

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82926; File No. SR-OCC-2017-020)

March 22, 2018

Self-Regulatory Organizations; The Options Clearing Corporation; Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Concerning Enhanced and New Tools for Recovery Scenarios

I. Introduction

On December 18, 2017, The Options Clearing Corporation (“OCC”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change SR-OCC-2017-020 (“Proposed Rule Change”), pursuant to Section 19(b) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder.² The Proposed Rule Change was published for comment in the Federal Register on December 26, 2017.³ On January 25, 2018, the Commission designated a longer period within which to approve the Proposed Rule Change, disapprove the Proposed Rule Change, or institute proceedings to determine whether to approve or disapprove

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 82351 (Dec. 19, 2017), 82 FR 61107 (Dec. 26, 2017) (SR-OCC-2017-020) (“Notice”). On December 8, 2017, OCC also filed a related advance notice (SR-OCC-2017-809) with the Commission pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010 and Rule 19b-4(n)(1)(i) under the Act (“Advance Notice”). 12 U.S.C. 5465(e)(1) and 17 CFR 240.19b-4(n)(1)(i), respectively. The Advance Notice was published in the Federal Register on January 23, 2018. Securities Exchange Act Release No. 82513 (Jan. 17, 2018), 83 FR 3244 (Jan. 23, 2018) (SR-OCC-2017-809).

The Financial Stability Oversight Council designated OCC a systemically important financial market utility on July 18, 2012. See Financial Stability Oversight Council 2012 Annual Report, Appendix A, available at <http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf>. Therefore, OCC is required to comply with the Payment, Clearing and Settlement Supervision Act and file advance notices with the Commission. See 12 U.S.C. 5465(e).

the Proposed Rule Change.⁴ To date,⁵ the Commission has received one comment letter to the Proposed Rule Change.⁶ The Commission is publishing this order pursuant to Section 19(b)(2)(B) of the Act⁷ to institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.

Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to the Proposed Rule Change, nor does it mean that the Commission will ultimately disapprove the Proposed Rule Change. Rather, as discussed below, the Commission seeks additional input on the Proposed Rule Change and issues presented by the proposal.

II. Description of the Proposed Rule Change⁸

The Proposed Rule Change would make certain revisions to OCC's Rules and By-Laws⁹ to enhance OCC's existing tools to address the risks of liquidity shortfalls and credit losses and to establish new tools by which OCC could re-establish a matched book following a default.¹⁰

⁴ Securities Exchange Act Release No. 82585 (Jan. 25, 2018), 83 FR 4526 (Jan. 31, 2018) (File No. SR-OCC-2017-020).

The comment period closed on January 16, 2018. See Notice, supra note 3, 82 FR at 61116.

⁶ See letter from Jacqueline H. Mesa, Senior Vice President of Global Policy, Futures Industry Association, dated January 16, 2018, to Brent J. Fields, Secretary, Commission ("FIA Letter"), available at <https://www.sec.gov/comments/sr-occ-2017-020/occ2017020.htm>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ The description of the Proposed Rule Change is substantially excerpted from the Notice. See Notice, supra note 3, 82 FR at 61107-61109.

⁹ OCC's By-Laws and Rules can be found on OCC's public website: <http://optionsclearing.com/about/publications/bylaws.jsp>.

¹⁰ Notice, supra note 3, 82 FR at 61107.

Each of the proposed tools is contemplated to be deployed by OCC in an extreme stress event that has placed OCC into a recovery or orderly wind-down scenario.¹¹

OCC proposed to make four revisions to its Rules and By-Laws. First, OCC proposed to revise the existing assessment powers in Section 6 of Article VIII of OCC's By-Laws, specifically to:

(a) Establish a rolling cooling-off period that would be triggered by the payment of a proportionate charge against the Clearing Fund (i.e., a triggering proportionate charge), during which period the aggregate liability of a Clearing Member to replenish the Clearing Fund (inclusive of assessments) would be 200 percent of the Clearing Member's required contribution as of the time immediately preceding the triggering proportionate charge;¹²

(b) Clarify that a Clearing Member that chooses to terminate its membership status during a cooling-off period will not be liable for replenishment of the Clearing Fund immediately following the expiration of such cooling-off period, provided that the withdrawing Clearing Member satisfies enumerated criteria, including providing notice of such termination by no later than the end of the cooling-off period and by closing-out or transferring all its open positions with OCC by no later than the last day of the cooling-off period;¹³ and

¹¹ Id.

¹² Id. at 61108, 61109.

¹³ Id. at 61108, 61109-10.

(c) Delineate between the obligation of a Clearing Member to replenish its contributions to the Clearing Fund and its obligations to meet additional assessments that may be levied following a proportionate charge to the Clearing Fund.¹⁴

Second, OCC proposed to adopt a new rule that would provide OCC with discretionary authority to call for voluntary payments from non-defaulting Clearing Members in a circumstance where one or more Clearing Members has already defaulted and OCC has determined that it may not have sufficient resources to satisfy its obligations and liabilities resulting from such default (“Rule 1009”).¹⁵ Rule 1009 also would establish that OCC would prioritize compensation of Clearing Members that made voluntary payments from any amounts recovered from the defaulted Clearing Members.¹⁶

Third, OCC proposed to adopt a new rule that would provide the following authority (“Rule 1111”):

(a) Allow OCC to call for voluntary tear-ups (“Voluntary Tear-Up”)¹⁷ of non-defaulting Clearing Member and/or customer positions at any time following the suspension or default of a Clearing Member, with the scope of any such Voluntary Tear-Ups being determined by the Risk Committee of OCC’s Board (“Risk Committee”),¹⁸

¹⁴ Id. at 61109, 6110.

