## 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.* Please include File Number SR–NYSEArca–2020–07 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–NYSEArca–2020–07. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. 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–NYSEArca–2020–07 and should be submitted on or before February 20, 2020.

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

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–01645 Filed 1–29–20; 8:45 am]

**BILLING CODE 8011–01–P**

[29] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–88028; File No. SR–NASDAQ–2019–091]**

### Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Adopt a New Rule Permitting Nasdaq To Halt Trading in a Security and Request Information From the Company Regarding the Number of Unrestricted Publicly Held Shares in Certain Circumstances

January 24, 2020.

On November 22, 2019, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt a new rule permitting Nasdaq to halt trading in a security and request information from the company regarding the number of unrestricted publicly held shares when Nasdaq observes unusual trading characteristics in a security or a company announces an event that may cause a contraction in the number of unrestricted publicly held shares. The proposed rule change was published for comment in the **Federal Register** on December 12, 2019.[3] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is January 26, 2020. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates March 11, 2020 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NASDAQ–2019–091).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–01642 Filed 1–29–20; 8:45 am]

**BILLING CODE 8011–01–P**

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 87677 (Dec. 6, 2019), 84 FR 67974.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–88029; File No. SR–OCC–2019–007]**

### Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change, as Modified by Partial Amendment No. 1, Concerning a Proposed Capital Management Policy That Would Support The Options Clearing Corporation's Function as a Systemically Important Financial Market Utility

January 24, 2020.

## I. Introduction

On August 9, 2019, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2019–007 (''Proposed Rule Change'') pursuant to Section 19(b) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4[2] thereunder to adopt a policy concerning capital management at OCC, which includes OCC's plan to replenish its capital in the event it falls close to or below target capital levels.[3] The Proposed Rule Change was published for public comment in the **Federal Register** on

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Notice of Filing *infra* note 4, at 84 FR 44952.

August 27, 2019.[4] The Commission received comments regarding the Proposed Rule Change.[5] On September 11, 2019, OCC filed a partial amendment (''Partial Amendment No. 1'') to modify the Proposed Rule Change.[6] On October 8, 2019, the Commission designated a longer period of time for Commission action on the Proposed Rule Change.[7] Notice of Partial Amendment No. 1 and of the designation of a longer period of time was published in the **Federal Register** on October 15, 2019.[8] On November 22, 2019, the Commission issued an order to institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.[9] This order approves the Proposed Rule Change.

## II. Background

One reason for the Proposed Rule Change is a specific Commission requirement for covered clearing agencies such as OCC. Rule 17Ad–22(e)(15) under the Exchange Act requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to identify, monitor, and manage the covered clearing agency's general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that the covered clearing agency can continue operations and services as a going concern if those losses materialize, including by taking the actions described in Rules 17Ad–22(e)(15)(i)–(iii) under the Exchange Act.[10] In adopting Rule 17Ad–22(e), which includes Rule 17Ad–22(e)(15), the Commission noted that ''each registered clearing agency has different organizational and operating structures and clears distinct products that warrant a tailored approach to governance and risk management, respectively.'' [11] The Commission also noted its belief that Rule 17Ad–22(e) ''achieves the appropriate balance between imposing new requirements on covered clearing agencies and allowing each covered clearing agency, subject to its obligations and responsibilities as an SRO under the Exchange Act, to design its policies and procedures pursuant to Rule 17Ad–22(e).''[12]

Rule 17Ad–22(e)(15) was adopted in 2016 as part of the Covered Clearing Agency Standards, with a compliance date of April 11, 2017.[13] Anticipating the need to come into compliance with new Rule 17Ad–22(e)(15), in January 2015, OCC filed with the Commission a proposed rule change regarding a plan to increase OCC's capitalization (the ''Capital Plan'').[14] The Capital Plan was approved by the Commission in February 2016,[15] and subsequently implemented by OCC. However, the approval order was vacated by the Court of Appeals for the D.C. Circuit and remanded to the Commission. On February 13, 2019, the Commission issued an order disapproving the Capital Plan on remand.[16] In order to come back into compliance with Rule 17Ad–22(e)(15), among other things, OCC now proposes changes to adopt, as part of its rules, a new policy concerning capital management at OCC (''Capital Management Policy''). Specifically, the proposed Capital Management Policy would (i) describe how OCC would determine the amount of liquid net assets funded by equity (''LNAFBE'') necessary to cover OCC's potential general business losses; (ii) require OCC to hold a minimum amount of shareholders equity (''Equity'') sufficient to support the amount of LNAFBE determined to be necessary; [17] and (iii) establish a plan for replenishing OCC's capital in the event that Equity were to fall below certain thresholds. OCC also proposes to revise its existing rules to support the terms of the proposed Capital Management policy.

