

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94988; File No. SR-OCC-2022-002)

May 26, 2022

Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Approval of Proposed Rule Change Concerning The Options Clearing Corporation's Governance Arrangements

I. INTRODUCTION

On February 7, 2022, the Options Clearing Corporation (“OCC”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change SR-OCC-2022-002 (“Proposed Rule Change”) pursuant to Section 19(b) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4² thereunder to amend certain of its governing documents by (1) clarifying that OCC’s Public Directors (defined below) may not be affiliated with any designated contract market (“DCM”) or futures commission merchant (“FCM”); (2) allowing OCC’s board of directors (the “Board”) to delegate certain authorities to Board-level committees³ or officers; (3) amending OCC’s by-laws (the “By-Laws”) with regard to stockholder consent; and (4) applying additional housekeeping amendments to the charter of the Board (“Board Charter”) and Committee Charters (collectively, the “Charters”).⁴ The Proposed

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Committees supporting OCC’s Board include an Audit Committee (the “AC”), a Compensation and Performance Committee (the “CPC”), a Governance and Nominating Committee (the “GNC”), a Risk Committee (the “RC”), and a Technology Committee (the “TC”) (collectively, the “Committees”). The purpose, form, and function of the Committees is governed by each Committee’s respective charter (*i.e.*, the “AC Charter,” the “CPC Charter,” the “GNC Charter,” the “RC Charter,” and the “TC Charter”) (collectively, the “Committee Charters”).

⁴ See Notice of Filing *infra* note 5, 87 Fed. Reg. at 10881.

Rule Change was published for public comment in the Federal Register on February 25, 2022.⁵ The Commission received one comment regarding the Proposed Rule Change.⁶ This order approves the Proposed Rule Change.

II. BACKGROUND⁷

A. Public Director Qualifications

The Proposed Rule Change would amend Sections 6A and 12 of Article III of the By-Laws, the Fitness Standards adopted by the Board thereunder,⁸ and the Board Charter to codify OCC's practice of nominating Public Directors who are, in addition to other qualifications, unaffiliated with DCMs and FCMs. Currently, OCC's By-Laws and Fitness Standards define Public Directors as individuals who are not affiliated with a national securities exchange, national securities association, or a broker or dealer in securities.⁹ OCC notes that these restrictions were intended to broaden the mix of viewpoints and business expertise represented on the Board.¹⁰ Subsequent to implementing these restrictions, OCC added futures market

⁵ Securities Exchange Act Release No. 94283 (Feb. 18, 2022), 87 Fed. Reg. 10881 (Feb. 25, 2022) (File No. SR-OCC-2022-002) ("Notice of Filing").

⁶ The comment on the Proposed Rule Change is available at <https://www.sec.gov/comments/sr-occ-2022-002/srocc2022002.htm>.

⁷ Capitalized terms used but not defined herein have the meanings specified in OCC's Rules and By-Laws, available at <https://www.theocc.com/about/publications/bylaws.jsp>.

⁸ See Fitness Standards for Directors, Clearing Members, and Others, available at https://www.theocc.com/getmedia/40ab0b06-5e8a-441e-97e3-fab85d3cfe0b/fitness_standards.pdf.

⁹ See By-Laws Art. III § 6A & Interpretation and Policy .01.

¹⁰ See Securities Exchange Act No. 30328 (Jan. 31, 1992), 57 Fed. Reg. 4784 (Feb. 7, 1992) (File No. SR-OCC-92-2).

clearing memberships and expanded its services to include clearance of futures and futures options.¹¹ OCC's practice has been and is to nominate Public Directors who are independent from DCMs and FCMs, and it believes it is appropriate to codify this practice in its By-Laws, Fitness Standards, and Board Charter.¹² Similar to the existing restrictions related to national securities exchanges, securities associations, and brokers and dealers, OCC believes that the proposal to exclude DCM- or FCM-affiliated Public Directors would broaden the mix of viewpoints and business expertise represented on the Board.¹³

B. Delegated Authority

OCC proposes to amend the Charters to delegate authority from the Board to the Committees to review and approve certain routine initiatives and policies. In addition, OCC proposes to amend its By-Laws and Committee Charters to delegate authority to authorize certain regulatory filings to a Committee or, in limited cases, an OCC officer.¹⁴ However, as provided under the current Board Charter, in all instances, the Board would retain the obligation to oversee such delegated activity.¹⁵

¹¹ See Exchange Act Release No. 44434 (June 15, 2001), 66 Fed. Reg. 33283 (June 21, 2001) (File No. SR-OCC-2001-05).

¹² See Notice of Filing supra note 5, 87 Fed. Reg. at 10882.

¹³ Id.

¹⁴ Under OCC's By-Laws, the Board may elect one or more officers as it may from time to time determine are required for the effective management and operation of the Corporation. By-Laws Art. IV § 1. In addition, the Chairman, Chief Executive Officer and Chief Operational Officer each may appoint such officers, in addition to those elected by the Board, and such agents as they each shall deem necessary or appropriate to carry out the functions assigned to them. By-Laws Art. IV § 2.

