order under the Rule, the Commission stated, “Apart from the flexibility with respect to strike prices, settlement, expiration dates, and exercise style, all of the other terms of the Flex Options are standardized pursuant to OCC and [CBOE] rules. Standardized terms include matters such as exercise procedures, contract adjustments, time of issuance, effect of closing transactions, restriction on exercise under OCC rules, margin requirements, and other matters pertaining to the rights and obligations of holders and writers. In addition, Flex Options are similar to existing exchange-traded options based on the S&P 100 and 500 stock indexes because Flex Options are limited to these well-known underlying broad-based stock indexes.” Release No. 34-31920 (February 23, 1993).

“accredited investor” in Rule 501(a) of Regulation D, we propose that it be sufficient for the clearing agency to have a reasonable belief that the purchasers of OTC options are ECPs. Consistent with our comment letter on the Commission’s JOBS Act proposal, we have included as a safe harbor that a clearing agency may rely on a registered broker-dealer to identify eligible OTC options participants. This is particularly appropriate in the case of the OTC options because they must be cleared through a clearing member of OCC that is registered with the Commission as a broker-dealer or one of the small number of clearing members that are “non-U.S. securities firms,” as defined in OCC’s By-Laws.

Exemption from Exchange Act Section 12(g). Exchange Act Rule 12h-1(d) exempts standardized options from registration under the Exchange Act. We believe that registration of cleared OTC options pursuant to Exchange Act Section 12(g) and the related reporting requirements applicable to securities registered under that Section would be inappropriate for essentially the same reasons that Securities Act registration and disclosure are inappropriate. No purpose would be served by such registration, no such registration is required with respect to standardized options, security futures or cleared security-based swaps.⁵⁴ Therefore no such registration should be required for cleared OTC Options. Even though the number of holders of record of cleared OTC Options would not exceed the registration threshold under Section 12(g), we believe that, for the sake of consistency, the avoidance of doubt, and in anticipation of any future change in the relevant facts that support this conclusion, Rule 12h-1 should be amended to apply to cleared OTC Options.⁵⁵ In accordance with Commission Rule 192(a), we have prepared suggested text for the proposed amendments as set forth in Appendix B.⁵⁶

⁵⁴ In the SB Swap Exemption Release, the Commission makes the following statement:

“[W]e believe that requiring clearing agencies to register security-based swaps under the Exchange Act would not provide additional useful information or meaningful protection to investors with respect to the security-based swap. In addition, the other consequences of Exchange Act registration, such as requirements for ongoing periodic reporting and application of the proxy rules to the clearing agency, would not be meaningful in the context of security-based swaps. At the same time, requiring such registration likely would impose burdens on clearing agencies issuing security-based swaps. At the same time, requiring such registration likely would impose burdens on clearing agencies issuing security-based swaps. Therefore . . . we believe that exempting the . . . clearing agency from the requirements of the Exchange Act arising from Section 12(a) or 12(g) is necessary or appropriate in the public interest and not inconsistent with the public interest or the protection of investors.”

SB Swap Exemption Release at 77 FR 20544. Although the SB Swap Exemption Release also adopts (at 77 FR 20543) Rule 12a-10 to exempt cleared security-based swaps from Section 12(a) of Exchange Act, we do not believe that such relief is necessary for cleared OTC Options because they are not proposed to be traded on any national securities exchange and therefore would not be subject to registration under Section 12(a) in any event.

⁵⁵ Alternatively, the Commission could provide the requested exemption by adding an additional paragraph to Rule 12h-1 as was done for security-based swaps. See SB Swap Exemption Release, 77 FR 20543.

⁵⁶ We are not requesting exemption from Sections 5 and 6 of the Exchange Act in connection with our clearance of the OTC Options. Certain clearinghouses for CDS have requested, and received, such exemptive relief in order to allow them to utilize a “forced trade” mechanism in which their clearing members are at times required to execute CDS trades at their quoted prices. As the Commission has pointed out, such mechanism involves the bringing together of buyers and sellers of CDS and absent an exemption such activity would cause the relevant

4. Request for Temporary Exemption

In addition to the rulemaking requested here, we are also requesting that the Commission or Commission staff issue temporary exemptions pursuant to Section 28 of the Securities Act and Section 36 of the Exchange Act, granting temporary relief substantially similar to the corresponding relief provided with respect to eligible CDSs under the Temporary CDS Rules. This relief could be put in place for a period long enough to allow the Commission to engage in the rulemaking described herein.

