

concerning loss allocation in the extremely unlikely event that the failure or disruption of a non-bank investment counterparty results in a loss to OCC arising from the investment of Clearing Member Cash. The expansion of existing authority to allocate such losses attributable to a non-bank investment counterparty helps establish a more transparent and clear loss allocation process and ensure OCC's authority to take action to contain losses and continue to meet its clearance and settlement obligations. Accordingly, OCC believes the proposed changes to OCC's Rules are consistent with Rule 17Ad-22(e)(13).

### III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date the proposed change was filed with the Commission or (ii) the date any additional information requested by the Commission is received. OCC shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

OCC shall post notice on its website of proposed changes that are implemented. The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the advance notice is consistent with the Clearing Supervision 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-OCC-2021-803 on the subject line.

#### Paper Comments

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

All submissions should refer to File Number SR-OCC-2021-803. This file number should be included on the subject line if email 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 advance notice that are filed with the Commission, and all written communications relating to the advance notice 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 the filing also will be available for inspection and copying at the principal office of the self-regulatory organization.

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 Number SR-OCC-2021-803 and should be submitted on or before February 2, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>51</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>51</sup> 17 CFR 200.30-3(a)(91).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93916; File No. SR-OCC-2021-014]

### Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Proposed Rule Change Concerning the Options Clearing Corporation's Cash and Investment Management

January 6, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 23, 2021, the Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

This proposed rule change would (1) formalize OCC's policy for safeguarding cash and related investments and (2) amend OCC's Rules governing use of the Clearing Fund in the event of the failure of a bank to meet a settlement obligation with OCC to ensure such access extends to the failure of an investment counterparty with whom OCC has invested cash deposited by Clearing Members in respect of margin or Clearing Fund requirements under the conditions identified in OCC Rule 1006(c) and (f), regardless of whether the investment counterparty is a bank. The Cash and Investment Management Policy is included in confidential Exhibit 5a of File Number SR-OCC-2021-014. Proposed amendments to OCC's Rules are included in Exhibit 5b of File Number SR-OCC-2021-014. All terms with initial capitalization that are not otherwise defined herein have the same meaning as set forth in the OCC By-Laws and Rules.<sup>3</sup>

#### II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the

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

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

<sup>3</sup> OCC's By-Laws and Rules can be found on OCC's website: <https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules>.

proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

*(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

(1) Purpose

OCC is proposing to enhance its cash and investment management practices by: (1) Formalizing OCC's policy for safeguarding cash and related investments, and (2) amending OCC's Rules to ensure access to the Clearing Fund if a non-bank investment counterparty fails to return Clearing Member cash deposited in respect of margin or Clearing Fund requirements under the conditions identified in OCC Rule 1006(c) and (f).

Background

OCC's By-Laws and Rules govern the management and investment of OCC's own funds and cash deposited by Clearing Members. With respect to OCC's own funds (other than Clearing Fund deposits), Article IX, Section 1 of OCC's By-Laws provides that funds in excess of the amount needed as working capital may be invested by the Board in Government securities or such other securities or financial instruments as the Board or a Board-level committee may from time to time approve.<sup>4</sup> With respect to cash deposited by Clearing Members, OCC Rules 604(a) and 1002(c) provide that cash deposited in respect of a Clearing Member's margin requirements or Clearing Fund contributions may from time to time be partially or wholly invested by OCC for its account in Government securities.<sup>5</sup> OCC does not propose to amend these By-Laws or Rules by this proposed rule change.

OCC's investments historically have been limited to overnight transactions under deliver-versus-payment ("DVP") reverse repurchase agreements. As collateral, the investment counterparty deliveries Government securities equal to 102% of the cash invested at the time the investment is made. Such investments reduce OCC's investment risks by permitting quick liquidation with little adverse price effect and controlling the movement of OCC's assets via a custodian bank. To minimize counterparty risk, OCC restricts its potential counterparties to

financial institutions that meet certain standards of size, capital adequacy, product offering and operational capacity.

In the event of a failure or disruption of an investment counterparty that is a bank, OCC's Rules provide OCC with authority to access the Clearing Fund to address liquidity shortfalls, including shortfalls arising from the investment of Clearing Member cash in Government securities. Specifically, OCC Rule 1006(f) authorizes OCC to take possession of cash or securities deposited by Clearing Members in respect of the Clearing Fund when OCC reasonably believes it necessary to meet its liquidity needs for same-day settlement as a result of the failure of any bank to achieve daily settlement with OCC.<sup>6</sup> In the extremely unlikely event that a bank investment counterparty failed to return the cash versus return of the Government securities to unwind a transaction under a reverse repurchase agreement—*e.g.*, because of a systems disruption, operational outage, or otherwise—OCC could exercise authority under Rule 1006(f) to borrow from the Clearing Fund to the extent required for OCC to meet its settlement obligations with Clearing Members.<sup>7</sup>