¹⁵ Id.

¹⁶ Id.

¹⁷ See id. at 61110 (defining Voluntary Tear-Up).

¹⁸ Id. at 61109, 61110-11.

(b) Allow OCC's Board to vote to tear-up the Remaining Open Positions¹⁹ of a defaulted Clearing Member, as well as any Related Open Positions²⁰ in a circumstance where OCC has attempted one or more auctions of such defaulted Clearing Member's remaining open positions and OCC has determined that it may not have sufficient resources to satisfy its obligations and liabilities resulting from such default, with the scope of any such tear-up ("Partial Tear-Up")²¹ being determined by the Risk Committee;²² and

(c) Allow OCC's Board to vote to re-allocate losses, costs and fees imposed upon holders of positions extinguished in a Partial Tear-Up through a special charge levied against remaining non-defaulting Clearing Members.²³

Fourth and finally, OCC proposed to revise the descriptions and authorizations in Article VIII of OCC's By-Laws concerning the use of the Clearing Fund to reflect its discretion to use remaining Clearing Fund contributions to re-allocate losses imposed on non-defaulting Clearing Members and customers from a Voluntary Tear-Up or a Partial Tear-Up.²⁴

¹⁹ See id. at 61111 (defining Remaining Open Positions).

²⁰ See id. (defining Related Open Positions).

²¹ See id. at 61109 (defining Partial Tear-Up).

²² Id. at 61109, 61111-12.

²³ Id. at 61109, 61112.

²⁴ Id.

III. Summary of Comment Received

On January 16, 2018, the Commission received a comment letter from the Futures Industry Association (“FIA”).²⁵ In the comment letter, FIA stated that it had identified a number of areas where it did not support the approach that OCC proposed in the Proposed Rule Change, and it separated its response into two sections.²⁶

First, with respect to replenishment of the Clearing Fund, the FIA stated that OCC “should provide an explanation as to how the cap level of 200% [regarding assessments in a cooling-off period] was determined and why [OCC] considers 200% appropriate, rather than a lower cap level.”²⁷ Second, with respect to Partial Tear-Up, the FIA generally supported its use as a position rebalancing tool.²⁸ The FIA stated, however, that its belief that “it is [not] reasonable nor analytically sound for tear-ups to result in incremental costs of undefined amounts being distributed through assessments, as it effectively enables the Board of OCC to engage in unlimited assessments.”²⁹ Additionally, the FIA stated that “where a cleared trade is selected by the Board of OCC for Partial Tear-Up, the price of the trade should be determined objectively (either by marking to market or an objective best-estimate of market price), not on a discretionary

²⁵ See FIA Letter, supra note 4.

²⁶ FIA Letter at 1.

²⁷ Id. at 2.

²⁸ Id.

²⁹ Id.

basis.”³⁰ The FIA also stated that “OCC should ensure that the design and application of Partial Tear-Ups do not dis-incentivize bidding in default management auctions.”³¹

IV. Proceedings to Determine Whether to Approve or Disapprove File No. SR-OCC-2017-020 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the Proposed Rule Change should be approved or disapproved.³² Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the Proposed Rule Change. As noted above, 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 and provide arguments to support the Commission’s analysis as to whether to approve or disapprove the Proposed Rule Change.

Pursuant to Section 19(b)(2)(B) of the Act,³³ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis, and input from, commenters with respect to the Proposed Rule Change’s consistency with the Act and the rules thereunder, including the following:

- Section 17A(b)(3)(F) of the Act,³⁴ which requires, in part, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and

³⁰ Id.

³¹ Id.

³² 15 U.S.C. 78s(b)(2)(B).

³³ Id.

³⁴ 15 U.S.C. 78q-1(b)(3)(F).

settlement of securities transactions, assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, and, in general, to protect investors and the public interest; and

- Rule 17Ad-22(e)(3)(ii) of the Act,³⁵ which requires a covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to plan for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.

V. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the Proposed Rule Change with respect to the issues identified above, as well as any other concerns they may have with the Proposed Rule Change. In particular, the Commission invites the written views of interested persons concerning whether the Proposed Rule Change is consistent with Section 17A(b)(3)(F) and Rule 17Ad-22(e)(3)(ii) under the Act, cited above, or any other provision of the Act, rules, and regulations thereunder.

Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.³⁶

³⁵ 17 C.F.R. 17Ad-22(e)(3)(ii).

³⁶ Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29, 89 Stat. 97 (1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Interested persons are invited to submit written data, views, and arguments regarding whether the Proposed Rule Change should be approved or disapproved by [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 by [insert 35 days from publication in the Federal Register].

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-OCC-2017-020 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-2017-020. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the Proposed Rule Change that are filed with the Commission, and all written communications relating to the Proposed Rule Change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m.

Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's website at <https://www.theocc.com/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-2017-020 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. If comments are received, any rebuttal comments should be submitted on or before [insert date 35 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁷

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Assistant Secretary

³⁷ 17 CFR 200.30-3(a)(12).