¹⁵ See Board Charter, available at <https://www.theocc.com/about/corporate-information/board-charter> (stating that "[t]he Board may form and delegate authority to committees and may delegate authority to one or more of its members and to one or more

Currently, the Charters delegate to the Committees the review of many routine initiatives or policies, but not usually the approval. Regulatory filings generally require approval by the full Board.¹⁶ OCC believes that its current governance processes have several disadvantages, including mandating that numerous matters that otherwise would not occupy the time and attention of the Board be brought to the full Board for approval.¹⁷ OCC also believes that requiring Board approval makes it more difficult to obtain authorization for regulatory filings between regularly scheduled Board meetings absent a special Board meeting.¹⁸ In practice, the Board routinely delegates authority to Committees to approve initiatives, policy changes, and rule filings on a case-by-case basis when proposed changes are expected to be ready for Board-level review between regular Board meetings, in part because the Board relies on the business expertise of the directors appointed to the Committees to review and approve proposed changes within the scope of each Committee's responsibilities.

The Proposed Rule Change would delegate to the Committees authority for the review and approval of certain initiatives and policies, as well as approval of proposed rule changes for matters within the scope of authority of each Committee. Specifically, OCC proposes to amend the Charters to delegate authority to the Committees to review and approve the following initiatives and policies that currently require Board approval:

designated officers of OCC. However, in all instances, the Board retains the obligation to oversee such delegated activity and to assure itself that delegation and reliance on the work of such delegates is reasonable.”).

¹⁶ The Board has delegated the approval of fee change-related filings to the CPC, and the Board may delegate authority for approving individual filings on a case-by-case basis.

¹⁷ See Notice of Filing supra note 5, 87 Fed. Reg. at 10882.

¹⁸ Id.

Committee	Initiatives and Policies
Audit Committee (“AC”)	evaluation and appointment of an external auditor
Compensation and Performance Committee (“CPC”)	review and approval of the: <ul style="list-style-type: none"> • corporate performance report (formerly the “Corporate Plan”); and • annual budget
Governance and Nominating Committee (“GNC”)	review and approval of the: <ul style="list-style-type: none"> • Director Code of Conduct • Related Party Transaction Policy • Board self-evaluation questionnaire
Risk Committee (“RC”)	review and approval of: <ul style="list-style-type: none"> • risk appetites and risk tolerances • changes to existing models

For matters that are within the scope of the Committee’s responsibilities, each Committee generally would have the authority to amend OCC policies filed with the Commission as rules pursuant to the Exchange Act.¹⁹ The Board would, however, retain sole approval authority for certain policies.²⁰ The Board would also retain the authority to revoke delegated authority and limit or modify the scope of such delegated authority, either in whole or in part, by Board resolution. OCC would also amend Article XI, Section 2 of the By-Laws to allow the Board to

¹⁹ For example, with respect to risk management-related policies, OCC would amend the RC Charter by deleting the provisions requiring the RC to recommend changes to certain risk-related policies to the Board for approval. Instead, the RC would be authorized to approve such regulatory filings. The Board would continue to review OCC’s risk management policies, procedures, and systems annually, but would delegate authority to approve intra-year changes to such policies and procedures to the RC.

²⁰ These include policies for which the Board has determined to retain oversight. For example, the Board would remain the sole authority to approve policies addressing decision-making in crises and emergencies. See Board Charter, available at <https://www.theocc.com/about/corporate-information/board-charter>.

delegate authority to Committees to authorize the filing of proposed amendments to OCC's rules. Board approval would continue to be required for filings related to amendments that require a supermajority vote pursuant to Article XI, Section 2 of the By-Laws.²¹ OCC would amend the Committee Charters to include among each Committee's functions and responsibilities the authorization of regulatory submissions within the scope of the functions and responsibilities delegated to each Committee.²²

OCC also proposes to allow the Board to delegate authority to an OCC officer to make certain regulatory filings. OCC believes that such delegated authority would help OCC to more efficiently revise its rules to improve their clarity and ensure their consistency.²³ Factors the Board would consider in delegating such authority to an officer include, but are not limited to, the responsibilities and expertise of the officer to whom authority would be delegated and any limitations on the scope of the delegated authority, including limitations to the subject matter, materiality of the changes, the regulatory approval process required to implement the amendments, and the manner in which the officer must notify the Board or a Committee about filings approved pursuant to such authority. Such delegation authority and related factors are described in OCC's proposed changes to the Board Charter and Section 2 of Article XI of the

²¹ Amendments requiring a supermajority vote include amendments of the introduction to Chapter X of the Rules (involving Clearing Fund contributions), Rule 1002, Rule 1006, Rule 1009, and Rule 1010. By-Laws Art. XI § 2.