In the unlikely event that any part of the borrowing under Rule 1006(f) is outstanding after 30 calendar days, or if OCC determines that some or all of the amount borrowed constituted an actual loss, OCC would charge the loss to the Clearing Fund.<sup>8</sup> In the unlikely event that OCC incurred an investment loss resulting from a bank's failure to return the invested cash because of bankruptcy, insolvency, receivership, suspension of operations or other similar event, OCC may, at its discretion, charge the loss to the Clearing Fund.<sup>9</sup> OCC may also, at its discretion, apply skin-in-the-game to a loss resulting from a borrowing or bank failure in the form of liquid net assets

<sup>6</sup> See OCC Rule 1006(f). As discussed, *infra*, this proposed rule change would amend this clause to apply when OCC reasonably believes it necessary to meet its liquidity needs for "daily settlement" as a result of the failure of any bank "to perform any obligation to the Corporation when due."

<sup>7</sup> OCC amended its Rules in 2018 to extend access to the Clearing Fund in the extraordinary event that OCC faces a liquidity need in order to complete same-day settlement for reasons other than a bank or clearing organization's bankruptcy, insolvency, receivership, suspension of operations, or any similar event. See Securities Exchange Act ("Exchange Act") Release No. 82309 (Dec. 13, 2017), 82 FR 60262 (Dec. 19, 2017) (File No. SR-OCC-2017-017).

<sup>8</sup> See OCC Rule 1006(c)(ii).

<sup>9</sup> See OCC Rule 1006(c)(i).

funded by equity<sup>10</sup> in excess of 110% of OCC's Target Capital Requirement.<sup>11</sup>

Proposed Changes

Cash and Investment Management Policy

OCC proposes to file its Cash and Investment Management Policy (or "Policy") as a proposed rule of the clearing agency within the meaning of Section 19(b)(1) of the Exchange Act<sup>12</sup> and SEC Rule 19b-4.<sup>13</sup> The Policy would include statements of purpose, applicability and scope, safeguarding standards for maintaining cash and related investments to minimize credit and liquidity risk, and guidelines for investing OCC Cash and Clearing Member Cash, as defined below.

Purpose, Applicability and Scope

The Policy would include statements of the Policy's purpose, applicability, and scope. The purpose of the Policy would be to (1) outline the safeguarding standards for cash and related investments managed by OCC to minimize credit and liquidity risk, and (2) provide guidelines for investments permitted by OCC's By-Laws and Rules. The Policy principally would apply to OCC's Treasury department ("Treasury"), which has responsibility for managing cash on behalf of OCC. The Policy's scope would include the safeguarding standards and investment activities specific to OCC's own cash ("OCC Cash") and cash from OCC's Clearing Members ("Clearing Member Cash").

The Policy would define OCC Cash to include working capital related to future operating costs, inclusive of financial resource held to meet liquidity and resiliency requirements,<sup>14</sup> proceeds from lines of credit, if any, maintained to support OCC's working capital,<sup>15</sup> the

<sup>10</sup> OCC's Capital Management Policy defines "liquid net assets funded by equity" to be the level of cash or cash equivalents, no greater than OCC's shareholders' equity, less any approved adjustments (*e.g.*, agency-related liabilities such as Section 31 fees held by OCC and the Minimum Corporate Contribution). See Exchange Act Release No. 91199 (Feb. 24, 2021), 86 FR 12237, 12241 (Mar. 2, 2021) (File No. SR-OCC-2021-003).

<sup>11</sup> See OCC Rule 1006(e)(ii).

<sup>12</sup> 15 U.S.C. 78s(b)(1).

<sup>13</sup> 17 CFR 240.19b-4.

<sup>14</sup> See Exchange Act Release No. 88029 (Jan. 24, 2020), 85 FR 5500, 5501-02 (Jan. 30, 2020) (File No. SR-OCC-2019-007) (discussing the determination of Target Capital Requirement under OCC's Capital Management Policy).

<sup>15</sup> Working capital lines of credit, if any, are separate from the syndicated credit facility and liquidity facilities that OCC maintains to cover default losses or liquidity shortfalls. See Exchange Act Release No. 88971 (May 28, 2020), 85 FR 34257 (June 3, 2020) (File No. SR-OCC-2020-804) (discussing OCC's revolving credit facility); Exchange Act Release No. 89039 (June 10, 2020), 85

<sup>4</sup> See By-Law Art. IX, Sec. 1.

<sup>5</sup> See OCC Rule 604(a); Rule 1006(c).

