

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-82793; File No. SR-OCC-2018-004)

February 28, 2018

Self-Regulatory Organizations; The Options Clearing Corporation; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change to Revise The Options Clearing Corporation's Schedule of Fees

I. Introduction

On January 19, 2018, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change, File No. SR-OCC-2018-004, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder.<sup>2</sup> The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>3</sup> The proposed rule change was published for comment in the Federal Register on February 2, 2018.<sup>4</sup> Under Section 19(b)(3)(C) of the Act,<sup>5</sup> the Commission is hereby: (i) temporarily suspending File No. SR-OCC-2018-004; and (ii) instituting proceedings to determine whether to approve or disapprove File No. SR-OCC-2018-004.

II. Description of the Proposed Rule Change

The proposed rule change by OCC would revise OCC's Schedule of Fees effective March 1, 2018 to implement an increase in clearing fees in accordance with

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> Securities Exchange Act Release No. 82596 (Jan. 30, 2018), 83 FR 4944 (Feb. 2, 2018) (SR-OCC-2018-004) ("Notice").

<sup>5</sup> 15 U.S.C. 78s(b)(3)(C).

OCC's Fee Policy,<sup>6</sup> which was adopted as part of its plan to raise additional capital ("Capital Plan").<sup>7</sup> As stated in the Notice, OCC filed the proposed rule change to revise OCC's Schedule of Fees in accordance with its Fee Policy and set fees at a level designed to cover OCC's operating expenses and maintain a Business Risk Buffer of 25%.<sup>8</sup>

OCC stated that it recently reviewed its current Schedule of Fees<sup>9</sup> against projected revenues and expenses for 2018 in accordance with its Fee Policy to determine

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<sup>6</sup> See Notice at 4944-45. OCC also filed a proposed rule change with the Commission to revise its Fee Policy to provide that proposed fee changes are required to be implemented no sooner than thirty (30) days from the date of filing of the proposed rule change concerning such fee change (as opposed to sixty (60) days). See Securities Exchange Act Release No. 82576 (Jan. 24, 2018), 83 FR 4324 (Jan. 30, 2018) (SR-OCC-2018-001). OCC submitted the proposed changes to its Fee Policy to the Commodity Futures Trading Commission ("CFTC") under CFTC Regulation 40.6. OCC stated that implementation of the proposed fee change on March 1, 2018 would require either: (i) Commission approval of SR-OCC-2018-001 and certification of the Fee Policy changes in SR-OCC-2018-001 under CFTC Regulation 40.6 or (ii) an exception to the 60-day notice period provision in the Fee Policy authorized by OCC's Board of Directors and the holders of all of the outstanding Class B Common Stock of OCC.

<sup>7</sup> See Securities Exchange Act Release No. 77112 (February 11, 2016), 81 FR 8294 (February 18, 2016) (SR-OCC-2015-02) ("Approval Order"). The Capital Plan was later subject to judicial review by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), which remanded the Approval Order to the Commission to further analyze whether the Capital Plan is consistent with the Act. Susquehanna Int'l Grp., LLP v. SEC, 866 F.3d 442 (D.C. Cir. 2017). The Commission's review of the Plan on remand is ongoing, and the Capital Plan remains in effect during this ongoing review.

<sup>8</sup> See Notice at 4944-45. The Business Risk Buffer is an amount of fee revenue that OCC targets above its anticipated operating expenses to allow for unexpected fluctuations in operating expenses, business capital needs, and regulatory capital requirements.