### *A. Determining Capital Requirements*

As noted above, OCC proposes to adopt rules describing the determination of the LNAFBE necessary to cover potential general business losses. As proposed, LNAFBE would be a subset of OCC's overall Equity—cash and cash equivalents, less any approved adjustments—and therefore, could not, by definition, exceed Equity. OCC proposes to set a ''Target Capital Requirement,'' which would be based on two components: (i) The amount of LNAFBE determined by OCC to be necessary to ensure compliance with OCC's regulatory obligations, including Rule 17Ad–22(e)(15) under the Exchange Act; [18] and (ii) any additional amounts determined to be necessary and appropriate for capital expenditures approved by OCC's Board.[19]

With respect to the first component of the Target Capital Requirement, to ensure that it is set at a level sufficient to ensure compliance with OCC's regulatory obligations, OCC proposes to set its Target Capital Requirement, at a minimum, equal to the greater of three amounts: (i) An amount equal to six-months of OCC's current operating expenses; (ii) the amount determined by OCC's Board to be sufficient to ensure a recovery or orderly wind-down of critical operations and services (''RWD Amount''); [20] or (iii) the amount determined by OCC's Board to be sufficient for OCC to continue

[4] Securities Exchange Act Release No. 86725 (Aug. 21, 2019), 84 FR 44952 (Aug. 27, 2019) (SR–OCC–2019–007) (''Notice of Filing''). OCC also filed a related advance notice (SR–OCC–2019–805) (''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) and 17 CFR 240.19b–4, respectively. The Advance Notice was published in the **Federal Register** on September 11, 2019. Securities Exchange Act Release No. 86888 (Sep. 5, 2019), 84 FR 47990 (Sep. 11, 2019) (SR–OCC–2019–805).

[5] Comments are available at *https://www.sec.gov/comments/sr-occ-2019-007/srocc2019007.htm*.

[6] *See* Notice of Extension *infra* note 8, at 84 FR 55189. In Partial Amendment No. 1, OCC appended an Exhibit 2 to the materials filed on August 9, 2019 regarding File No. SR–OCC–2019–007. The appended Exhibit 2 consists of communications from OCC concerning the proposal dated after OCC filed the proposal on August 9, 2019 and does not change the purpose of or basis for the Proposed Rule Change. References to the Proposed Rule Change from this point forward refer to the Proposed Rule Change, as amended by Partial Amendment No. 1.

[7] *See* Notice of Extension *infra* note 8, at 84 FR 55189.

[8] Securities Exchange Act Release No. 87246 (Oct. 8, 2019), 84 FR 55189 (Oct. 15, 2019) (SR–OCC–2019–007) (''Notice of Extension'').

[9] Securities Exchange Act Release No. 87603 (Nov. 22, 2019), 84 FR 65858 (Nov. 29, 2019) (SR–OCC–2019–007).

[10] 17 CFR 240.17Ad–22(e)(15).

[11] Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786, 70797 (October 13, 2016) (S7–03–14) (''Covered Clearing Agency Standards'').

[12] *Id.*

[13] *See* Covered Clearing Agency Standards, 81 FR at 70786.

[14] *See* Securities Exchange Act Release No. 74136 (Jan. 26, 2015, 80 FR 5171 (Jan. 30, 2015) (File No. SR–OCC–2015–02).

[15] Securities Exchange Act Release No. 7112 (Feb. 11, 2016), 81 FR 8294 (Feb. 18, 2016) (File No. SR–OCC–2015–02).

[16] *See* Securities Exchange Act Release No. 85121 (Feb. 13, 2019), 84 FR 5157 (Feb. 20, 2019) (File No. SR–OCC–2015–02).

[17] LNAFBE would mean cash and cash equivalents to the extent that such cash and cash equivalents do not exceed Equity.

[18] 17 CFR 240.17Ad–22(e)(15).

[19] In setting the Target Capital Requirement, OCC would also consider, but not be bound by, its projected rolling twelve-months' operating expenses pursuant to OCC's interpretation of Commodity Exchange Act Rule 39.11(a)(2). 17 CFR 39.11(a)(2). Nothing in this Order constitutes an interpretation of Rule 39.11(a)(2) under the Commodity Exchange Act by the Commission or an endorsement of OCC's interpretation of Rule 39.11(a)(2).

[20] Under the proposal, OCC's Board would approve the RWD Amount annually at a level designed to cover the cost to maintain OCC's critical services over the recovery or wind-down period. Identification of OCC's critical services and the length of time necessary to recover or wind-down is covered in OCC's Recovery and Wind-Down Plan. *See* Securities Exchange Act Release No. 83918 (Aug. 23, 2018), 83 FR 44091 (Aug. 29, 2018).

operations and services as a going concern if general business losses materialize (''Potential Loss Amount'').[21] OCC believes that a minimum Target Capital Requirement sized to cover at least these three amounts would address OCC's obligations under Exchange Act Rule 17Ad–22(e)(15).[22] With respect to the second component of the Target Capital Requirement, the proposal would authorize OCC's Board to increase the Target Capital Requirement by an amount to be retained for capital expenditures.[23] OCC's Board would be responsible for reviewing and approving the Target Capital Requirement annually.