²² The RC Charter currently grants the RC authority to "authorize the filing of regulatory submissions pursuant to" the performance of the responsibilities and functions that the Board shall delegate to the RC from time to time. See RC Charter, available at <https://www.theocc.com/about/corporate-information/board-charter>.

²³ See Notice of Filing supra note 5, 87 Fed. Reg. at 10883.

By-Laws.²⁴ Based on the factors identified above, OCC believes that the Chief Legal Officer and Chief Regulatory Officer have the appropriate responsibility and expertise to identify matters suitable for delegated approval based on the limits imposed with respect to the method of filing the proposed changes under the Exchange Act and the materiality of the proposed changes.²⁵

C. By-Law Article XI

OCC proposes to amend Article XI of the By-Laws to remove the provision that allows OCC to treat an Exchange Director's vote as the consent of the stockholder who elected the Exchange Director for those amendments to the By-Laws that require stockholder consent. According to OCC, the provision codified a long-standing understanding between OCC and the stockholders to consider the affirmative vote of each Exchange Director as the approval of the stockholder.²⁶ To avoid potential conflicts between an Exchange Director's fiduciary duty as a

²⁴ OCC anticipates that if implemented, the Board would delegate authority to the Chief Legal Officer and Chief Regulatory Counsel to authorize regulatory filings that (1) may be filed for immediate effectiveness pursuant to Section 19(b)(3) of the Exchange Act, and (2) proposed rule changes that the Chief Legal Officer or Chief Regulatory Counsel determines in his or her discretion to constitute clarifications, corrections or minor changes, in each case other than filings that would amend OCC's By-Laws, Rules that require a supermajority vote of the Board to amend pursuant to Article XI, Section 2 of the By-Laws, or rule-filed policies for which the Board has retained oversight vis-à-vis the Committees. In addition, OCC anticipates that if implemented, the Board's delegation of authority would be conditioned on the officers notifying the Board of regulatory filings approved by delegated authority at the next regularly scheduled Board meeting. OCC expects to implement procedures to ensure the Board is so notified. See Notice of Filing supra note 5, 87 Fed. Reg. at 10883.

²⁵ Id.

²⁶ See Exchange Act Release No. 43630 (Nov. 28, 2000), 65 Fed. Reg. 75991, 75991 (Dec. 5, 2000) (File No. SR-OCC-00-05) ("Each of OCC's stockholders is a participant exchange of OCC, and each is entitled to elect one 'exchange director' to OCC's board of directors. It has been the practice of OCC and the exchanges to consider the affirmative vote of each exchange director to be the required approval of the stockholder that elected

director of OCC and the Exchange Director’s fiduciary duty to the stockholder, the By-Laws provide that an Exchange Director may disclaim such stockholder consent.²⁷ It is OCC’s current practice to obtain written consent from the stockholders for all matters that require such consent.²⁸ OCC contends that the Proposed Rule Change would eliminate the outdated authority in OCC’s By-Laws to impute an Exchange Director’s vote to constitute stockholder consent and better reflect current practice.²⁹ As a result, OCC’s By-Laws would require written consent from the stockholders for all matters that require such consent.

D. Other Amendments to the Board Charter and Corporate Charters

The Proposed Rule Change would make other amendments to the Charters arising from the annual review of OCC’s governance arrangements. These proposed amendments are intended to increase consistency across OCC’s governance arrangements and to make other conforming changes to improve their clarity and transparency. These changes are described and broadly categorized below.³⁰

that exchange director. OCC is proposing to amend Article XI, Section 1 to provide more explicit authorization for this procedure.”).

²⁷ Id.

²⁸ See Notice of Filing supra note 5, 87 Fed. Reg. at 10884. Such matters would include amendments to Sections 2, 3 and 5 of Article II (By-Laws pertaining to Stockholders, including those addressing Special Meetings, Quorum, and Voting), Article III (By-Laws pertaining to the Board), as well as other Articles listed in Article XI. By-Laws Art. XI § 1.

²⁹ Id.

³⁰ Many of the components of the Proposed Rule Change may serve more than one purpose and could, therefore, be discussed in more than one category herein. The categorization of changes is not designed to denote otherwise.

(1) Clarity and Transparency

The Proposed Rule Change would amend the Board Charter to provide for a minimum of four meetings per year, rather than five. This change would align the Board Charter with the Committee Charters, which generally require at least four meetings each year. The Proposed Rule Change would also modify the attendance guidelines to provide that attendance telephonically or by videoconference for meetings scheduled for in-person attendance is discouraged. This change conforms with the current Director Code of Conduct and would be applied to each of the Committee Charters.

The Proposed Rule Change would also amend the discussion of the Board's mission to more accurately reflect that OCC's services to the industry are not limited to clearance and settlement.³¹ The amendments would also clarify that the Board approves "material," rather than "major," changes in auditing and accounting principles and practices. This proposed change would align the Board Charter with language in the AC Charter.