Minimum Corporate Contribution,<sup>16</sup> and investments made with OCC Cash. The Policy would not apply to cash held in respect of OCC's pension plan, post-retirement welfare plan, or other deferred compensation plans. The Policy would define Clearing Member Cash to include Clearing Fund cash deposits; cash deposited by Clearing Members in respect of margin requirements; cash held in liquidating settlement accounts for suspended Clearing Members,<sup>17</sup> proceeds from OCC's syndicated credit facility and liquidity facilities,<sup>18</sup> and investments made with Clearing Member Cash.<sup>19</sup> The Policy would not apply to non-cash collateral deposited by Clearing Members to satisfy margin or Clearing Fund requirements.

#### Safeguarding Standards

The Policy would address the safeguarding standards for managing OCC Cash and Clearing Member Cash, which OCC would either hold in a demand deposit or Federal Reserve Bank accounts or invest in accordance with OCC's By-Laws and investment strategy, as discussed below.

#### OCC Cash

Unless invested, OCC Cash would be held in demand deposit accounts or at a Federal Reserve Bank. Demand deposit accounts would be limited to commercial financial institutions that meet initial and ongoing standards for depository banks outlined in OCC's procedures concerning its banking relationships.

Treasury would be responsible for maintaining appropriate levels of liquidity in OCC's operating accounts to meet general business obligations and regulatory requirements. To fulfill this responsibility, the Policy would provide that OCC may maintain bank lines of credit for working capital purposes. The source of such credit line would need to meet the standards for credit facility banks outlined in OCC's procedures concerning its banking relationships.

FR 36444 (June 16, 2020) (File No. SR-OCC-2020-803) (discussing OCC's non-bank liquidity facility).

<sup>16</sup> See Exchange Act Release No. 92038 (May 27, 2021), 86 FR 29861 (Jun. 3, 2021) (File No. SR-OCC-2021-003) (establishing a persistent minimum level of OCC's own capital that it would contribute to default losses or liquidity shortfalls prior to allocating a default loss to the Clearing Fund contributions of non-defaulting Clearing Members).

<sup>17</sup> See OCC Rule 1104.

<sup>18</sup> See *supra* note 17 (citing SEC notices of no objection to advance notices concerning OCC's credit and liquidity facilities).

<sup>19</sup> See *supra* note 7 and accompanying text.

#### Clearing Member Cash

The Policy would provide that unless invested, Clearing Member Cash would be held in a demand deposit account or in accounts at a Federal Reserve Bank. With respect to commercial banks, Clearing Member Cash would only be held in financial institutions that meet the initial and ongoing standards for depository banks as provided in in OCC's procedures concerning banking relationships. The Policy would provide that Clearing Member Cash collected at OCC's settlement banks may be transferred to other depository banks, including to and from OCC's bank accounts for settlement, investment, and cash management purposes. Upon the suspension of a Clearing Member, OCC would promptly move all margin and Clearing Fund cash related to the Clearing Member into a liquidating settlement account for use in meeting the obligations of the Clearing Member, as provided under OCC's Rules.<sup>20</sup> Treasury would be responsible for ensuring accounts are appropriately funded to meet financial obligations. Interest earned on Clearing Fund cash deposits held at a Federal Reserve Bank would accrue to the benefit of Clearing Members, less a cash management fee.

The Policy would also provide that OCC would employ a bank account structure that segregates customer funds per applicable regulatory requirements<sup>21</sup> and OCC's By-Laws and Rules.<sup>22</sup> Futures customer segregated cash would be held in segregated fund accounts pursuant to applicable Commodity and Futures Trading Commission ("CFTC") regulations, including that OCC ensures that it receives proper written acknowledgment from the depository for each new segregated funds account that the account has been established to hold segregated cash generated from futures customers.<sup>23</sup> The Policy would further provide that if OCC sustains an investment loss with respect to invested margin cash OCC will not pass on the loss to a futures customer segregated account.

#### Investment Guidelines

The Policy would also provide guidelines for investments permitted by OCC's By-Laws and Rules and approved by the Board or Compensation and Performance Committee ("CPC"),

<sup>20</sup> See OCC Rule 1104.

<sup>21</sup> See 17 CFR 39.15 (requiring a derivatives clearing organization to comply with the segregation requirements section 4d of the Commodity Exchange Act).

<sup>22</sup> See OCC By-Laws Art. VI, Sec. 3(f) (providing for maintenance of segregated futures accounts).

<sup>23</sup> See 17 CFR 1.20(g)(4).

including OCC's investment strategy, investment governance principles, and guidelines for the investment of OCC Cash and Clearing Member Cash.