*B. Maintaining Capital*

As noted above, OCC proposes to adopt rules that would require it to hold the minimum amount of Equity necessary to cover the Target Capital Requirement. Specifically, OCC proposes to adopt rules pertaining to the monitoring and management of OCC's Equity. Under the proposed rules, OCC's senior management would be responsible for reviewing analyses, including projections of future volume, expenses, cash flows, capital needs and other factors, to help ensure adequate financial resources are available to meet general business obligations. Such analyses would also include a monthly review of whether OCC's Equity falls close to or below the Target Capital Requirement. Under the proposal, OCC would view Equity less than 110 percent of the Target Capital Requirement as falling close to the Target Capital Requirement.[24] OCC would refer to a breach of this 110 percent threshold as an ''Early Warning.'' Under the proposed rules, OCC's senior management would be obligated to notify OCC's Board promptly if Equity were to fall below the Early Warning threshold and to recommend to the Board whether to implement a fee increase in an amount that the Board determines necessary and appropriate to raise additional Equity.

Under the proposal, OCC's senior management would also, on a quarterly basis, review OCC's schedule of fees in consideration of projected operating expenses, projected volumes, anticipated cash flows, and capital needs. Based on its review, OCC's senior management would recommend to OCC's Board Compensation and Performance Committee whether to issue a fee increase, decrease or fee waiver. Additionally, if Equity were to exceed 110 percent of the Target Capital Requirement plus an amount of excess Equity approved for capital expenditures, OCC's Board could reduce the cost of clearing by lowering fees, declaring a fee holiday, or issuing refunds.

OCC stated that resources held to meet OCC's Target Capital Requirement would be in addition to OCC's resources to cover participant defaults.[25] OCC proposes, however, to mitigate losses arising out of a Clearing Member default with OCC's own excess capital. Specifically, OCC proposes to offset default losses remaining after the application of a defaulted Clearing Member's margin deposits and Clearing Fund contributions with OCC's capital in excess of 110 percent of the Target Capital Requirement at the time of the default. OCC also proposes to charge losses remaining after the application of OCC's excess capital to OCC senior management's deferred compensation as well as non-defaulting Clearing Members.[26] The Commission understands these aspects of the proposal to constitute the first instance where a covered clearing agency is seeking Commission consideration of a ''skin-in-the-game'' component to financial risk management for central clearing. A skin-in-the-game component to financial risk management entails a covered clearing agency (in this instance, OCC), upon the occurrence of a default or series of defaults and application of all available assets of the defaulting participant(s), choosing to apply its own capital contribution to the relevant clearing or guaranty fund in full to satisfy any remaining losses prior to the application of any (a) contributions by non-defaulting members to the clearing or guaranty fund, or (b) assessments that the covered clearing agency require non-defaulting participants to contribute following the exhaustion of such participant's funded contributions to the relevant clearing or guaranty fund.[27]

*C. Replenishing Capital*

OCC proposes to establish a plan for replenishing its capital in the event that Equity were to fall below certain thresholds (''Replenishment Plan''). As described above, OCC proposes to establish an Early Warning threshold to define when OCC's Equity falls close enough to the Target Capital Requirement to require action. OCC also proposes to establish two ''Trigger Event'' thresholds to identify (i) whether OCC's Equity were to fall below the Target Capital Requirement; and (ii) the appropriate response based on the severity and speed of capital deterioration. Further, the proposed Capital Management Policy would require that, on an annual basis, OCC's management recommend that the Board approve or, as appropriate, modify the Replenishment Plan, and that the Board review and, as appropriate, approve Management's recommendation.

Under the proposed rules, a Trigger Event would occur if OCC's Equity were to remain below 100 percent of the Target Capital Requirement for a period of 90 consecutive calendar days (referred to herein as the ''Moderate Trigger Event''). OCC believes that the failure of a fee increase resulting from an Early Warning to increase OCC's Equity above the Target Capital Requirement within 90 days would indicate that corrective action in the form of a fee increase would be insufficient.[28] Under the proposed rules, a Trigger Event would also occur if OCC's Equity were to fall below 90 percent of the Target Capital Requirement at any time (referred to herein as the ''Severe Trigger Event''). OCC believes that a Severe Trigger Event would be a sign that corrective action more significant and with a more immediate impact than increasing fees should be taken to increase OCC's Equity.[29]

As noted above, OCC's Board would be authorized to approve fee increases to address the deterioration of OCC's capital over time. To address the more acute capital replenishment needs posed by the Trigger Events, OCC proposes to authorize the use of two

[21] Under the proposal, OCC's Board would set the Potential Loss Amount by analyzing and aggregating potential losses from individual operational risk scenarios, aggregating the loss events, and conducting loss modeling at or above the 99 percent confidence level.