The Proposed Rule Change would also revise the description of the Conflict of Interest Policy within the Board Charter. The current Conflict of Interest Policy does not define "conflict of interest," but rather refers variously throughout the policy to different types of conflicts, including potential conflicts and apparent conflicts, which are referred to as those that may "be reasonably perceived by others to raise questions about potential conflicts of interest." OCC would streamline the policy by defining "conflict of interest" as "actual, potential or apparent conflicts of interest" and referring to the new defined term "conflict of interest" throughout the policy instead of identifying specific types of conflicts (i.e., potential or apparent) at various

³¹ For example, OCC provides thought leadership and education to market participants and the public about the prudent use of products that OCC clears.

points throughout the policy. Accordingly, OCC would remove the current references to potential and apparent conflicts of interest scattered throughout the policy, including the references to apparent conflicts of interest described as matters that may “be reasonably perceived by others to raise questions about potential conflicts of interest.” These changes would align the Board Charter with the current Director Code of Conduct, which employs the same defined term. The Board Charter’s discussion of ethics and conflicts of interest would also be amended to reflect the full title of the Director Code of Conduct and the corporate title for OCC’s general counsel. In addition, the Board Charter would be updated to clarify that an Exchange Director’s, Member Director’s, or Public Director’s qualification as independent for purposes of service on the AC is subject to the assessment of the Board and GNC, which includes other disqualifying material relationships, as provided by the current Board Charter.

OCC is also proposing to update the cadence of certain AC reviews to reflect that the AC shall conduct such reviews at each regular meeting of the AC.³² The current AC Charter contemplates that the AC shall conduct certain reviews quarterly based on the assumption that regular meetings will occur quarterly. OCC believes that, while it is generally the case that regular meetings are scheduled each quarter, the proposed change would avoid the need to call special meetings to address items on a quarterly cadence if a regularly scheduled meeting happens to fall at the beginning of the next quarter or the end of the last quarter.³³ The cadence of reviews for other reports described as “periodic” or occurring “regularly” would also be

³² Such reviews include, but are not limited to, regulatory inspection reports and OCC’s system of internal controls.

³³ See Notice of Filing supra note 5, 87 Fed. Reg. at 10885.

amended to reflect that that the review would be conducted at each regular meeting of the AC. Similar changes would be made to the CPC Charter and TC Charter.

OCC would amend the CPC Charter by removing gendered pronouns that assume the Chairman and Chief Executive Officer necessarily will be individuals who identify as male. Similar changes would be applied to the Board Charter and AC Charter. The Proposed Rule Change would also provide for CPC oversight of OCC's succession planning for "critical roles," in alignment with terminology in OCC's policies and procedures that address succession planning. In addition, references to the "Corporate Plan" would be replaced with references to the "corporate performance report," which better describes the initiative by which the CPC assesses OCC's performance against its corporate goals.

OCC would amend the RC Charter by changing the minimum number of meetings from six to four to align with the other Committee Charters, which generally require at least four meetings each year.

The Proposed Rule Change also includes administrative changes designed to enhance the clarity and conciseness of the Charters. For the Board Charter, OCC is proposing the following:

- under the "Mission of the Board" heading, in the tenth bulleted item describing the Board's oversight role, removing "such officer" from "approving the compensation of each such officer" so that the bullet would state "[o]verseeing the development and design of employee compensation, incentive, and benefit programs and evaluating the performance of any Executive Chairman, the Chief Executive Officer, and the Chief Operating Officer and approving the compensation of each";

- under the “Board Issues” heading and “Membership” subheading: in the first paragraph of the “Selection of Member Directs and Public Directors” section, removing “in order” in “retain a search firm in order to assist [the GNC] in these efforts”;
- in the second paragraph of the same section, replacing “such annual meeting” with “the annual meeting,” deleting “as in effect from time to time” from “the Director Nomination Procedure as in effect from time to time,” and deleting the introductory clause beginning the sentence, “With respect to Member Directors”;
- in the “Member Directors Changing Their Employment” paragraph of the “Retirement” section, deleting “with respect thereto” and “requirements of the” in “the [GNC] . . . shall recommend to the Board any action to be taken with respect thereto, consistent with the requirements of the By-Laws concerning the continued eligibility of such person to remain a Member Director;”
- under the “Board Issues” heading and “Conduct” subheading, the second paragraph of “Distribution of Materials; Board Presentations” in the “Board Meetings” section, replacing “summaries/slides of presentations” with “materials”; and
- under the “Management Structure, Evaluation and Succession” heading and “Management Structure” section, deleting “what is in” in the phrase “the specific needs of the business and what is in the best interest of OCC and the market participants it serves.”

