

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98932; File No. SR-OCC-2023-007)

November 14, 2023

Self-Regulatory Organizations; Options Clearing Corporation; Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Partial Amendment No. 1, Concerning Modifications to the Amended and Restated Stock Options and Futures Settlement Agreement Between The Options Clearing Corporation and the National Securities Clearing Corporation

I. Introduction

On August 10, 2023, the Options Clearing Corporation (“OCC”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change SR-OCC-2023-007 (“Proposed Rule Change”) pursuant to Section 19(b) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4² thereunder to modify the Amended and Restated Stock Options and Futures Settlement Agreement dated August 5, 2017, between OCC and National Securities Clearing Corporation, OCC’s rules related to liquidity risk management, and OCC’s rules related to default management in connection with the proposed modifications to the Existing Accord.³ The Proposed Rule Change was published for public comment in the *Federal Register* on August 30, 2023.⁴ The Commission has received no comments regarding the Proposed Rule Change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Notice of Filing *infra* note 4, at 88 Fed. Reg. 59976.

⁴ Securities Exchange Act Release No. 98215 (Aug. 24, 2023), 88 Fed. Reg. 59976 (Aug. 30, 2023) (File No. SR-OCC-2023-007) (“Notice of Filing”). OCC also filed a related advance notice (SR-OCC-2023-801) (“Advance Notice”) 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 Exchange Act. 12 U.S.C. 5465(e)(1). 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b-4, respectively. The Advance Notice was published in the *Federal Register* on August 30, 2023. Securities Exchange Act Release No. 98214 (Aug. 24, 2023), 88 Fed. Reg. 59988 (Aug. 30, 2023) (File No. SR-OCC-2023-801).

On September 25, 2023, pursuant to Section 19(b)(2) of the Exchange Act,⁵ the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.⁶ On November 8, 2023, OCC filed a Partial Amendment No. 1 to the Proposed Rule Change.⁷ The Commission is publishing this notice to solicit comments on Partial Amendment No. 1 from interested persons and is instituting proceedings, pursuant to Section 19(b)(2)(B) of the Exchange Act,⁸ to determine whether to approve or disapprove the proposed rule change, as modified by the Partial Amendment No. 1 (hereinafter defined as “Proposed Rule Change”).

II. Summary of the Proposed Rule Change

NSCC is a clearing agency that provides clearing, settlement, risk management, and central counterparty services for trades involving equity securities. OCC is the sole clearing agency for standardized equity options listed on national securities exchanges registered with the Commission, including options that contemplate the physical delivery of equities cleared by NSCC in exchange for cash (“physically settled” options).⁹ OCC

⁵ 15 U.S.C. 78s(b)(2).

⁶ Securities Exchange Act Release No. 98508 (Sep. 25, 2023), 88 FR 67407 (Sep. 29, 2023) (File No. SR-OCC-2023-007).

⁷ Partial Amendment No. 1 delays implementation of the proposed change. As amended, OCC would implement the proposed rule change within 90 days of receiving all necessary regulatory approvals and would announce the specific date of implementation on its public website at least 14 days prior to implementation. The delay is proposed in light of the technical system changes that are required to implement the liquidity stress testing enhancements and to be able to provide sufficient notice to Clearing Members following receipt of approval.

⁸ 15 U.S.C. 78s(b)(2)(B).

⁹ The term “physically-settled” as used throughout the OCC Rulebook refers to cleared contracts that settle into their underlying interest (i.e., options or futures contracts that are not cash-settled). When a contract settles into its underlying interest, shares of stock are sent (i.e., delivered) to contract holders who have the right to receive the shares from contract holders who are obligated to deliver the shares at the time of exercise/assignment in the case of an option and maturity in the case of a future.

also clears certain futures contracts that, at maturity, require the delivery of equity securities cleared by NSCC in exchange for cash. As a result, the exercise and assignment of certain options or maturation of certain futures cleared by OCC effectively results in stock settlement obligations to be cleared by NSCC (“E&A Activity”). NSCC and OCC maintain a legal agreement, generally referred to by the parties as the “Accord” agreement, that governs the processing of such E&A Activity for firms that are members of both OCC and NSCC (“Common Members”).

Under certain circumstances, the Accord currently allows NSCC not to guaranty the settlement of securities arising out of E&A Activity for a defaulted Common Member. To the extent NSCC chooses not to guaranty such transactions, OCC would have to engage in an alternate method of settlement outside of NSCC to manage the default of the Common Member, which presents two issues. First, based on historical data, the cash required for such alternative settlement could be as much as \$300 billion.¹⁰ Second, settlement outside of NSCC introduces significant operational complexities.¹¹

OCC proposes to revise the Accord to address the liquidity and operational issues that arise under the current Accord. Specifically, the proposed changes to the Accord would require NSCC to guaranty the positions of a defaulting Common Member if OCC makes a payment to cover the incremental risk posed by such positions (the “Guaranty Substitution Payment” or “GSP”). Based on historical data, the GSP could be as much as \$6 billion (in contrast with the potential \$300 billion required for alternative settlement).¹²

¹⁰ See Notice of Filing, 88 FR at 59977.