[22] *See* Notice of Filing, 84 FR at 44945.

[23] Under the proposal, OCC's Board could determine, in the alternative, to fund capital expenditures out of funds in excess of the Target Capital Requirement. OCC stated that, in making such a determination, its Board would consider factors including, but not limited to, the amount of funding required, the amount of Equity proposed to be retained, the potential impact of the investment on OCC's operations, and the duration of time over which funds would be accumulated. *See id.*

[24] OCC stated that 10 percent of the Target Capital Requirement represents approximately two months of earnings, and that OCC believes that a two-month window would provide OCC's senior management and Board sufficient time to respond to a deterioration of OCC's capital. *See* Notice of Filing, 84 FR at 44946.

[25] *See* Notice of Filing, 84 FR at 44950.

[26] Such losses would be charged on a pro rata basis to (a) non-defaulting Clearing Members' Clearing Fund contributions, and (b) the aggregate value of the EDCP Unvested Balance (defined below).

[27] *See* Covered Clearing Agency Standards, 81 FR at 70806.

[28] *See* Notice of Filing, 84 FR at 44946–47.

[29] *See* Notice of Filing, 84 FR at 44946.

additional resources: (i) Funds held under The Options Clearing Corporation Executive Deferred Compensation Plan Trust (''EDCP''); [30] and (ii) funds obtained by levying a special fee on Clearing Members.

In response to a Trigger Event, OCC would be required to replenish its capital first through the contribution of the EDCP Unvested Balance. The amount of the EDCP Unvested Balance contributed would be the lesser of (i) the entire EDCP Unvested Balance or (ii) the amount necessary to raise OCC's Equity above 110 percent of the Target Capital Requirement. If a contribution of the entire EDCP Unvested balance were necessary, OCC would be required to reevaluate its Equity vis-à-vis the Target Capital Requirement to determine whether further action would be required following such a contribution.

The proposed rules would require that OCC take further action if, after contributing the entire EDCP Unvested Balance, either: (i) Equity were to remain above 90 percent, but below 100 percent, of the Target Capital Requirement for an additional 90-day period; [31] or (ii) Equity were below 90 percent of the Target Capital Requirement. Under the proposal, if OCC were to determine that further action would be necessary to replenish its capital, OCC would be required to levy a special fee on its Clearing Members (''Operational Loss Fee''), which would be payable within five business days of OCC providing notice to the Clearing Members. Accordingly, OCC proposes to amend its schedule of fees to describe the maximum Operational Loss Fee that it could charge Clearing Members. The maximum Operational Loss Fee would be sized to provide OCC with the RWD Amount after any applicable taxes (''Adjusted RWD Amount'').[32] Under the proposal, OCC would be authorized to charge Clearing Members, collectively, the lesser of (i) the maximum Operational Loss Fee or (ii) the amount necessary to raise OCC's Equity above 110 percent of the Target Capital Requirement. Under the proposal, OCC would allocate the Operational Loss Fee equally among the Clearing Members. OCC believes that charging the Operational Loss Fee in equal shares is preferable to other potential allocation methods because it would equally mutualize the risk of operational loss among the firms that use OCC's services.[33]

The proposed rules would permit OCC to charge amounts only up to the maximum Operational Loss Fee. If, after charging some amount less than the maximum Operational Loss Fee, OCC were to issue clearing fee refunds to manage excess capital, OCC would issue such refunds in equal shares until the amount of the Operational Loss Fee charged to each Clearing Member had been fully refunded. If OCC were to charge some amount less than the maximum Operational Loss Fee, then the proposed rules would allow OCC to charge another Operational Loss Fee in the future, provided that the sum of all Operational Loss Fees, less amounts refunded, could not exceed the maximum Operational Loss Fee. In the event that OCC were to charge the maximum Operational Loss Fee, OCC would then be required to convene its Board to develop a new replenishment plan.