OCC is also proposing certain administrative changes designed to enhance the clarity, conciseness, and consistency of the AC Charter. Specifically, OCC is proposing the following:

- changing the reference to the AC’s review of the “Compliance Policy” to the “Compliance Risk Policy” to align with the current title of that policy;
- modifying reference to the General Counsel to reflect that the General Counsel is OCC’s Chief Legal Officer;
- clarifying that, in the section addressing competencies of AC members, “working familiarity with basic finance and accounting practices” means “financial literacy”;
- under the “Membership and Organization” section, (i) in the first paragraph of the “Composition” section, abbreviating “Board of Directors” and removing extraneous references to the “full” Board and “full Committee membership,” and (ii) in the first paragraph of the “Meetings” section, replacing “The Committee will” with “The Committee shall” for consistency with the language of similar requirements; and
- under the “Functions and Responsibilities” section, in the ninth bulleted item concerning the AC’s functions and responsibilities in discharging its oversight role, replacing “at least once in a calendar year” with “at least once every calendar year.”

For the CPC Charter, OCC is proposing the following:

- in the “Membership and Organization” section, (i) in the first paragraph of the “Composition” section, replacing “The Committee shall consist of” with “The Committee shall be comprised of”; and (ii) in the first paragraph of the “Meetings” section, replacing “The Committee will” with “The Committee shall” and deleting “is” in the phrase “as is necessary”;

- in the “Authority” section and “Scope” subsection, correcting a reference to “employees of the OCC,” which should be “employees of OCC;”
- for the bulleted items discussing the CPC’s functions and responsibilities in discharging its oversight role in the “Functions and Responsibilities” section: in the fifth bulleted item, deleting the phrase “with respect thereto”; in the eighth bulleted item replacing “For each calendar year” with “Each calendar year”; and fifteenth bulleted item, replacing “every two years” with “every two calendar years.”

For the GNC Charter, OCC is proposing the following:

- under the “Membership and Organization” section, in the first paragraph of the “Composition” section, (i) replacing “The Committee will be composed” with “The Committee shall be comprised,” (ii) inserting “at least” before the required number of Exchange Director and Member Director membership on the GNC, and (iii) replacing “The Committee Chair will be designated by the Board from among the Public Director Committee members” with “The Chair shall be a Public Director”; and
- for the bulleted items discussing the GNC’s functions and responsibilities in discharging its oversight role in the “Functions and Responsibilities” section: in the eleventh bulleted item, replacing “For each calendar year” with “Each calendar year”; and in the thirteenth bulleted item, replacing “the manner in which” with “how.”

OCC also proposes certain administrative changes to the RC Charter, including (i) to specify that the RC recommends changes to OCC’s Recovery and Orderly Wind-Down Plan “for

approval,” consistent with language used with respect to policies for which the Board has retained approval authority with respect to amendments; and (ii) to replace “examinations” with “audits” in the description of the RC’s oversight of internal or external audits of OCC’s financial, collateral, risk model and third party risk management processes, consistent with the use of the term “audit” elsewhere in that description.

The proposed changes also include a few administrative changes designed to enhance the clarity and concision in the TC Charter. These minor administrative changes remove unnecessary verbiage or otherwise modify the verbiage in certain provisions.

(2) Clear and Direct Lines of Responsibility

The Proposed Rule Change would amend the Board Charter by clarifying that the Board has delegated to Committees the “oversight” of specific risks, not the “management” of those risks. OCC believes that this proposed change better aligns the Board Charter with the Committee Charters and better distinguishes responsibilities of the Board, Committees, and management.³⁴ The Board Charter would also be amended to replace reference to “senior management” or management in instances where referring to OCC’s Management Committee would more clearly delineate OCC’s governance structure.

The AC assists the Board in overseeing OCC’s financial reporting process, OCC’s system of internal control, OCC’s auditing process, OCC’s process for monitoring compliance with applicable laws and regulation, and OCC’s compliance and legal risks.³⁵ The Proposed Rule Change would amend the AC Charter, and specifically the discussion of the AC’s functions

³⁴ See Notice of Filing supra note 5, 87 Fed. Reg. at 10884.

³⁵ See AC Charter, available at <https://www.theocc.com/about/corporate-information/board-charter>.

and responsibilities, by adding the AC’s oversight of management’s responsibility to “measure” compliance and legal risks to conform with the Board Charter, which provides that the Board oversees OCC’s processes and frameworks for comprehensively managing such risks. In addition, the proposed changes provide that the AC recommends material changes in accounting principles and practices for Board approval, which aligns with the Board Charter, which provides that the Board oversees OCC’s financial reporting, internal and external auditing, and accounting and compliance processes, including the approval of such major (i.e., material) changes.

The Board established the CPC to assist in overseeing general business, regulatory capital, investment, corporate planning, and compensation and human capital risks, as well as executive management succession planning and performance assessment.³⁶ Consistent with the proposed change to the AC Charter, OCC proposes to amend the CPC Charter by describing the CPC’s oversight of management’s responsibility to “measure” general business risks, including as they relate to OCC’s corporate performance report (formerly the “Corporate Plan”) and corporate budget, capital requirements, human capital, compensation and benefit programs, management succession planning, and management performance assessment processes, arising from OCC’s business activities in light of OCC’s role as a systemically important financial market utility, to conform with similar language in the Board Charter. With respect to oversight of OCC’s human resources programs, the Proposed Rule Change would amend the CPC Charter to reflect the CPC’s oversight of OCC’s diversity, equity, and inclusion efforts.