<sup>9</sup> OCC previously revised its Schedule of Fees effective December 1, 2016, to implement a fee increase in accordance with the Fee Policy. See Securities Exchange Act Release No. 79028 (October 3, 2016), 81 FR 69885 (October 7, 2016) (SR-OCC-2016-012).

whether the Schedule of Fees was sufficient to cover OCC’s anticipated operating expenses and achieve the Business Risk Buffer. OCC stated that it analyzed: (i) expenses budgeted for 2018; (ii) projected other revenue streams for 2018; (iii) projected volume mix; and (iv) projected volume growth for 2018. After this review, OCC determined that the current fee schedule is set at a level that would be insufficient to ensure that OCC achieves its Business Risk Buffer as required under the Fee Policy.<sup>10</sup> OCC stated that it arrived at the proposed fee schedule below by determining the figures that provide the best opportunity for OCC to achieve coverage of its anticipated operating expenses plus a Business Risk Buffer. Accordingly, OCC proposed the Schedule of Fees set forth in the table below:

<b>Current Fee Schedule</b>		<b>Proposed Fee Schedule</b>	
<b>Trades with contracts of:</b>	<b>Current Fee</b>	<b>Trades with contracts of:</b>	<b>Proposed Fee</b>
1-1100	\$0.050/contract	1-1018	\$0.054/contract
>1100	\$55/trade	>1018	\$55/trade

OCC proposed to modify its Schedule of Fees to: (i) increase its per contract clearing fee from \$0.050 to \$0.054 per contract; and (ii) adjust the quantity of contracts at which the fixed, per trade clearing fee begins from greater than 1100 contracts per trade to greater than 1018 contracts per trade. OCC stated that the proposed changes are designed to target a level of revenues sufficient to cover OCC’s operating expenses plus the Business Risk Buffer while continuing to maintain its existing fixed, per trade, fee at \$55 per trade.

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<sup>10</sup> OCC provided a summary of its analysis in a confidential Exhibit 3 to the filing.

OCC stated that in accordance with its Fee Policy, OCC will continue to monitor cleared contract volume and operating expenses to determine if further revisions to OCC's Schedule of Fees are required so that monies received from clearing fees cover its operating expenses plus the Business Risk Buffer.<sup>11</sup>

### III. Summary of Comment Received

On February 22, 2018, the Commission received a comment letter on the proposed rule change from Susquehanna International Group, LLP ("SIG").<sup>12</sup> In the comment letter, SIG expressed concern regarding whether the information provided by OCC in the Notice was sufficient to allow for meaningful public comment on the proposal.<sup>13</sup> Specifically, SIG asserted that OCC's Shareholder Exchanges are incented to overestimate OCC's expenses, because such overestimation would lead to increased dividends.<sup>14</sup> SIG asserted further that, without access to the expense projections filed as a confidential exhibit to the proposed rule change, the public has no basis to believe that the proposed fee increase is reasonable and no ability to comment critically on OCC's

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<sup>11</sup> Any subsequent changes to OCC's Schedule of Fees would be the subject of a subsequent proposed rule change filed with the Commission.

<sup>12</sup> See letter from Richard J. McDonald, SIG, dated February 14, 2018, to Brent J. Fields, Secretary, Commission ("SIG Letter"). See comments on the proposed rule change (SR-OCC-2018-004), <https://www.sec.gov/comments/sr-occ-2018-004/occ2018004.htm>.

<sup>13</sup> SIG Letter at 2.

<sup>14</sup> SIG Letter at 3. OCC is owned by Chicago Board Options Exchange, Incorporated ("CBOE"); International Securities Exchange, LLC; NASDAQ OMX PHLX, LLC; NYSE American LLC; and NYSE Arca, Inc. See Approval Order at 8294.

supporting analysis.<sup>15</sup> In addition, SIG characterized OCC's proposal to increase fees as a negative consequence of the Capital Plan.<sup>16</sup>

#### IV. Suspension of File No. SR-OCC-2018-004

Pursuant to Section 19(b)(3)(C) of the Act,<sup>17</sup> at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,<sup>18</sup> the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. As discussed further below, the Commission believes a temporary suspension of the proposed rule change is warranted here to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder. In particular, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change to consider whether the proposed

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<sup>15</sup> SIG Letter at 2.