## III. Statutory Standards

Section 19(b)(2)(C) of the Exchange Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to such organization.[34] The Commission addresses in its review of the Proposed Rule Change the following relevant provisions of the Exchange Act and the rules and regulations thereunder applicable to registered clearing agencies:

- Section 17A(b)(3)(F) of the Exchange Act requires, in part, that the rules of a registered 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 OCC or for which it is responsible, and to protect investors and the public interest.[35]
- Section 17A(b)(3)(D) of the Exchange Act requires, in part, that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.[36]
- Rule 17Ad–22(e)(2) under the Exchange Act requires, in part, that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that meet a number of criteria.[37]
- Rule 17Ad–22(e)(15) under the Exchange Act requires, in part, that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to identify, monitor, and manage the covered clearing agency's general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that the covered clearing agency can continue operations and services as a going concern if those losses materialize, including by taking the actions described in Rules 17Ad–22(e)(15)(i)–(iii) under the Exchange Act.[38]

## IV. Discussion and Commission Findings

After considering the entire record, and for the reasons discussed below, the Commission finds the proposal is consistent with Sections 17A(b)(3)(F) and 17A(b)(3)(D) of the Exchange Act,[39] as well as Rules 17Ad–22(e)(2) and 17Ad–22(e)(15) thereunder.[40]

Before addressing the relevant portions of the Exchange Act and the rules and regulations thereunder, however, we address a comment submitted by Susquehanna International Group (''SIG''). SIG does not comment on the substance of the proposal, but, rather, expresses a generalized concern that the capital accumulated through the proposed Capital Management Policy could ultimately be monetized only or disproportionately for the benefit of the OCC shareholders in the event of a future sale of OCC.[41] SIG acknowledges that OCC's By-Laws currently limit the shareholders of OCC to national securities exchanges or national securities associations.[42] SIG states, however, that OCC's By-Laws leave

[30] The EDCP funds available for capital replenishment would be only those funds that are (x) deposited on or after January 1, 2020 in respect of the EDCP and (y) in excess of amounts necessary to pay for benefits accrued and vested under the EDCP at such time (''EDCP Unvested Balance'').

[31] The 90-calendar day term of a subsequent Moderate Trigger Event would be measured beginning on the date OCC applies the EDCP Unvested Balance.

[32] OCC acknowledged that the tax implications of the income represented by the Operational Loss Fee would depend on the extent to which any operational loss giving rise to a Trigger Event would be tax deductible. *See* Notice of Filing, 84 FR at 44947.

[33] *See id.* OCC stated that it found no evidence of a correlation between the risk of operational loss and either volume or a Clearing Member's credit risk profile. *See id.*

[34] 15 U.S.C. 78s(b)(2)(C).

[35] 15 U.S.C. 78q–1(b)(3)(F).

[36] 15 U.S.C. 78q–1(b)(3)(D).

[37] 17 CFR 240.17Ad–22(e)(2).

[38] 17 CFR 240.17Ad–22(e)(15).

[39] 15 U.S.C. 78q–1(b)(3)(D) and (F).

[40] 17 CFR 240.17Ad–22(e)(2) and 17 CFR 240.17Ad–22(e)(15).

[41] Letter from Brian Sopinsky, General Counsel, Susquehanna International Group, dated October 1, 2019, to Vanessa Countryman, Secretary, Commission (''SIG Letter'') at 1.

[42] SIG Letter at 1.

open the possibility of one of these organizations acquiring OCC or a future change to OCC's By-Laws to permit others to acquire OCC.[43] The Commission notes that any such future transformative transaction (including any related proposals concerning the Capital Management Policy) would be subject to the filing requirements of Section 19 of the Exchange Act. We would therefore assess the details and potential effects of the transaction at that time, including the treatment of fees collected from Clearing Members. In light of this required review of any such transaction, the Commission does not believe that the concerns raised by SIG about such a future transaction render the Capital Management Policy inconsistent with the Exchange Act.

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

Section 17A(b)(3)(F) of the Exchange Act requires, in part, that the rules of OCC be designed to promote the prompt and accurate clearance and settlement of securities transactions and to assure the safeguarding of securities and funds which are in the custody or control of OCC or for which it is responsible.[44] Based on its review of the record, the Commission finds the proposal is consistent with Section 17A(b)(3)(F) of the Exchange Act.

The Commission believes that the Capital Management Policy as a whole would help to ensure that OCC monitors and maintains its Equity at a level sufficient to either continue operating as a going concern or to wind-down its operations in an orderly manner in the event that OCC incurs potential operational or general business losses. In particular, the Commission believes that the proposed establishment of a Target Capital Requirement in combination with the capital monitoring, management, and replenishment tools described above, including the Operational Loss Fee, would reduce the risk that OCC would be unavailable to clear and settle securities transactions and therefore is consistent with promoting prompt and accurate clearance and settlement of securities transactions. The Commission did not receive any comments on this aspect of the proposal.

In addition, as described above, OCC proposes to mitigate losses arising out of a Clearing Member default with OCC's excess capital (*i.e.,* skin-in-the-game). Further, OCC proposes to charge losses remaining after the application of skin-in-the-game to OCC senior management as well as Clearing Members through the contribution of the EDCP Unvested Balance. Taken together, these aspects of the Proposed Rule Change could reduce the potential losses charged to the Clearing Fund contributions of non-defaulting Clearing Members in the event of a Clearing Member default, which in turn would help preserve the Clearing Fund contributions of non-defaulting Clearing Members.[45] As such, the components of the Proposed Rule Change related to skin-in-the-game are consistent with promoting the safeguarding of securities and funds in OCC's custody or for which OCC is responsible.

