

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-84836; File No. SR-OCC-2018-013)

December 17, 2018

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change to Extend Term Limits for Member Directors Serving on The Options Clearing Corporation's Board of Directors

I. INTRODUCTION

On October 26, 2018, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change SR-OCC-2018-013 ("Proposed Rule Change") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")¹ and Rule 19b-4 thereunder,² to extend the term limits for Member Directors serving on OCC's Board of Directors ("Board") from two consecutive three-year terms to three consecutive three-year terms. The Proposed Rule Change was published for comment in the Federal Register on November 7, 2018,³ and the Commission has received no comments in response.

II. BACKGROUND⁴

OCC proposes a change to Article III, Section 2 of its By-Laws and to the Board of Directors Charter and Corporate Governance Principles ("Board Charter") that would extend the term limits for Member Directors from two consecutive three-year terms to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Exchange Act Release No. 34-84521 (Nov. 1, 2018), 83 FR 55768 (Nov. 7, 2018) ("Notice").

⁴ All terms with initial capitalization that are not otherwise defined herein have the same meaning as set forth in the OCC By-Laws and Rules. OCC's By-Laws and Rules can be found on OCC's public website: <http://optionsclearing.com/about/publications/bylaws.jsp>.

three consecutive three-year terms. According to OCC, the purpose of the change is to address issues associated with frequent Member Director turnover by providing the potential for longer consecutive service by Member Directors who, among other considerations, may have developed considerable knowledge about OCC's business and the interests of Clearing Members.

Board Composition and Member Director Considerations

OCC's Certificate of Incorporation and By-Laws establish the Board's composition and the procedures for director selection. Pursuant to these documents, when at full capacity, the Board consists of twenty directors: (i) nine directors representing OCC Clearing Members ("Member Directors"); (ii) five directors designated by and representing each of OCC's five Equity Exchanges ("Exchange Directors"); (iii) five directors who are not affiliated with any national securities exchange, national securities association, or with any broker or dealer in securities ("Public Directors"); and (iv) one management director, who serves as the Executive Chairman ("Management Director").⁵

According to OCC, Member Directors serve on the Board to comply with Section 17A(b)(3)(C) of the Exchange Act, which requires, among other things, that the rules of a clearing agency assure fair representation of its participants in the selection of its directors and administration of its affairs.⁶ The term "participant" when used with respect to a clearing agency under the Exchange Act means any person, such as a

⁵ OCC By-Laws, Article III, Sections 1, 2, 6, 6A, and 7 (addressing the number of directors and required qualifications of Member Directors, Exchange Directors, Public Directors, and the Management Director); see also Board Charter at 4 (Size of Board; Composition).

⁶ 15 U.S.C. 78q-1(b)(3)(C).

Clearing Member, who directly uses the clearing agency to clear or settle securities transactions.⁷ Accordingly, OCC's By-Laws set forth the qualifications for Member Directors, providing that a Member Director must be either a Clearing Member or representative (e.g., a director, senior officer, principal, or general partner) of a Clearing Member Organization or an affiliate of such organization.⁸

At its annual meeting of stockholders, OCC's stockholders elect Member Directors from a list of nominees prepared by the Board's Governance and Nominating Committee ("GNC") and approved by the Board.⁹ In furtherance of the Exchange Act's fair representation requirement described above, Article III, Section 5 of OCC's By-Laws requires the GNC in selecting Member Director nominees to "endeavor to achieve balanced representation among Clearing Members on the Board of Directors to assure that (i) not all Member Directors are representatives of the largest Clearing Member Organizations based on the prior year's volume, and (ii) the mix of Member Directors includes representatives of Clearing Member Organizations that are primarily engaged in agency trading on behalf of retail customers or individual investors."¹⁰ All director nominees, including Member Director nominees, must also be considered under the standards for directors in OCC's Fitness Standards for Directors, Clearing Members, and

⁷ See 15 U.S.C. 78c(a)(24) (defining the term "participant" when used with respect to a clearing agency); 15 U.S.C. 78c(a)(9) (defining the term "person").

⁸ OCC By-Laws, Article I, Section 1.R.(6) and Article III, Section 2.