<sup>16</sup> Id. at 1. OCC's Board of Directors decided that OCC was significantly undercapitalized, and, therefore, proposed an expedited plan to substantially increase OCC's capitalization. See Approval Order at 8294. Subsequent to the Approval Order, parties, including SIG, filed a petition for review of the Approval Order in the D.C. Circuit, challenging the Commission's Approval Order. The D.C. Circuit ultimately remanded the case to the Commission for further proceedings without reaching the merits of the Capital Plan. Susquehanna, 866 F.3d at 443. The court did not vacate the Approval Order prior to remand, instead leaving the Capital Plan in place and remanding to give the Commission an opportunity to reevaluate the Capital Plan. Id. at 451. As noted above, the Commission's reconsideration of the Capital Plan is ongoing.

<sup>17</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>18</sup> 15 U.S.C. 78s(b)(1).

rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that clearing agency rules provide for the equitable allocation of reasonable dues, fees and other charges among its participants.

V. Proceedings to Determine Whether to Approve or Disapprove File No. SR-OCC-2018-004

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)<sup>19</sup> and 19(b)(2)(B) of the Act<sup>20</sup> to determine whether the proposed rule change should be approved or disapproved.

Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>21</sup> the Commission is providing notice of the grounds for disapproval under consideration. As noted above, the Fee Policy to which the proposed rule change relates was adopted as part of OCC's Capital Plan, and the Capital Plan remains subject to Commission review.<sup>22</sup> The commenter asserts that the fee increase contradicts previous statements by OCC regarding "OCC's assurances of

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<sup>19</sup> 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

<sup>20</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>21</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>22</sup> See supra note 7.

low fees in its Capital Plan submissions,” calls into question the consistency of the Capital Plan with the Act, and is otherwise without basis.<sup>23</sup> The Commission believes it is appropriate to institute proceedings to assess whether the considerations currently before the Commission in connection with its review of the Capital Plan on remand are implicated by the issues raised by the proposed fee change.<sup>24</sup> Moreover, the commenter argues that, without access to the information provided by OCC on a confidential basis, the public cannot “meaningfully comment on the propriety of the proposed fee increase.”<sup>25</sup> The Commission is also instituting proceedings to allow for additional consideration and comment on this and other issues raised by the commenter. Finally, the Commission believes that OCC’s proposed rule change raises questions as to whether it is consistent with Section 17A(b)(3)(D) of the Act,<sup>26</sup> which requires clearing agency rules to provide for the equitable allocation of reasonable dues, fees and other charges among its participants.

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<sup>23</sup> SIG Letter at 2.

<sup>24</sup> The Commission notes that one of the issues before us in considering the Capital Plan is the contention by some of those commenting on the Plan that the Plan will lead to an increase in fees. In responding to these comments in our initial approval of the Plan, we observed that “[t]he Exchange Act rule filing requirements for fee changes provide an opportunity for public comment and an opportunity for the Commission to review the change, summarily suspend it and institute proceedings to ultimately approve or disapprove the change, as applicable, to ensure an SRO’s rules meet regulatory requirements.” See Approval Order at 8303.

<sup>25</sup> SIG Letter at 3.

<sup>26</sup> 17 CFR 240.17Ad-22(d)(7).

## VI. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the proposed fee change. In particular, the Commission invites the written views of interested persons concerning whether the proposed fee change is consistent with Section 17A(b)(3)(D) of the Act<sup>27</sup> or any other provision of the Act, rules, and regulations thereunder. Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-OCC-2018-004 on the subject line.

### Paper Comments:

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

All submissions should refer to File No. SR-OCC-2018-004. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website

(<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent

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<sup>27</sup> 15 U.S.C. 78q-1(b)(3)(D).



amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's website at <https://www.theocc.com/about/publications/bylaws.jsp>.

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

All submissions should refer to File No. SR-OCC-2018-004 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal on or before [insert date 35 days from publication in the Federal Register].

VII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,<sup>28</sup> that File No. SR-OCC-2018-004, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule changes should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>29</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>28</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>29</sup> 17 CFR 200.30-3(a)(12).