5. Comparison of Regulatory Schemes for Cleared OTC Options, Uncleared OTC Options, Standardized Options and Security-Based Swaps

The following comparison was included in the Original Petition at the request of the Commission staff and has been updated in this petition to reflect intervening regulatory developments.

Uncleared OTC Options. As discussed above, existing OTC options on equity securities and indexes of such securities are “securities” for purposes of the federal securities laws, and are offered and sold in reliance on transactional exemptions from registration under the Securities Act, such as Section 4(a)(2) and Regulation D. To comply with available exemptions, the sale of such OTC options is ordinarily restricted to persons who are both accredited investors (as defined in Section 2(a)(15) of the Securities Act) and ECPs. Such options are generally sold by registered broker-dealers unless an exclusion from the definition of “broker” or “dealer” is applicable or an exemption applies.⁵⁷ There is no prescribed disclosure regime applicable to these products under the federal securities laws other than the information requirements under Rule 502 of Regulation D if the seller seeks to rely on the Regulation D safe harbor and the purchaser is not an accredited investor. Uncleared OTC options are bilateral agreements between the parties, and such agreements are generally not carried in accounts of customers at a registered broker-dealer.

Standardized Options. In contrast to uncleared OTC options, “standardized options” are listed on national securities exchanges and cleared by OCC. They are exempt from the provisions of the Securities Act, other than Section 17, pursuant to Rule 238, and from registration under Section 12 of the Exchange Act pursuant to Rules 12a-9 and 12h-1(d).⁵⁸

clearinghouses to meet the definition of an “exchange” under the Exchange Act, triggering the applicability of Sections 5 and 6 of the Exchange Act. Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With the Pending Revision of the Definition of “Security” To Encompass Security-Based Swaps, and Request for Comment, 76 FR 39927 at 39935. As OCC does not intend to utilize any such “forced trade” mechanism, we do not believe exemption from Sections 5 and 6 to be necessary.

⁵⁷ See Exchange Act §§ 3(a)(4), (5), and Section 206 of the Gramm-Leach-Bliley Act (Public Law 106-102; 15 USC § 78C) pursuant to which, among other things, banks are permitted to engage in certain activities with respect to “identified bank products” without broker-dealer registration.

⁵⁸ Note that we are not requesting exemption of the OTC Options from Section 12(a) of the Exchange Act in a manner similar to the exemption of standardized options under Rule 12a-9, because the OTC Options will not be traded on any exchange and therefore will not be required to be registered pursuant to Section 12(a).

Standardized options are subject to Rule 9b-1, which prescribes the content of the ODD and requires delivery of the ODD to options customers. Standardized options are securities carried in accounts of OCC clearing members on OCC's books and in securities accounts on the books of OCC clearing members and other broker-dealers for their public customers. Customers need not meet accredited investor or ECP standards to trade standardized options, which are available for trading by retail customers. We believe it would be anomalous for the Commission to require registration of the OTC Options (the purchase of which is restricted under OCC's rules to parties that are both ECPs and accredited investors) under the Securities Act and Exchange Act, while no such registration is required with respect to standardized options (which are a retail product).

Security-Based Swaps. Section 15F of the Exchange Act, as amended by Dodd-Frank, created a new regime for registration and regulation of "security-based swap dealers" and "major security-based swap participants." This regime would not apply to dealers in and purchasers of cleared OTC Options. Cleared security-based swaps are exempt from the provisions of the Securities Act, other than Section 17(a), pursuant to Rule 239, and from registration under Section 12 of the Exchange Act pursuant to Rules 12a-10 and 12h-1(h).⁵⁹ In addition, the Commission has adopted Rule 240, which exempts from the Securities Act, other than Section 17(a), any security-based swap that is a security-based swap agreement as defined in Section 2A of the Securities Act as in effect prior to July 16, 2011 and entered into between ECPs, and adopted Rules 12a-11 and 12h-1(i), which exempts such security-based swap agreements from registration under Section 12 of the Exchange Act.⁶⁰