¹¹ See *id.*

¹² See *id.*

The total amount owed by the Common Member would be a combination of the member's unpaid deposit to the NSCC Clearing Fund ("Required Fund Deposit")¹³ and Supplemental Liquidity Deposit.¹⁴ The SLD portion of the GSP would be the unpaid SLD associated with any E&A Activity. The Required Fund Deposit portion of the GSP, however, would be estimated by reference to the day-over-day change in gross market value of the Common Member's positions at NSCC as a proxy for estimating what percentage of the member's Required Fund Deposit is attributable to E&A Activity. OCC acknowledges that this methodology overestimates or underestimates the Required Fund Deposit attributable to a Common Member's E&A activity, but states that current technology constraints prohibit NSCC from performing a precise calculation of the GSP on a daily basis for every Common Member.¹⁵

In addition to revising the Accord, OCC also proposes changes to its rules in connection with the proposed changes to the Accord. For example, OCC proposes to change its rules to permit payment of the GSP to NSCC. OCC further proposes to revise its rules related to liquidity risk management to account for the potential need to make such a payment to NSCC. OCC proposes to incorporate the GSP into its stress testing framework as a liquidity demand and would estimate the potential demand based on the

¹³ The Required Fund Deposit is calculated pursuant to Rule 4 (Clearing Fund) and Procedure XV (Clearing Fund Formula and Other Matters) of the NSCC Rules. *See* Notice of Filing, 88 FR at 59979, n.27.

¹⁴ Under the NSCC Rules, NSCC collects additional cash deposits from those Members who would generate the largest settlement debits in stressed market conditions, referred to as "Supplemental Liquidity Deposits" or "SLD." *See* Rule 4A of the NSCC Rules. *See also* Notice of Filing, 88 FR at 59979, n.28.

¹⁵ *See* Notice of Filing, 88 FR at 59979-80. OCC and NSCC have agreed that performing the necessary technology build at this time would delay the implementation of this proposal. Therefore, NSCC would consider incorporating those technology updates into future revisions to the Accord, for example in connection with a move to a shorter settlement cycle in the U.S. equities markets. *See* Notice of Filing, 88 FR at 59980, n.31.

peak GSP observed over a one-year lookback.¹⁶ Such stress testing would be based on the total GSP, rather than the portion estimated to arise out of E&A activity.

III. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act to determine whether the Proposed Rule Change should be approved or disapproved.¹⁷ Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the Proposed Rule Change. 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 comment on the Proposed Rule Change, which would provide the Commission with 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 Exchange Act,¹⁸ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the Proposed Rule Change's consistency with Section 17A of the Exchange Act¹⁹ and the rules thereunder, including the following provisions:

¹⁶ Because not all types of expirations are the same with respect to the notional amount of activity sent by OCC to NSCC, OCC proposes to use five separate categories of expirations with potentially different GSP amounts to apply. *See* Notice of Filing, 88 FR at 59986 (defining the following five categories: standard monthly expiration, end of week expirations, end of month expiration, bank holiday expirations, and daily expirations).

¹⁷ 15 U.S.C. 78s(b)(2)(B).

¹⁸ *Id.*

¹⁹ 15 U.S.C. 78q-1.

- Section 17A(b)(3)(F) of the Exchange Act,²⁰ which requires, among other things, that the rules of a clearing agency are designed to promote the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions; to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible; to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions; and, in general, to protect investors and the public interest;
- Rule 17Ad-22(e)(1) under the Exchange Act,²¹ which requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for a well-founded, clear, transparent, and enforceable legal basis for each aspect of its activities in all relevant jurisdictions;
- Rule 17Ad-22(e)(7) under the Exchange Act,²² which requires, in part, that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to effectively measure, monitor, and manage the liquidity risk that arises in or is borne by the covered clearing agency, including measuring, monitoring, and managing its settlement and funding flows on an ongoing and timely basis, and its use of intraday liquidity; and

²⁰ 15 U.S.C. 78q-1(b)(3)(F).

²¹ 17 CFR 240.17Ad-22(e)(1).

²² 17 CFR 240.17Ad-22(e)(7).

- Rule 17Ad-22(e)(20) under the Exchange Act,²³ which requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to identify, monitor, and manage risks related to any link the covered clearing agency establishes with one or more other clearing agencies, financial market utilities, or trading markets.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments 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)²⁴ and Rules 17Ad-22(e)(1), (e)(7), and (e)(20)²⁵ of the Exchange Act, or any other provision of the Exchange Act, or the 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(g) under the Exchange Act,²⁶ any request for an opportunity to make an oral presentation.²⁷

²³ 17 CFR 240.17Ad-22(e)(17)(i).

²⁴ 15 U.S.C. 78q-1(b)(3)(F).

²⁵ 17 CFR 240.17Ad-22(e)(1), 17 CFR 240.17Ad-22(e)(7), and 17 CFR 240.17Ad-22(e)(20).

²⁶ 17 CFR 240.19b-4(g).

²⁷ Section 19(b)(2) of the Exchange Act grants to 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 Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

The Commission asks that commenters address the sufficiency of OCC's statements in support of the Proposed Rule Change, which are set forth in the Notice of Filing²⁸ in addition to any other comments they may wish to submit about the Proposed Rule Change.

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 number SR-OCC-2023-007 on the subject line.

Paper Comments:

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

All submissions should refer to file number SR-OCC-2023-007. 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 (<https://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

²⁸ See OCC Notice of Filing, *supra* note 4.

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 a.m. and 3 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/Company-Information/Documents-and-Archives/By-Laws-and-Rules>.

Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection.

All submissions should refer to File Number SR-OCC-2023-007 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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

Sherry R. Haywood,
Assistant Secretary.

²⁹ 17 CFR 200.30-3(a)(31).