⁹ OCC By-Laws, Article III, Section 5. In advance of the election, OCC shares the list of nominees with Clearing Members who are provided an opportunity to submit additional nominees. Id.

¹⁰ OCC By-Laws, Article III, Section 5.

Others (“Fitness Standards”)¹¹ regarding their skills, experience, expertise, attributes, and professional backgrounds.¹² The Fitness Standards include criteria that apply specifically to Member Directors.¹³ In addition, at least every three years, the GNC is required to review the composition of the Board as a whole for consistency with public interest and regulatory requirements, including whether the Board reflects the appropriate balance across the categories of directors such as Member Directors.¹⁴

Member Director Term Limits

Member Directors are the only type of OCC directors currently subject to term limits. Specifically, Member Directors are limited to serving two consecutive three-year terms for a total of six consecutive years of Board service (excluding any time that may

¹¹ The Fitness Standards are available on OCC’s public website: <https://www.theocc.com/about/corporate-information/board-charter.jsp>.

¹² See OCC’s Fitness Standards at 1-2; see also OCC Governance and Nominating Committee Charter (“GNC Charter”) at 3 (providing that the GNC shall identify, screen, and review individuals qualified to be elected or appointed to serve as Member Directors consistent with the Fitness Standards), available on OCC’s public website at <https://www.theocc.com/about/corporate-information/board-committee-charters.jsp>; OCC By-Laws Article III, Section 2, Interpretation and Policy .01 (providing that the GNC shall use the Fitness Standards for Directors, Clearing Members, and Others in considering Member Director nominees).

¹³ Additional criteria for Member Directors includes: (i) balanced representation among all Clearing Members; (ii) balanced representation of all business activities of Clearing Members; (iii) nature of the firm with which each prospective director is associated; (iv) industry affiliations; (v) assure that not all Member Directors are representatives of the largest Clearing Member Organizations based on the prior year’s volume; and (vi) develop a mix of Member Directors that includes representatives of Clearing Member Organizations that are primarily engaged in agency trading on behalf of retail customers or individual investors. Fitness Standards at 2.

¹⁴ GNC Charter at 3-4.

be served filling a vacancy).¹⁵ All other directors – Exchange Directors, Public Directors, and the Management Director – are not subject to any term limits.¹⁶

III. DISCUSSION AND COMMISSION FINDINGS

Section 19(b)(2)(C) of the Exchange Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to such organization.¹⁷ After carefully considering the Proposed Rule Change, the Commission finds the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to OCC. More specifically, the Commission finds that the proposal is consistent with Section 17A(b)(3)(C) of the Exchange Act¹⁸ and Rules 17Ad-22(e)(2)(i), (e)(2)(iii), and (e)(2)(iv) thereunder.¹⁹

A. Consistency with Section 17A(b)(3)(C) of the Exchange Act

Section 17A(b)(3)(C) of the Exchange Act²⁰ requires, among other things, that the rules of a clearing agency assure a fair representation of its participants in the selection of

¹⁵ OCC By-Laws, Article III, Section 2(a). For example, a Member Director who is appointed in 2018 to fill a vacancy and then is elected to serve a three-year term beginning in 2020 would currently be eligible to serve out two consecutive three-year terms ending in 2026.

¹⁶ The Commission previously approved the removal of term limits for Public Directors in 2016. Exchange Act Release No. 34-78862 (Sept. 16, 2016), 81 FR 65415, 65427 (Sept. 22, 2016) (SR-OCC-2016-002).

¹⁷ 15 U.S.C. 78s(b)(2)(C).

¹⁸ 15 U.S.C. 78q-1(b)(3)(C).

¹⁹ 17 CFR 240.17Ad-22(e)(i), (iii), and (iv).

²⁰ 15 U.S.C. 78q-1(b)(3)(C).

its directors and administration of its affairs.²¹ The Exchange Act does not define fair representation or set up particular standards of representation. The Commission has stated that, “at a minimum, fair representation requires that the entity responsible for nominating individuals for membership on the board of directors should be obligated by by-law or rule to make nominations with a view toward assuring fair representation of the interests of shareholders and a cross-section of the community of participants.”²² The Commission believes that the Proposed Rule Change is consistent with the fair representation requirement.