Cleared OTC Options. As described above, OCC's proposed regulatory scheme for OTC Options would draw elements from each of the above-described regimes as follows: As in the case of uncleared OTC options, there would be no prescribed disclosure regime applicable to cleared OTC Options. However, the requested exemptions from Securities Act and Exchange Act registration provisions would eliminate the need for reliance on private offering exemptions just as is the case under existing rules for standardized options and cleared security-based swaps, including cleared CDS. As is the case for cleared security-based swaps and consistent with market practice for uncleared OTC options, purchases and sales of cleared OTC Options would be restricted to ECPs. Rule 9b-1 by its terms is inapplicable to OTC Options, and there would therefore be no ODD. As in the case of standardized options, cleared security-based swaps and security-based swap agreements (as defined in Section 2A of the Securities Act as in effect prior to July 16, 2011), cleared OTC Options would be exempted from all provisions of the Securities Act other than anti-fraud provisions in Section 17 pursuant to proposed Rule 241 and from

⁵⁹ See SB Swap Exemption Release.

⁶⁰ Release No. 33-9231, Exemptions for Security-Based Swaps (July 1, 2011) (adopting interim final Rule 240 under the Securities Act and interim final Rules 12a-11 and 12h-1(i) under the Exchange Act in part to provide additional time for the Commission to consider the implications of requiring compliance with the registration provisions of the Securities Act and Exchange Act without disrupting the operation of the security-based swaps market); Release No. 33-9383, Extension of Exemptions for Security-Based Swaps (February 4, 2013) (extending the expiration dates of the interim final rules until February 11, 2014). See also Cleary Gottlieb Steen & Hamilton LLC, SEC No-Action Letter (July 15, 2011) (granting no-action relief with respect to security-based swaps based on or referencing only loans or indexes only of loans).

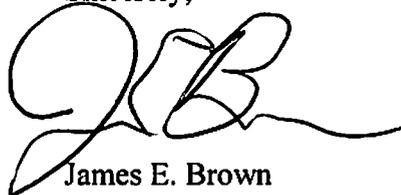
registration under Section 12 of the Exchange Act pursuant to proposed Rule 12h-1(j).⁶¹ As in the case of standardized options, positions in cleared OTC Options would be carried in securities accounts of registered broker-dealers, except for positions held through non-U.S. clearing members. Accordingly, as in the case of standardized options, the Commission's Rules 8c-1, 15c2-1 and 15c3-3 would apply. When carried in accounts of FINRA members, cleared OTC Options would be subject to FINRA rules.

6. Conclusion

OCC believes that the proposed rule changes and exemptive relief described herein will provide substantial benefits to participants in the markets for OTC Options in a manner that will be appropriate in the public interest and consistent with the protection of investors. We urge the Commission to adopt the rule changes and to issue the requested exemptive relief as soon as reasonably possible. If you have any questions or comments or require further information regarding the contents of this letter, please do not hesitate to contact me at (312) 322-6855 or jbrown@theocc.com, or James R. McDaniel, a partner with Sidley Austin LLP, our outside counsel, at (312) 853-2665 or jmcdaniel@sidley.com.

Thank you for your attention to this matter.

Sincerely,



James E. Brown

⁶¹ No relief from Section 12(a) of the Securities act is necessary for cleared OTC Options because they will not be traded on any national securities exchange. Therefore we have not proposed an analogous rule to Rules 12a-9, 12a-10 and 12a-11.