Accordingly, the Commission finds that the proposed Capital Management Policy is consistent with the requirements of Section 17A(b)(3)(F) of the Exchange Act.[46]

*B. Consistency With Section 17A(b)(3)(D) of the Exchange Act*

Section 17A(b)(3)(D) of the Exchange Act requires the rules of a clearing agency to provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.[47] As discussed below, based on its review of the record, the Commission finds that OCC's proposal—as relevant here, the proposal to adopt the Operational Loss Fee—is consistent with Section 17A(b)(3)(D) of the Exchange Act.

1. OCC's Proposal To Set the Amount of the Operational Loss Fee Is Reasonable

As discussed above, the Operational Loss Fee is designed to replenish OCC's capital following the realization of losses arising out of operational or general business risk exposures (as opposed to losses arising out of the default of a Clearing Member). To that end, OCC proposes to set the maximum amount of the Operational Loss Fee based on the amount determined necessary to either recover and continue operating as a going concern, or wind-down its operations in an orderly manner, with adjustments to those amounts to account for the potential tax implications of revenues that would be generated by the fee.[48] Additionally, the proposal would not require OCC to charge the maximum amount of the Operational Loss Fee, and would provide OCC the means to repay any Operational Loss Fee charged to Clearing Members through subsequent refunds.[49]

As noted, the purpose of the Operational Loss Fee is to provide OCC with sufficient replenishment capital following an operational- or general business risk-related loss, such that OCC could either recover its operations and continue operating as a going concern, or wind-down its operations in an orderly manner. The Commission did not receive any comments on the aspects of the proposal related to the sizing of the Operational Loss Fee. Further, as discussed above, the Commission has reviewed the regulatory information available to it related to OCC's Clearing Members and understands that the maximum Operational Loss Fee would be approximately the same as the contingent obligations under the OCC Clearing Fund assessment requirements for a Clearing Member operating at the minimum Clearing Fund deposit.[50] The Commission believes that OCC's proposal to size the Operational Loss Fee consistent with other Clearing Member obligations while also generating an amount of capital appropriate to recover OCC's operations and continue as a going concern or wind down its operations in an orderly manner is reasonable and therefore consistent with the requirements of Section 17A(b)(3)(D) of the Exchange Act.[51]

2. OCC's Proposal Would Provide for the Equitable Allocation of the Operational Loss Fee

If levied, OCC would allocate the Operational Loss Fee equally among all Clearing Members.[52] According to OCC, equal allocation is preferable to a proportional allocation based on, for example, Clearing Members' trade volume or Clearing Fund contributions, because, in OCC's view, all Clearing Members benefit from equal access to the clearance and settlement services provided by OCC, irrespective of how much a given Clearing Member chooses to use those services.[53] Additionally, in developing its proposal to adopt the

[43] SIG Letter at 1.

[44] 15 U.S.C. 78q–1(b)(3)(F).

[45] Additional issues relevant to the skin-in-the-game aspects of the proposal, including relevant comments, are discussed below in Section V.C.

[46] 15 U.S.C. 78q–1(b)(3)(F).

[47] 15 U.S.C. 78q–1(b)(3)(D).

[48] *See* Notice of Filing, 84 FR at 44947. As discussed in Section V.D.2 herein, the Commission finds that the approach OCC applies to determining such amounts is reasonable and supported by the record.

[49] *See id.*

[50] Such minimum assessments could equal up to an additional $1 million ($500,000 minimum Clearing Fund requirement, assessed up to two times) on top of a Clearing Member's existing $500,000 minimum Clearing Fund contribution, for a total contribution of $1.5 million. *See, generally,* OCC Rule 1006(h), available at *https://www.theocc.com/components/docs/legal/rules_and_bylaws/occ_rules.pdf*

[51] 15 U.S.C. 78q–1(b)(3)(D).

[52] *See* Notice of Filing, 84 FR at 44947.

[53] *See id.*

Operational Loss Fee, OCC considered alternative allocation methods for the Operational Loss Fee, including allocating the Operational Loss Fee proportionally among Clearing Members based on trade volume, risk profile, and other metrics.[54] As part of this process, OCC reviewed available data related to different measures of Clearing Members' use of OCC's clearance and settlement services, such as trade volume and credit risk profiles, and performed a series of analyses to determine whether there is a potential correlation between and among those metrics and the various operational and general business risks that could give rise to the Operational Loss Fee.

The Commission received, and has reviewed, these analyses.[55] These analyses did not show a correlation between the operational and general business risks that could give rise to the Operational Loss Fee and contract volume, Clearing Fund contributions, risk profile, or other metrics.[56] Based on our review of the record, we conclude that it is consistent with the Exchange Act to allocate the Operational Loss Fee equally among all Clearing Members.