First, the Commission agrees that increasing the number of three-year terms that Member Directors may serve from two to three could provide OCC with the ability to retain the experience of Member Directors who, among other considerations, may have developed considerable knowledge about OCC’s business and the interests of Clearing Members and therefore could bring significant value to OCC’s governance process. Moreover, the mechanisms described above in the applicable By-Laws and board committee charters would continue to require the GNC to endeavor to achieve balanced representation among Clearing Members on the Board when nominating Member Directors and in conducting reviews of the Board’s composition.²³ The Commission believes that these mechanisms should be sufficient to continue to promote the fair representation of Clearing Members, while still permitting OCC to potentially retain the services of experienced Member Directors. Further, the Commission notes that the

²¹ See supra note 7.

²² Exchange Act Release No. 34-20221 (Sept. 23, 1983), 48 FR 45167, 45172 (Oct. 3, 1983) (Depository Trust Co., et. al.; Order).

²³ See supra notes 10-13.

Proposed Rule Change would not guarantee the nomination or election of a Member Director to a third consecutive term. For these reasons, the Commission believes that the Proposed Rule Change is consistent with Section 17A(b)(3)(C) of the Exchange Act.²⁴

B. Consistency with Rules 17Ad-22(e)(2)(i), (e)(2)(iii), and (e)(2)(iv) under the Exchange Act

Rules 17Ad-22(e)(2)(i), (e)(2)(iii), and (e)(2)(iv) under the Exchange Act require that a covered clearing agency, such as OCC, establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that, among other things: are clear and transparent; support the public interest requirements in Section 17A of the Exchange Act applicable to clearing agencies, and the objectives of owners and participants; and establish that the board of directors and senior management have appropriate experience and skills to discharge their duties and responsibilities.²⁵ The Commission believes that the Proposed Rule Change is consistent with these provisions of Rule 17Ad-22(e)(2) for the following reasons.

First, the revised term limits for Member Directors would be set forth explicitly in OCC's By-Laws and Board Charter, both of which are available on the OCC website. We believe that, by making these documents publicly available and easily accessible, OCC would be providing clear and transparent governance arrangements consistent with the requirements of Rule 17Ad-22(e)(2)(i).²⁶

Second, for the same reasons we believe the Proposed Rule Change is consistent with the fair representation requirements under Section 17A(b)(3)(C) of the Exchange

²⁴ 15 U.S.C. 78q-1(b)(3)(C)

²⁵ 17 CFR 240.17Ad-22(e)(i), (iii), and (iv).

²⁶ 17 CFR 240.17Ad-22(e)(i).

Act,²⁷ as discussed above in Section III.A, the Commission believes that the Proposed Rule Change is consistent with Rule 17Ad-22(e)(2)(iii)'s²⁸ requirement that OCC establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that support the public interest requirements in Section 17A of the Exchange Act applicable to clearing agencies and the objectives of owners and participants.

Finally, by providing OCC with the potential ability to retain the experience of Member Directors who, among other considerations, may have developed considerable knowledge about OCC's business and the interests of Clearing Members that may be difficult to replace and that could bring significant value to OCC's governance process, we believe that the Proposed Rule Change would promote a Board composition in which OCC's directors have appropriate experience and skills to discharge their duties and responsibilities. Accordingly, the Commission believes that ensuring that OCC has the flexibility to have Member Directors serve a third consecutive three-year term should help to ensure that OCC's Board has the appropriate experience and skills to discharge their responsibilities, consistent with the requirements of Rule 17Ad-22(e)(iv).²⁹

²⁷ 15 U.S.C. 78q-1(b)(3)(C).

²⁸ 17 CFR 240.17Ad-22(e)(iii).

²⁹ 17 CFR 240.17Ad-22(e)(iv).

IV. CONCLUSION

On the basis of the foregoing, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Exchange Act, and in particular, the requirements of Section 17A of the Exchange Act³⁰ and the rules and regulations thereunder.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,³¹ that the Proposed Rule Change (SR-OCC-2018-013) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³²

Eduardo A. Aleman
Deputy Secretary

³⁰ In approving this Proposed Rule Change, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³¹ 15 U.S.C. 78s(b)(2).

³² 17 CFR 200.30-3(a)(12).