Elizabeth M. Murphy

March 12, 2013

Page 18

cc: Elisse B. Walter, Chairman, SEC
Luis A. Aguilar, Commissioner, SEC
Troy A. Paredes, Commissioner, SEC
Daniel M. Gallagher, Commissioner, SEC
John Ramsay, SEC
Lona Nallengara, SEC
Brian A. Bussey, SEC
Thomas Kim, SEC
Amy Starr, SEC
Andrew Schoeffler, SEC
Heather Seidel, SEC
Peter Curley, SEC
Joseph Kamnik, SEC
Wayne P. Luthringshausen, OCC
Michael McClain, OCC
James R. McDaniel, Sidley Austin LLP

APPENDIX A
Proposed Rule 241

Rule 241 – Exemption for Over-the-Counter Options Issued by Clearing Agencies

(a) Provided that the conditions of paragraph (b) of this section are satisfied and except as expressly provided in paragraph (c) of this section, the Act does not apply to any offer or sale of an option that:

(1) Is issued or will be issued by a clearing agency that is either registered as a clearing agency under Section 17A of the Securities Exchange Act of 1934 or exempt from registration under Section 17A of the Securities Exchange Act of 1934 pursuant to a rule, regulation, or order of the Commission (“eligible clearing agency”);

(2) The Commission has determined is permitted to be cleared pursuant to the eligible clearing agency’s rules; and

(3) Is not traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 or on a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 (an “over-the-counter option”).

(b) The exemption provided in paragraph (a) of this section applies only to an offer or sale of an over-the-counter option described in paragraph (a) of this section if the following conditions are satisfied:

(1) The over-the-counter option is offered or sold in a transaction involving the eligible clearing agency in its function as a central counterparty with respect to such over-the-counter option;

(2) The over-the-counter option is sold only to a person that is, or the eligible clearing agency reasonably believes to be, an eligible contract participant (as defined in Section 1a(18) of the Commodity Exchange Act); and

(3) The eligible clearing agency posts on its publicly available Web site at a specified Internet address or includes in its agreement covering the over-the-counter option that the eligible clearing agency provides or makes available to its counterparty the following:

(i) A statement identifying any security, issuer, or security index underlying the over-the-counter option;

(ii) A statement indicating the security to be delivered (or class of securities), or if cash settled, the security or security index (or class of securities) whose value is to be used to determine the amount of the settlement obligation under the over-the-counter option; and

(iii) A statement of whether the issuer of any security, each issuer of a security in a security index, or each referenced issuer underlying the over-the-counter option is subject to the reporting requirements of Sections 13 or 15(d) of the Securities Exchange Act of 1934 and, if not subject to such reporting requirements, whether public information,

including financial information, about any such issuer is available and where the information is available.

(c) For purposes of paragraph (b)(2) of this section, an eligible clearing agency may rely upon a broker-dealer registered with the Commission pursuant to Section 15 of the Securities Exchange Act of 1934 to determine that persons to whom such over-the-counter options are sold are eligible contract participants.

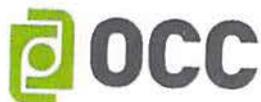
(d) The exemption provided in paragraph (a) of this section does not apply to the provisions of Section 17(a) of the Act.

(e) Any offer or sale of an over-the-counter option by or on behalf of the issuer of the securities underlying the over-the-counter option, an affiliate of the issuer, or an underwriter, will constitute a contract for sale of, sale of, offer for sale, or offer to sell the underlying securities as defined in section 2(a)(3) of the Act.

APPENDIX B
Proposed Amendment to Exchange Act Rule 12h-1

Rule 12h-1 – Exemptions from Registration under Section 12(g) of the Act

(j) Any option that is issued by a clearing agency registered as a clearing agency under Section 17A of the Act or exempt from registration under Section 17A of the Act pursuant to a rule, regulation, or order of the Commission in its function as a central counterparty that the Commission has determined is permitted to be cleared pursuant to the clearing agency's rules, and that was offered and sold in reliance on Rule 241 under the Securities Act of 1933.



James E. Brown
Executive Vice President
General Counsel and Secretary

October 4, 2012

Via Electronic Mail

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File Number S7-07-12: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings

Dear Ms. Murphy:

The Options Clearing Corporation (“OCC”) appreciates the opportunity to comment on the Commission’s recent release (the “Release”)¹ proposing new Rule 506(c). Founded in 1973, OCC is currently the world’s largest equity derivatives clearing organization. OCC clears securities options, security futures and other securities contracts subject to the Commission’s jurisdiction, and commodity futures and commodity options subject to the jurisdiction of the Commodity Futures Trading Commission. OCC clears derivatives for all nine U.S. securities options exchanges and five U.S. futures exchanges and is the clearing agency for all standardized options listed on national securities exchanges in the United States.