The Board established the GNC to assist the Board in overseeing OCC’s corporate governance processes, including assessing the clarity and transparency of OCC’s governance

³⁶ See CPC Charter, available at <https://www.theocc.com/about/corporate-information/board-charter>.

arrangements, establishing the qualifications necessary for Board service to ensure that the Board is able to discharge its duties and responsibilities, identifying and recommending to the Board candidates eligible for service as Public Directors and Member Directors, and resolving certain conflicts of interests.³⁷ The proposed changes to the GNC Charter are designed to clarify the Board's expectation that the GNC assist the Board in reviewing and proposing changes to the Board Charter, by stating that the GNC would recommend to the Board, where appropriate, changes to the Board Charter and Corporate Governance Principles.

The Board established the RC to assist the Board in overseeing OCC's financial, collateral, risk model and third-party risk management processes, among other responsibilities.³⁸ Consistent with the foregoing Committee Charter changes, the Proposed Rule Change would amend the RC Charter by describing the committee's oversight of management's responsibility to "measure" these risks arising from OCC's business activities in light of OCC's role as a systemically important financial market utility, which conforms with similar language in the Board Charter. OCC would also amend the RC Charter to provide that the RC shall review, and have the authority to approve, OCC's risk appetites and risk tolerances at least once every twelve months. Such a change would be consistent with the proposed delegation of authority for such reviews and approvals, discussed above. In addition, the Proposed Rule Change would consolidate discussion of the RC's functions and responsibilities with respect to oversight and

³⁷ See GNC Charter, available at <https://www.theocc.com/about/corporate-information/board-charter>.

³⁸ See RC Charter, available at <https://www.theocc.com/about/corporate-information/board-charter>.

annual review of OCC's management of liquidity risks and the adequacy of OCC's committed liquidity facilities. This change would streamline the RC Charter's discussion of liquidity risks.

The Board established the TC to assist the Board in overseeing OCC's information technology ("IT") strategy and other company-wide operational capabilities.³⁹ Consistent with the foregoing Committee Charter changes, this proposed rule change would amend the TC Charter by describing the TC's oversight of management's responsibility to "measure" IT and other operational risks arising from OCC's business activities in light of OCC's role as a systemically important financial market utility to conform with similar language in the Board Charter. The Proposed Rule Change would also amend the TC Charter to reflect the TC's current practice of overseeing all security risks, not just information security risks.

(3) Consideration of Participants' Objectives and Other Relevant Stakeholders' Interests

The Proposed Rule Change would amend provisions governing the composition of the Board and the RC to reflect OCC's belief that strong and transparent governance with robust member input on relevant risk issues is necessary to provide effective risk management, consistent with OCC's current practice. Changes to the Board Charter and RC Charter would codify that one of the factors OCC considers when nominating Directors to the Board and RC is to obtain input from a broad array of market participants on risk management issues. OCC believes that this amendment would align the Board Charter and RC Charter with the By-Laws, which require significant Clearing Member representation on the Board.⁴⁰ OCC believes the

³⁹ See TC Charter, available at <https://www.theocc.com/about/corporate-information/board-charter>.

⁴⁰ See Notice of Filing *supra* note 5, 87 Fed. Reg. at 10884.

Proposed Rule Change is consistent with the recommendation made by certain market participants that central counterparties like OCC have governance practices in place that obtain and address input from a broader array of market participants on risk issues.⁴¹

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.⁴² After carefully considering the Proposed Rule Change, the Commission finds that 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)(F) of the Exchange Act,⁴³ and Rule 17Ad-22(e)(2)⁴⁴ thereunder, as described in detail below.

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

Section 17A(b)(3)(F) of the Exchange Act requires, among other things, that a clearing agency's rules are designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions; and the rules are designed, in general, to protect investors and the public interest.⁴⁵ Based on its review of the record, and for the reasons described below, the Commission believes

⁴¹ Id.

⁴² 15 U.S.C. 78s(b)(2)(C).

⁴³ 15 U.S.C. 78q-1(b)(3)(F).

⁴⁴ 17 CFR 240.17Ad-22(e)(2).

⁴⁵ 15 U.S.C. 78q-1(b)(3)(F).

that the proposed changes to revise OCC's governance arrangements are consistent with being organized to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which OCC is responsible, and protect investors and the public interest.

The Commission believes that OCC's proposed changes to codify its practice of nominating Public Directors who are unaffiliated with DCMs and FCMs are consistent with Section 17A(b)(3)(F). This amendment would likely preserve OCC's ability to enhance diversity of representation on the Board and aid the Board in exercising its oversight of OCC's clearance and settlement functions to ensure that they are not just prompt and accurate, but are also structured to protect investors and promote the public interest. The Commission believes that the changes to OCC's governing documents to facilitate inclusion of the perspectives provided by non-DCM- and non-FCM-affiliated Public Directors should support the protection of the public interest because such Public Directors are not affiliated with and therefore should not have conflicts obligating them to represent the views of any DCM or FCM, in addition to any national securities exchange, securities association, broker, or dealer.