#### Investment Strategy

The Policy would provide that OCC's investment strategy is to preserve principal and maintain adequate liquidity. After principal and liquidity requirements are satisfied, only then would Management seek to optimize investment returns. OCC would disclose its investment strategy through its public website on a periodic basis via its qualitative disclosures to the Principles for Financial Market Infrastructure Disclosures.<sup>24</sup>

#### Investment Governance Principles

The Policy would provide that OCC may invest OCC Cash and Clearing Member Cash in permitted investments per applicable regulatory requirements, OCC's By-Laws and Rules, the investment strategy and the following governance principles. Current investment practices would be outlined in procedures maintained by OCC. Investment counterparties would need to be financial institutions or financial market utilities that meet initial and ongoing standards outlined in OCC's procedures concerning its banking relationships, which consider the financial institution's size, capital adequacy, product offering and operational capabilities. Any interest or gain received on the investments would belong to OCC except as may otherwise be provided in OCC's By-Laws, Rules or Board-approved policies.<sup>25</sup> OCC would not commingle investments of OCC Cash with investments of Clearing Member Cash.

#### Investment of OCC Cash

The Policy would provide that OCC Cash may be invested in instruments that pose minimal credit and liquidity risk pursuant to applicable regulatory requirements, OCC's By-Laws, the investment strategy, and Board or CPC approved investments. Approved investments other than in Government securities would continue to be subject to Board or CPC approval, as required under Section 1 of Article IX of OCC's By-Laws.<sup>26</sup> In addition, investment of

<sup>24</sup> See Disclosure Framework, available at <https://www.theocc.com/Risk-Management/PFMI-Disclosures>.

<sup>25</sup> As discussed, interest earned on Clearing Fund cash deposits held at a Federal Reserve Bank would accrue to the benefit of Clearing Members, less a cash management fee.

<sup>26</sup> In addition to investments in Government securities through overnight DVP transactions, the

working capital in excess of 110% of OCC's Target Capital Requirement would not be limited to overnight transactions.<sup>27</sup>

#### Investment of Clearing Member Cash

The Policy would further provide that Clearing Member Cash may be invested in Government securities by OCC in transactions that provide next-day liquidity in accordance with applicable regulatory requirements, OCC's Rules, and the investment strategy, subject to the following guiding principles. First, the Policy would provide that notwithstanding the authority to invest Clearing Fund cash under OCC Rule 1002(c), it is OCC's policy not to invest Clearing Fund cash, which is instead maintained in accounts at a Federal Reserve Bank or a commercial bank. This policy would be subject to an exception approved by the Chief Executive Officer or Chief Operating Officer in emergency situations (such as a disruption at a Federal Reserve Bank) when necessary or advisable for the protection of the Corporation or otherwise in the public interest to continue to facilitate the prompt and accurate clearance and settlement of confirmed trades or other transactions and to provide OCC's services in a safe and sound manner. Second, the Policy would provide that margin cash would only be invested in instruments that provide liquidity to OCC by the following business day. Third, the Policy would provide that OCC will implement procedures to ensure that end-of-day margin cash balances remain above the aggregate level of any Required Cash Deposits, as that term is defined in OCC's Liquidity Risk Management Framework.<sup>28</sup> The policy

Board has approved investments of OCC's own cash in U.S. government money market mutual funds.

<sup>27</sup> With respect to OCC's liquid net assets funded by equity in excess of 110% of the Target Capital Requirement, the Board has initially approved investment of such funds in Government securities through DVP transactions for terms no more than 30 days.

<sup>28</sup> The Liquidity Risk Management Framework defines "Required Cash Deposits" (sometimes referred to as minimum cash requirements or "MCR") as deposits of cash under OCC's Contingency Funding Plan that supplement OCC's Base Liquidity Resources (*i.e.*, the amount of committed liquidity resources maintained at all times by OCC to meet its minimum Cover 1 liquidity resource requirements under the applicable regulations). Under that framework, OCC may require a Clearing Member Group to post such additional cash collateral to supplement OCC's Available Liquidity Resources (*i.e.*, Base Liquidity Resources plus allowed Clearing Fund cash deposits in excess of the minimum required amount) when stressed liquidity demands for that Clearing Member Group are above established thresholds or until the settlement demand is met. See Exchange Act Release No. 89014 (June 4, 2020),

with respect to investing Required Cash Deposits would be subject to the same exception as for investment of Clearing Fund cash. Fourth, any change regarding whether to invest investment futures customer segregated funds would be approved by OCC's Chief Financial Officer in consultation with OCC's Legal and Compliance departments.<sup>29</sup>

The Policy would also describe how OCC maintains liquidity facilities for immediate access to liquidity in the event of a suspension of a Clearing Member or a failure of a bank, securities or commodity clearing organization, or investment counterparty (with respect to the investment of Clearing Member Cash) to meet an obligation owing to OCC, or in anticipation thereof, pursuant to OCC Rules 1006(c) and (f), proposed amendments to which are discussed below. The liquidity providers for these facilities would be approved and monitored according to the OCC's Third-Party Risk Management Framework and Liquidity Risk Management Framework.<sup>30</sup>

#### Amendments to OCC Rule 1006

OCC proposes to amend OCC Rule 1006, which governs its ability to access the Clearing Fund in the event of the failure (or anticipated failure) of bank to meet a settlement obligation with OCC, to extend such access to the failure of a non-bank investment counterparty to meet settlement obligations with OCC under the conditions identified in OCC Rule 1006(c) and (f). In addition, OCC proposes to restate OCC Rule 1006(f) for clarity.