Since the Commission first permitted trading of standardized options in 1973, OCC has been deemed to be the issuer of the options it clears for purposes of both the Securities Act of 1933 (the “Securities Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”). Until 2003, when Securities Act Rule 238 and Exchange Act Rule 12a-9 became effective, OCC was required to register the options it cleared under both statutes.

OCC currently proposes to clear over-the-counter options on the S&P 500 index (“OTC Options”).² OCC’s clearing of OTC Options would further a central objective of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act by facilitating the central clearing of such options. Central clearing reduces the counterparty risk in uncleared OTC Options and may decrease risk to end-users and systemic risk. Because Securities Act Rule 238 and

¹ Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Release No. 33-6354, 77 Fed. Reg. 54464 (September 5, 2012).

² See SR-OCC-2012-14, published for comment in Commission Rel. No. 34-67834, 77 Fed. Reg. 57602 (September 18, 2012). OCC’s proposal was originally submitted in SR-OCC-2011-19, published in Commission Rel. No. 34-66090 (January 3, 2012), 77 FR 1107 (January 9, 2012).

Elizabeth M. Murphy
October 4, 2012

Act³ that would exempt OTC Options from the registration and prospectus delivery requirements of the Securities Act and Exchange Act. We continue to believe that the amendments we proposed in the foregoing petition should be put in place in order to ensure consistent regulatory treatment of OTC Options and other cleared derivatives.

Pending any Commission action on the proposed amendments (or other exemptive action to accomplish the same purpose), OCC has considered relying on Securities Act Rule 506 with respect to the OTC Options. On August 30, 2012, OCC filed amended rules (the “OTC Options Rules”)⁴ with respect to OTC Options. Among other things, the OTC Options Rules would require counterparties to OTC Options to be both “eligible contract participants” as defined in Section 3(a)(65) of the Exchange Act (“ECPs”) and accredited investors as defined in Rule 501(a) of Regulation D. The OTC Option Rules also include a deemed representation from each clearing member that submits a transaction in OTC Options for clearance that any customer for whose account the transaction is effected qualifies as such. In addition, all transactions must be cleared through a clearing member of OCC that is registered with the Commission as a broker-dealer or through one of the small number of clearing members that are “non-U.S. securities firms,” as defined in OCC’s By-Laws.

While OCC has authority in the proposed OTC Options Rules to require its clearing members to refrain from any general solicitation or general advertising in connection with their transactions in OTC Options, imposition of such a restriction would forego the increased efficiencies that were intended to be created by the elimination of that prohibition in the case of transactions that are limited to accredited investors and may also conflict with the goal of transparency in derivatives markets. Notwithstanding our reluctance to prohibit general solicitation, the imposition of the “reasonable steps” requirement as a condition to the exemption coupled with the absence of a safe harbor means of compliance with that requirement could create uncertainty for OCC. Some issuers such as private investment vehicles may be very familiar with the circumstances of their investors. By contrast, industrial or commercial companies generally have no direct relationship with the purchasers of the securities issued by them. Rather, such issuers rely—and have relied for many decades—on intermediary broker-dealers to identify prospective investors as accredited investors. Like these issuers, OCC would have no relationship with the counterparties to OTC Options who are not OCC clearing members. OCC would therefore necessarily have to rely on its clearing members to comply with their contractual agreements to identify counterparties as ECPs and accredited investors.

³ See Petition for Rulemaking and Request for Exemption from Provisions of the Securities Act of 1933 and Securities Exchange Act of 1934 for Cleared OTC Options, Commission File No. 4-644 (January 13, 2012).

⁴ See *supra*, note 2.

Elizabeth M. Murphy
October 4, 2012

We note the statement in the Release that a registered broker-dealer is “a reasonably reliable third party” for the purpose of identifying accredited investors for the reason that “registered broker-dealers are subject to existing regulatory schemes, including Commission oversight.” We believe that an issuer’s reliance on a registered broker-dealer to identify accredited investors—particularly where the broker-dealer is subject to heightened SRO suitability standards for the product in question as is the case with respect to options issued by OCC—should automatically constitute “reasonable steps” for purposes of Rule 506(c) and that the Commission should so provide in the final rule or in the adopting release.