In response to the Notice of Filing,⁴⁶ the Commission received a comment opposing the proposal on the basis that it does not consider the interests of Clearing Members' customers, and only benefits OCC's biggest shareholders by enabling OCC to increase systemic risk.⁴⁷ The Commission disagrees with this assertion, as the proposed change to appoint non-DCM- and non-FCM-affiliated Public Directors would preserve OCC's ability to enhance Board diversity

⁴⁶ See Notice of Filing supra note 5, 87 Fed. Reg. at 10881.

⁴⁷ The comment on the Proposed Rule Change is available at <https://www.sec.gov/comments/sr-occ-2022-002/srocc2022002.htm>.

and improve stakeholder representation, rather than decrease it. By limiting the appointment of Public Directors to candidates unaffiliated with securities exchanges, securities associations, brokers, dealers, FCMs, and DCMs, OCC enhances rather than hinders its ability to consider and address the interests of stakeholders, including Clearing Members' customers and small shareholders.

OCC's proposed changes to establish a framework for delegated authority are also consistent with Section 17A(b)(3)(F). The Commission believes that the Proposed Rule Change would establish a clear and transparent framework for the delegation of authority from the Board to Committees and to officers to approve changes to certain rules. Such a framework would facilitate the efficient maintenance and administration of OCC's rules because it would allow the Board to delegate the approval of routine regulatory changes to Committees or officers, which would in turn leverage the specialized experience of the Committees or officers and expedite review and approval of routine matters. Facilitating the efficient maintenance and administration of OCC's rules would help to ensure that such rules promote the prompt and accurate clearance and settlement of securities transactions because the routine rule changes would not need to wait for Board approval. This would allow OCC to file such rule changes with the Commission more quickly and ensure that amendments to the clearance and settlement process are enacted promptly.

The commenter opposing the proposal argues that the Proposed Rule Change would “concentrate power and risk while reducing checks and balances” by, in part, increasing executive control while reducing Board control.⁴⁸ However, the Commission does not believe that the proposed changes would reduce Board control in practice, given that the Board would

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Id.

retain the obligation to oversee the delegated activity in all instances. Moreover, the Committees are comprised entirely of Board Directors, which means that any issues that are delegated to the Committees will be presented for Board Directors' consideration regardless.

The Commission further believes the proposed change to Article XI of OCC's By-Laws is consistent with Section 17A(b)(3)(F). Crucially, the Proposed Rule Change does not change the existing Article XI requirement that certain By-Law amendments cannot occur through the action of the Board without the approval of all of the stockholders. The proposed amendment to remove the language attributing an Exchange Director's vote to constitute stockholder consent is a reasonable step given OCC's current practice of obtaining written stockholder consents for all By-Law amendments that require them. The separation of the roles of individuals serving as both Board members and stockholder representatives would, in general, protect investors and the public interest.

Additionally, the Commission believes that the other housekeeping amendments to the Charters arising from the annual review of OCC's governance arrangements are consistent with Section 17A(b)(3)(F). As described above, many of the housekeeping amendments would resolve small inconsistencies within and across OCC's rules. The proposed changes would also more clearly define the responsibilities of the Board and Committees as well as codify that OCC's Board seeks to obtain input from a broad array of market participants on risk management issues. These housekeeping amendments to the Board and Committee Charters would, in general, protect investors and the public interest.

The Commission believes, therefore, that the proposal to (i) clarify that OCC's Public Directors may not be affiliated with any DCM or FCM; (ii) allow the Board to delegate authority to various Committees and officers to review and approve routine initiatives and policies and

authorize certain regulatory filings; (iii) remove the portion of Article XI, Section 1 of the By-Laws; and (iv) make certain housekeeping amendments to the Charters is consistent with the requirements of Section 17A(b)(3)(F) of the Exchange Act.⁴⁹

B. Consistency with Rule 17Ad-22(e)(2) under the Exchange Act

Rule 17Ad-22(e)(2) under the Exchange Act requires that a covered clearing agency 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, specify clear and direct lines of responsibility, and consider the interests of participants' customers, securities issues and holders, and other relevant stakeholders of the covered clearing agency.⁵⁰

The Commission believes the proposed changes to nominate Public Directors who are unaffiliated with DCMs and FCMs are consistent with Rule 17Ad-22(e)(2)(vi). The changes serve to enhance the diversity of the Board by requiring that OCC look beyond parties affiliated with exchanges, associations, and other such market participants when appointing Public Directors. This improved representation would in turn enable the Board to better consider the interests of participants' customers, securities issues and holders, and other relevant stakeholders of the covered clearing agency.