To ensure that OCC may access the Clearing Fund in the event of a failure or disruption of a non-bank counterparty with whom OCC has invested Clearing Member Cash, OCC would amend OCC Rule 1006(f) to include "investment counterparty" to the list of counterparties—currently, any bank or securities or commodities clearing organization—whose failure or disruption may result in a borrowing under Rule 1006(f). Similarly, OCC would also amend OCC Rule 1006(a) and (c) to add the same phrase to the list

85 FR 35446, 35449 (June 10, 2020) (File No. SR–OCC–2020–003).

<sup>29</sup> Like Clearing Fund cash, OCC does not currently invest futures customer segregated funds. If OCC determined to invest such funds, such investments would be subject to CFTC regulations regarding a derivatives clearing organization's investment of futures customer funds. See 17 CFR 1.25.

<sup>30</sup> See Exchange Act Release No. 90797 (Dec. 23, 2020), 85 FR 86592 (Dec. 30, 2020) (File No. SR–OCC–2020–014) (approving OCC's framework for identifying, measuring, monitoring, and managing OCC's exposures to its counterparties); Exchange Act Release No. 89014, 85 FR 35446 (approving OCC's approach to managing liquidity risk).

of counterparties whose failure resulting from bankruptcy, insolvency, receivership, suspension of operations, or any similar event may result in allocation of losses to the Clearing Fund. Rule 1006(c) and (f) would be further amended to provide that failure of an investment counterparty under those paragraphs would be limited to a failure with respect to Clearing Member Cash (*i.e.*, cash invested under Rule 604(a) or Rule 1002(c)).<sup>31</sup> Any investment loss resulting from investment of OCC Cash would be treated as an operational loss that would be addressed under OCC's Capital Management Policy, rather than a loss that would be allocated to the Clearing Fund.<sup>32</sup>

OCC would also amend the condition that triggers borrowing authority under Rule 1006(f)—currently clause (iii) of the first sentence of Rule 1006(f)—which would be renumbered as Rule 1006(f)(1)(C). That condition would be amended to apply when the Corporation reasonably believes it necessary to borrow to meet its liquidity needs for "daily settlement" rather than "same-day settlement," as in the current text. OCC may reasonably believe that a disruption at a bank, securities or commodities clearing organization, or investment counterparty could last multiple days, resulting in liquidity needs for daily settlement over more than one day. This amendment would ensure that OCC has authority to initiate a borrowing for the amount OCC believes necessary to meet its liquidity needs over the timeframe OCC believes the disruption will affect OCC's ability to meet daily settlement requirements with Clearing Members, rather than only that amount that OCC believes it needs on a day-by-day basis.

OCC would further amend the condition in Rule 1006(f)(1)(C) to apply when OCC reasonably believes such a liquidity need will arise because of one of the identified counterparty's failure "to perform any obligation to the Corporation when due," rather than such a counterparty's failure "to achieve daily settlement." This change aligns with the condition for allocation of losses under Rule 1006(c) and eliminates any ambiguity that might arise concerning the settlement obligations to which the current Rule refers. As under the current Rule, use of funds obtained through such a

<sup>31</sup> The same limitation would apply to Rule 1006(a), which incorporates the reasons specified in Rule 1006(c) by reference.

<sup>32</sup> See Exchange Act Release No. 88029, 85 FR at 5502–03 (discussing OCC's plan for replenishing its capital in the event that shareholders' equity falls below certain thresholds).

borrowing would continue to be limited to the purposes described in Rule 1006(f)(1)(C), as amended, *i.e.*, to meet OCC's liquidity needs for daily settlement with Clearing Members.

In addition to the substantive changes discussed above, OCC would also restate Rule 1006(f) for clarity. The current paragraph would be divided into four subparagraphs with courtesy headings: (1) *Conditions*; (2) *Uses*; (3) *Term*; *Clearing Fund Charge*; and (4) *Substitution Requests*. The conditions in Rule 1006(f)(1) would begin with the first sentence of current Rule 1006(f), less the conjoined clause beginning with "and use such assets," the substance of which would be moved to paragraph (f)(2). The remaining clause before the conjunction would be amended to describe OCC's investment of Clearing Fund cash contributions in the active voice. The three conditions for a borrowing identified in Rule 1006(f), currently numbered (i) through (iii), would then follow after the conjunction as items (A) through (C). Item (A) would be further amended to remove legalese and state the condition more plainly. Item (C) would be amended substantively as discussed above.