One commenter, the FIA, submitted a comment letter noting that the use of the Operational Loss Fee could allocate some amount of non-default losses to OCC's Clearing Members and stating that non-default losses should not be allocated to Clearing Members. In the FIA's view, as a CCP, OCC should absorb such losses rather than utilize capital on a discretionary basis.[57] Rather than assess the Operational Loss Fee in the event of a Trigger Event, the FIA asserts that OCC should begin accumulating retained earnings now so that it will be in a position to use them instead of the Operational Loss Fee.[58] OCC responds that raising additional capital through the accumulation of retained earnings over a number of years would still source the funds from Clearing Members, but would do so in a manner that essentially would pre-fund the replenishment obligation rather than only impose it if and when doing so became necessary.[59] OCC further describes the series of events that would have to occur in the event that its Equity fell at or below different percentages of the Target Capital Requirement, and the different measures OCC would have to take, including potentially raising fees, lowering costs, and using its available skin-in-the-game to cure such losses (and that would have to fail) before OCC would be permitted to charge the Operational Loss Fee.[60]

OCC's proposal with respect to the Operational Loss Fee will permit OCC to raise additional equity in the event that its equity falls close to or below the Target Capital Requirement. The Operational Loss Fee represents an appropriate and reasonable allocation of potential contingent costs to Clearing Members. The FIA's suggested approach would still source the required funds from Clearing Members, but in a manner that essentially pre-funds the maximum potential replenishment obligation without being informed by the specific facts and circumstances that inform OCC's determination of the actual required amount.[61] In contrast, under OCC's proposal, the Operational Loss Fee would be imposed only if and when OCC's efforts to set and maintain its capital reserves at a level sufficient to withstand operational and business losses are insufficient, OCC's capital reserves deteriorate to a significant degree as a result, and the other tools available to OCC are insufficient to return OCC's capital reserves to a minimum acceptable level. In this respect, the Commission believes that OCC's approach is both reasonable and consistent with the Exchange Act. Because the Operational Loss Fee is not assessed until a specific but contingent future time, it leaves available to Clearing Members funds and liquidity that may be put to more efficient use as opposed to being held indefinitely at OCC in the form of collected fees. Further, the Proposed Rule Change would allow OCC to charge less than the maximum Operational Loss Fee because, if and when such a fee were to become necessary, OCC would know that actual amount required to achieve replenishment. In the Commission's view, this approach is more precise, requiring OCC to determine and collect only the amount of the Operational Loss Fee required by OCC under the given circumstances to replenish its resources.

Further, as the FIA noted, OCC estimates that the Operational Loss Fee, if assessed now, would be around $1.4 million per Clearing Member.[62] OCC's rules currently require Clearing Members to maintain net capital of at least $2 million.[63] Based on its review of data provided by OCC, as of the time of filing, 98 percent of Clearing Members would be able to absorb the maximum Operational Loss Fee without breaching that requirement.[64] Further, a $1.4 million Operational Loss Fee would be roughly similar to the contingent obligations under the OCC Clearing Fund assessment requirements for a Clearing Member operating at the minimum Clearing Fund deposit.[65] In the Commission's view, this helps ensure that any potential liquidity obligations OCC may place on its Clearing Members via the Operational Loss Fee is at a level that is generally consistent with OCC's existing assessment demands on such Clearing Members.

Finally, the FIA's preferred approach of imposing higher fees now and building up OCC's capital reserves to the necessary level *over time* would not provide OCC with an *immediately available* replenishment plan, and would therefore, not be consistent with OCC's obligation to comply with Rule 17Ad-22(e)(15)(iii) of the Exchange Act. As such, although the FIA has a general objection to any CCP allocating non-default losses to Clearing Members, the FIA does not assert that, or otherwise explain how, OCC's specific proposal to do so in the context of the Operational Loss Fee would render the Proposed Rule Change inconsistent with the Exchange Act.

The FIA further expresses the belief that imposing the Operational Loss Fee on Clearing Members without providing a return to Clearing Members is inequitable and that, ideally, OCC's shareholders should either be required to provide ''similar such commitment or allow for an equity dilution.'' [66]

As explained above, the Commission believes that the record demonstrates that OCC has designed the Operational Loss Fee in a manner that is equitable to the Clearing Members in terms of determining (i) the overall amount of the Operational Loss Fee, and (ii) the relative burdens and obligations Clearing Members must meet in paying the Operational Loss Fee. Moreover, the Commission believes that the

[54] *See id.* Additionally, OCC discussed the equal allocation of the Operational Loss Fee with Clearing Members on May 31, 2019. *See* Notice of Filing, 84 FR at 44949.