OCC's proposed changes to delegate authority are consistent with Rule 17Ad-22(e)(2)(v). The Commission believes that by delegating approval of certain regulatory changes to Committees, the authority to review and approve certain initiatives and policies or to direct

⁴⁹ 15 U.S.C. 78q-1(b)(3)(F).

⁵⁰ 17 CFR 240.17Ad-22(e)(2)(i), (iii), (v), and (vi).

certain regulatory filings would reside with the Committee that has oversight authority over the relevant subject matter for such initiatives, policies, and proposed changes. Such delegations would allocate the limited time and attention of the Board more efficiently. The proposed changes to delegate authority aid in specifying clear and direct lines of responsibility.

The Commission believes the proposed change to Article XI is consistent with Rule 17Ad-22(e)(2)(iii). By removing the provision that allows OCC to treat an Exchange Director's vote as the consent of the stockholder who elected the Exchange Director for those amendments to the By-Laws that require stockholder consent, the proposed change would resolve an Exchange Director's potential conflict of interest of acting with fiduciary duty as a director while also having a fiduciary duty to the stockholder. Given that OCC retains the requirement in Article XI for all stockholders to approve amendments to certain portions of the By-Laws, the proposed provision removal would not result in any negative impacts to the stockholder. Instead, the separation of the Exchange Director's roles as Board members and stockholder representatives would better support the public interest requirements of Section 17A.

Moreover, the Commission believes that all of the proposed housekeeping changes to the Charters are consistent with specific subsections of Rule 17Ad-22(e)(2) as described below.

Rule 17Ad-22(e)(2)(i) requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent.⁵¹ The Commission believes that changes described above in Section II.D.1 are consistent with Rule 17Ad-22(e)(2)(i), in that they either improve the alignment of the governance documents or correct minor inaccuracies, which

⁵¹ 17 CFR 240.17Ad-22(e)(2)(i).

in turn creates stronger clarity and transparency. For example, OCC proposed changes across the charter to require the Board and Committees each to hold at least four meetings per year.

The commenter opposing the proposal argues that the Proposed Rule Change would “concentrate power and risk while reducing checks and balances” by, in part, reducing meeting frequency.⁵² However, the Commission does not believe that the proposed changes to the Board’s meeting frequency will negatively affect the ability of the Board to address stockholder concerns. By amending the number of Board meetings per year from five to four to align with the meeting frequency specified in the Committee Charters, OCC will potentially increase administrative efficiency and better ensure the Board or the Committees address all issues critical to stakeholders. Additionally, the Proposed Rule Change does not preclude the Board from holding additional meetings as needed.

Rule 17Ad-22(e)(2)(v) requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that specify clear and direct lines of responsibility.⁵³ The Commission believes that the changes described above in Section II.D.2 are consistent with Rule 17Ad-22(e)(2)(v), as they each serve to clarify the specific responsibilities of the Board, the Committees, and officers.

⁵² The comment on the Proposed Rule Change is available at <https://www.sec.gov/comments/sr-occ-2022-002/srocc2022002.htm>. The commenter also raised concerns about “increasing roadblocks for potential new Board members.” *Id.* However, the commenter does not specify what portions of the Proposed Rule Change would represent a “roadblock,” if any. In contrast, the Commission believes that a significant portion of the Proposed Rule Change would in fact make OCC’s governance arrangements clearer and more transparent and also specify clear and direct lines of responsibility as discussed below.

⁵³ 17 CFR 240.17Ad-22(e)(2)(v).

Finally, Rule 17Ad-22(e)(2)(vi) requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that consider the interests of participants' customers, securities issues and holders, and other relevant stakeholders of the covered clearing agency.⁵⁴ The proposed changes to the Board Charter and RC Charter to codify input from a broad array of market participants as one of the factors considered for nominating Directors to the Board and Risk Committee are consistent with this Rule, as the diversity of opinions would better consider a broader array of interests among OCC's relevant stakeholders.

The Commission believes, therefore, that the proposal to (i) clarify that OCC's Public Directors may not be affiliated with any DCM or FCM; (ii) allow the Board to delegate authority to various Committees and officers to review and approve routine initiatives and policies and authorize certain regulatory filings; (iii) remove the portion of Article XI, Section 1 of the By-Laws; and (iv) apply additional housekeeping amendments is consistent with the requirements of Rule 17Ad-22(e)(2)(i), (iii), (v), and (vi) under the Exchange Act.⁵⁵

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 Act⁵⁶ and the rules and regulations thereunder.

⁵⁴ 17 CFR 240.17Ad-22(e)(2)(vi).

⁵⁵ 17 CFR 240.17Ad-22(e)(2)(i), (iii), (v), and (vi).

⁵⁶ 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).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,⁵⁷ that the Proposed Rule Change (SR-OCC-2022-002) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁸

J. Matthew DeLesDernier
Assistant Secretary

⁵⁷ 15 U.S.C. 78s(b)(2).

⁵⁸ 17 CFR 200.30-3(a)(12).