The prescribed uses for the borrowed funds described in several places throughout current Rule 1006(f) would be aggregated in Rule 1006(f)(2). As currently found in the conjoined clause in the first sentence of current Rule 1006(f), Rule 1006(f)(2)(A) would provide that OCC may use funds it takes possession of under Rule 1006(f) to (i) meet obligations, losses or liquidity needs; or (ii) borrow or otherwise obtain funds through any means determined to be reasonable at the discretion of the Chairman, Chief Executive Officer or the Chief Operating Officer (including, without limitation, pledging such assets as security for loans and/or using such assets to effect repurchase, securities lending or other transactions). Proposed Rule 1006(f)(ii) would also be restated to remove a gendered pronoun. Rule 1006(f)(2)(B) would describe the limitations on use of funds borrowed under the renumbered conditions in Rule 1006(f)(1)(A) and (C).

Rule 1006(f)(3) would contain the term for a borrowing, as well as the conditions that would trigger a loss chargeable to the Clearing Fund. The 30-day period before which OCC would be obligated to charge a borrowed amount as a loss to the Clearing Fund would be located at Rule 1006(f)(3)(A), with certain non-substantive edits to the text. The conditions that would trigger the loss allocation to the Clearing Fund would be located at Rule 1006(f)(3)(B) and would be restated to move the

lengthy conditions after the main clause, among other non-substantive revisions.

Finally, Rule 1006(f)(4) would relocate OCC's authority to refuse Clearing Member substitution requests regarding securities contributed to the Clearing Fund that the Corporation has taken possession of under Rule 1006(f). In addition to relocating that provision to the end of Rule 1006(f), this proposed rule change would restate that provision to reflect the reorganization of Rule 1006(f).

## (2) Statutory Basis

Section 17A(b)(3)(F) of the Exchange Act,<sup>33</sup> requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities 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 perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, to protect investors and the public interest. For the reasons discussed below, OCC believes the proposed rule change is consistent with Section 17A(b)(3)(F)<sup>34</sup> of the Exchange Act and Rule 17Ad-22(e)(7)(viii),<sup>35</sup> Rule 17Ad-22(e)(13),<sup>36</sup> and Rule 17Ad-22(e)(16)<sup>37</sup> thereunder.

## Consistency With Section 17A(b)(3)(F) of the Exchange Act

The Cash and Investment Management Policy is designed to safeguard cash and related investments within OCC's custody or control. The Policy applies to, among other things, cash deposited by Clearing Members in respect of margin and Clearing Fund requirements, any Government securities in which OCC invests such cash, and the Minimum Corporate Contribution, each of which are liquid resources available to facilitate settlement and to cover potential losses in the event of a Clearing Member default. The Policy also extends to OCC's own cash, including cash OCC maintains to cover potential general business losses so that OCC can continue operations and services as a going concern if those losses materialize, in accordance with OCC's Capital Management Policy. By providing safeguarding standards for

managing such cash and related investments, the Policy would help ensure those resources will be available to facilitate settlement, cover potential default losses, or cover potential general business losses, as applicable. Therefore, OCC believes the Policy is designed to promote the prompt and accurate clearance and settlement of securities 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, and, in general, to protect investors and the public interest, consistent with Section 17A(b)(3)(F) of the Exchange Act.<sup>38</sup>

The proposed rule change is also designed to ensure that OCC can continue to promptly settle the securities and derivatives transactions it clears by enhancing the existing tools OCC has to address potential liquidity shortfalls. Specifically, the proposed rule change would expand the existing borrowing authority in OCC's By-Laws to authorize borrowing in the extraordinary event that OCC faces a liquidity need in order to complete daily settlement with its Clearing Members resulting from the failure or disruption of an investment counterparty with whom OCC has invested Clearing Member Cash that is not a bank.

It is conceivable, though extremely unlikely, that an investment counterparty may fail to return Clearing Member Cash that OCC has invested in Government securities with the counterparty in a DVP transaction as a result of a disruption or failure at that investment counterparty. The proposed rule change would enable OCC to borrow against the Clearing Fund in this scenario in order to avoid disrupting OCC's ordinary settlement cycle. In the extremely unlikely event that OCC incurs a loss resulting from the investment of Clearing Member Cash, OCC would retain authority to allocate such loss to the Clearing Fund, at OCC's discretion. Accordingly, OCC believes the proposed rule change is designed to promote the prompt and accurate clearance and settlement of securities transactions, in accordance with the requirements of Section 17A(b)(3)(F) of the Exchange Act.<sup>39</sup>

## Consistency With Rule 17Ad-22(e)(16)

Rule 17Ad-22(e)(16) under the Exchange Act requires, in part, that OCC establish, implement, maintain and enforce written policies and procedures reasonably designed to safeguard OCC's

<sup>33</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>34</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>35</sup> 17 CFR 240.17Ad-22(e)(7)(viii).