We understand and support the Commission’s desire not to impose “onerous and prescriptive” conditions on the new Rule 506(c). However, making “reasonable steps” a condition of the exemption without providing safe harbor guidance on what constitutes “reasonable steps” may undermine the usefulness of the exemption. We believe that permitting—not requiring—an issuer to rely conclusively (absent any reason to know that the broker-dealer is not complying with its undertakings) on a registered broker-dealer under the circumstances described is not overly prescriptive. We also note that many other Commission rules – not least the provision in Rule 502(d) regarding anti-underwriter precautions—specify conditions for safe harbor exemptions from the requirements of Section 5 of the Securities Act without providing that these safe harbors are the exclusive means of qualifying for an exemption.

OCC operates as an industry utility, refunding to its clearing members the amount by which clearing fees collected each year exceed OCC’s operating costs and increased capital needs. In fiscal year 2011, OCC’s costs averaged only 1.5 cents per cleared contract after refunds. Such a cost structure, which benefits both clearing members and their customers, could not be maintained if OCC were required to second-guess the certifications of its clearing members or to review the underlying documentation that such clearing members produce in the ordinary course of business to “know their customers” under SRO rules and to comply with SRO heightened suitability standards for options transactions. For example, FINRA Rule 2360(b)(16) contains detailed standards for diligence in approving a customer’s account for options trading and requiring supervision by specially qualified personnel. Members are required to ascertain the essential facts relative to the customer including financial situation and investment objectives. Special provisions relate to obtaining and verifying information relating to customers who are natural persons. It would be duplicative and cost prohibitive for OCC to involve itself in this verification endeavor, with little likelihood of being able to improve upon the scrutiny already required to be provided by clearing members under the regulatory regimes to which they are subject. Such an endeavor is outside the traditional scope of responsibilities of a registered clearing agency.

We also note that the mandate in Section 201(a) of the JOBS Act for an issuer to take “reasonable steps” is accompanied by a mandate to “us[e] such methods as determined by the Commission.” We believe this language can be understood to require the Commission to specify at least some steps that are automatically reasonable for this purpose. The specification need not (and should not) be exclusive, but we believe that Section 201(a) implies that there should be some specification. We believe that a true “safe” harbor is particularly important in the context of a cleared product, such as the OTC Options, as any lack of certainty surrounding whether the

Elizabeth M. Murphy
October 4, 2012

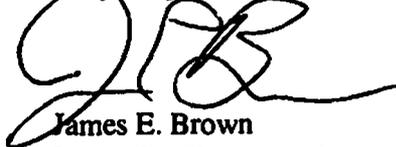
securities in question have been properly offered and sold does not merely affect the issuer and the offerees and purchasers of the securities, but could also affect other purchasers of products cleared through the relevant clearing agency, as well as financial intermediaries that have relationships with the clearing agencies, and the broader financial markets.

OCC further believes that the requirement to take “reasonable steps” regarding the accredited investor status of counterparties should not be a condition of the Rule 506(c) exemption but a free-standing obligation that the Commission should enforce by periodic inquiry. There is no reason to believe from the text of Section 201(a) of the JOBS Act that the mandate for issuers to take “reasonable steps” was intended to be a condition to the availability of the exemption. If Congress had so intended, it could have written Section 201(a) accordingly.

A safe harbor that is subject to a “reasonableness” condition is no safe harbor. As Chairman Schapiro noted in recent correspondence with Chairman Issa of the House Committee on Oversight and Government Reform, the Commission’s Rule 175 is seldom used because of its requirement that the issuer have a reasonable basis for a forward-looking statement.

To the extent that the Commission believes that Section 201(a) is at all ambiguous on whether the “reasonable belief” requirement should be a condition of the exemption, we note that the Commission retains its exemptive authority under Section 28 of the Securities Act to accomplish Congress’ manifest intent in Section 201(a): to expand the Rule 506 safe harbor by eliminating the prohibition on general solicitation and general advertising.

Very truly yours,

A handwritten signature in black ink, appearing to read 'JEB', with a long horizontal flourish extending to the right.

James E. Brown
Executive Vice President
and General Counsel