<sup>36</sup> 17 CFR 240.17Ad-22(e)(13).

<sup>37</sup> 17 CFR 240.17Ad-22(e)(16).

<sup>38</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>39</sup> *Id.*

own and its participants' assets, minimize the risk of loss and delay in access to these assets, and invest such assets in instruments with minimal credit, market, and liquidity risks.<sup>40</sup> As discussed above, the Policy outlines safeguarding standards for cash and related investments intended to minimize credit and liquidity risks. In addition, the Policy sets forth OCC's conservative investment strategy, according to which OCC's primary objective is to preserve principal and maintain adequate liquidity. The Policy also requires cash and related investments to be maintained with counterparties that have been initially approved and routinely monitored in accordance with OCC's Third Party Risk Management Policy and procedures governing banking relationships. Accordingly, OCC believes that the Policy is consistent with Rule 17Ad-22(e)(16).

Consistency With Rule 17Ad-22(e)(7)(viii)

Additionally, Rule 17Ad-22(e)(7)(viii) requires that OCC address foreseeable liquidity shortfalls that would not be covered by OCC's liquid resources and seek to avoid unwinding, revoking, or delaying the settlement of payment obligations.<sup>41</sup> As stated above, OCC believes that it could be foreseeable, though extremely unlikely, that an investment counterparty that is not a bank may fail to return Clearing Member Cash as the result of the investment counterparty's disruption or failure. An alternative available to OCC for addressing uncovered liquidity shortfalls would be to exercise authority under Rule 505 to extend the settlement window to the close of Fedwire.<sup>42</sup> The proposed rule change would improve OCC's ability to address such situations by expanding OCC's borrowing authority to enable OCC to borrow against the Clearing Fund to address a failure or disruption at a non-bank investment counterparty rather than disrupting its ordinary settlement cycle. Accordingly, OCC believes that proposed changes to OCC Rules are consistent with Rule 17Ad-22(e)(7)(viii).

Consistency With Rule 17Ad-22(e)(13)

Finally, Rule 17Ad-22(e)(13) requires, in part, that OCC establish, implement, maintain and enforce written policies and procedures reasonably designed to ensure OCC has the authority to take timely action to contain losses and

liquidity demands and continue to meet its obligations.<sup>43</sup> As described above, this proposal would amend OCC's Rules concerning loss allocation in the extremely unlikely event that the failure or disruption of a non-bank investment counterparty results in a loss to OCC arising from the investment of Clearing Member Cash. The expansion of existing authority to allocate such losses attributable to a non-bank investment counterparty helps establish a more transparent and clear loss allocation process that ensures OCC's authority to take action to contain losses and continue to meet its clearance and settlement obligations. Accordingly, OCC believes the proposed changes to OCC's Rules are consistent with Rule 17Ad-22(e)(13).

*(B) Clearing Agency's Statement on Burden on Competition*

Section 17A(b)(3)(I) of the Exchange Act<sup>44</sup> requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. OCC does not believe the proposed rule change would have any impact or impose any burden on competition. The primary purpose of the proposed rule change is to formalize OCC's Cash and Investment Management Policy and enhance OCC's access to the Clearing Fund by expanding the existing authority concerning bank failures to also apply in the case of failures by other investment counterparties. The proposed rule change would not affect Clearing Members' access to OCC's services or disadvantage or favor any particular user in relationship to another user. As such, OCC believes that the proposed changes would not have any impact or impose any burden on competition.

*(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments on the proposed rule change were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may

designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

OCC shall post notice on its website of proposed changes that are implemented. The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

**IV. Solicitation of Comments**

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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-OCC-2021-014 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-2021-014. This file number should be included on the subject line if email 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

<sup>40</sup> 17 CFR 240.17Ad-22(e)(16).

<sup>41</sup> 17 CFR 240.17Ad-22(e)(7)(viii).

<sup>42</sup> See OCC Rule 505 (Extension of Settlements).

<sup>43</sup> 17 CFR 240.17Ad-22(e)(13).

<sup>44</sup> 15 U.S.C. 78q-1(b)(3)(I).

<https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules>.

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 Number SR–OCC–2021–014 and should be submitted on or before February 2, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>45</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93917; File No. SR–NYSEAMER–2021–49]

### Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Expiration Date of the Temporary Amendments to Rules 9261 and 9830

January 6, 2022.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b–4 thereunder,<sup>3</sup> notice is hereby given that on December 27, 2021, NYSE American LLC (“NYSE American” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes extending the expiration date of the temporary amendments to Rules 9261 and 9830 as set forth in SR–NYSEAMER–2020–69 from December 31, 2021 to March 31, 2022, in conformity with recent changes by the Financial Industry Regulatory Authority, Inc. (“FINRA”). The

proposed rule change would not make any changes to the text of NYSE American Rules 9261 and 9830. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

##### A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes extending the expiration date of the temporary amendments as set forth in SR–NYSEAMER–2020–69<sup>4</sup> to Rules 9261 (Evidence and Procedure in Hearing) and 9830 (Hearing) from December 31, 2021 to March 31, 2022, to harmonize with recent changes by FINRA to extend the expiration date of the temporary amendments to its Rules 9261 and 9830. SR–NYSEAMER–2020–69 temporarily granted to the Chief or Deputy Chief Hearing Officer the authority to order that hearings be conducted by video conference if warranted by public health risks posed by in-person hearings during the ongoing COVID–19 pandemic. The proposed rule change would not make any changes to the text of Exchange Rules 9261 and 9830.<sup>5</sup>

###### Background

In 2016, NYSE American (then known as NYSE MKT LLC) adopted disciplinary rules that are, with certain exceptions, substantially the same as the Rule 8000 Series and Rule 9000 Series

of FINRA and its affiliate the New York Stock Exchange LLC (“NYSE”), and which set forth rules for conducting investigations and enforcement actions.<sup>6</sup> The NYSE American disciplinary rules were implemented on April 15, 2016.<sup>7</sup>

In adopting disciplinary rules modeled on FINRA’s rules, NYSE American adopted the hearing and evidentiary processes set forth in Rule 9261 and in Rule 9830 for hearings in matters involving temporary and permanent cease and desist orders under the Rule 9800 Series. As adopted, the text of Rule 9261 and Rule 9830 are substantially the same as the FINRA rules with certain modifications.<sup>8</sup>

In response to the COVID–19 global health crisis and the corresponding need to restrict in-person activities, on August 31, 2020, FINRA filed with the Commission a proposed rule change for immediate effectiveness, SR–FINRA–2020–027, which allowed FINRA’s Office of Hearing Officers (“OHO”) to conduct hearings, on a temporary basis, by video conference, if warranted by the current COVID–19-related public health risks posed by an in-person hearing. Among the rules FINRA amended were Rules 9261 and 9830.<sup>9</sup>

Given that FINRA and OHO administers disciplinary hearings on the Exchange’s behalf, and that the public health concerns addressed by FINRA’s amendments apply equally to Exchange disciplinary hearings, on September 15, 2020, the Exchange filed to temporarily amend Rule 9261 and Rule 9830 to permit FINRA to conduct virtual hearings on its behalf.<sup>10</sup> In December 2020, FINRA filed a proposed rule change, SR–FINRA–2020–042, to extend the expiration date of the temporary amendments in SR–FINRA–2020–027 from December 31, 2020, to April 30, 2021.<sup>11</sup> On December 22, 2020, the Exchange similarly filed to extend the temporary amendments to Rule 9261 and Rule 9830 to April 30, 2021.<sup>12</sup> On April 1, 2021, FINRA filed a proposed rule change, SR–FINRA–2021–006, to extend the expiration date of the

<sup>6</sup> See Securities Exchange Act Release Nos. 77241 (February 26, 2016), 81 FR 11311 (March 3, 2016) (SR–NYSEMKT–2016–30) (“2016 Notice”).

<sup>7</sup> See NYSE MKT Information Memorandum 16–02 (March 14, 2016).

<sup>8</sup> See 2016 Notice, 81 FR at 11327 & 11332.

<sup>9</sup> See Securities Exchange Act Release No. 89737 (September 2, 2020), 85 FR 55712 (September 9, 2020) (SR–FINRA–2020–027) (“SR–FINRA–2020–027”).

<sup>10</sup> See note 4, *supra*.

<sup>11</sup> See Securities Exchange Act Release No. 90619 (December 9, 2020), 85 FR 81250 (December 15, 2020) (SR–FINRA–2020–042).

<sup>12</sup> See Securities Exchange Act Release No. 90823 (December 30, 2020), 86 FR 650 (January 6, 2021) (SR–NYSEAMER–2020–88).

<sup>45</sup> 17 CFR 200.30–3(a)(12).

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b–4.

<sup>4</sup> See Securities Exchange Act Release No. 90085 (October 2, 2020), 85 FR 63603 (October 8, 2020) (SR–NYSEAMER–2020–69) (“SR–NYSEAMER–2020–69”).

<sup>5</sup> The Exchange may submit a separate rule filing to extend the expiration date of the proposed extension beyond March 31, 2022 if the Exchange requires additional temporary relief from the rule requirements identified in SR–NYSEAMER–2020–69. The amended NYSE American rules will revert back to their original state at the conclusion of the temporary relief period and any extension thereof.