[55] *See* Notice of Filing, 84, FR at 44947 (noting that OCC included as confidential Exhibit 3e a comparison of its quantification of operational risks to contract volume and the amount of Clearing Fund deposits).

[56] *See* Notice of Filing, 84, FR at 44947 (noting that ''OCC has not observed any correlation between the annual quantifications of these risks and contract volume or Clearing Member credit risk.'').

[57] FIA Letter at 3.

[58] FIA Letter at 2.

[59] OCC Letter at 2.

[60] OCC Letter at 4–5.

[61] OCC Letter at 2.

[62] FIA Letter at 2.

[63] Notice of Filing, 84 FR at 44951–52 (citation omitted).

[64] *See* Notice of Filing, 84, FR at 44952 (stating that OCC included, as confidential Exhibit 3h, financial data reported by Clearing Members).

[65] Notice of Filing, 84 FR at 44951; *see also* supra note 51.

[66] FIA Letter at 2.

Operational Loss Fee serves a critical purpose for the benefit of Clearing Members, their customers and the broader U.S. equity markets. OCC is the only clearing agency for standardized U.S. securities options listed on SEC-registered national securities exchanges (''listed options'') and provides central counterparty services for the U.S. listed-options markets.[67] OCC's role as the sole CCP for all listed options contracts in the U.S. makes it an integral part of the national system for clearance and settlement, and the Financial Stability Oversight Council designated OCC as a systemically important financial market utility (''SIFMU'') in 2012.[68] The resilience and ongoing orderly operations of OCC thus broadly benefits Clearing Members, their customers, and the broader U.S. financial system.[69] While OCC could have considered or proposed other approaches that might have entailed different obligations and burdens for Clearing Members (including via raising additional capital from the Clearing Members), the failure of OCC to consider or propose such alternative measures does not render the Proposed Rule Change inequitable.

A different commenter—LPL Financial (''LPL'')—expresses the belief that the proposal to allocate the Operational Loss fee in equal shares among OCC's Clearing Members would be inequitable and suggests that, instead, the Operational Loss Fee should be allocated ''in a manner that corresponds to the extent to which each Clearing Member utilizes (and therefore benefits from) the OCC's operations.'' [70] In LPL's view, such an allocation would ''correctly acknowledge that the extent to which a Clearing Member makes use of the OCC's clearing and settlement systems does, in some cases, directly correspond to the risk that the OCC will incur certain operational losses.'' [71] LPL further challenges OCC's statement that ''there is no correlation between operational risks, on the one hand, and contract volume, on the other hand,'' as ''flawed inasmuch as it ignores the fact that a Clearing Member that makes greater use of the OCC's clearing and settlement system places greater strain on that system and thus exposes the system to greater operational risk.''[72]

Based on the Commission's regulatory and supervisory experience, the Commission does not agree that a Clearing Member that ''makes greater use of OCC's clearing and settlement system necessarily places greater strain on that system and thus exposes the system to greater operational risk.'' Contrary to LPL's assertion that ''each contract introduced to the OCC's system brings with it a new opportunity for internal fraud and cyber-attack,'' [73] based on its supervisory and regulatory experience with OCC, the Commission understands that contracts are not submitted to be processed by OCC on a one-by-one basis such that each contract represents an equal potential for operational risk.

Further, in the Commission's experience, a Clearing Member's ''use'' of OCC's services is not necessarily correlated to that Clearing Member's operational resiliency. OCC has a broad range of geographically diverse Clearing Members, comprised of U.S. broker-dealers, future commission merchants, and foreign securities firms of various sizes, all of which serve diverse markets and engage in diverse strategies and activities on behalf of diverse clients, including professional traders, as well as institutional and retail investors. There is, therefore, no basis to conclude, for example, that a Clearing Member that clears 1,000 contracts in a given month in a particular set of financial products necessarily introduces *less* operational risk to OCC than a Clearing Member that clears 10,000 contracts in a different set of financial products in that same month.

LPL also fails to acknowledge or address the specific operational and business risks that could give rise to the Operational Loss Fee. As noted above, OCC conducted analyses to determine whether it could identify a correlation between various measures of Clearing Members' use of OCC's clearance and settlement services and the specific types of operational and general business risks that could give rise to the Operational Loss Fee. These included, among others, internal fraud, external fraud, employment practices, workplace safety, damage to physical assets, business disruption and system failures, and execution, delivery, and process management at OCC. The Commission believes that the operational and business risks identified and analyzed by OCC are reasonable in light of the requirements of Rule 17Ad–22(e)(15) discussed above.[74] And based on the Commission's review of the record, we do not believe that there is a positive correlation between these types of risks and a Clearing Member's ''use of OCC's clearing and settlement services.'' For example, OCC's analyses do not show a correlation between a Clearing Member's contract volume or credit risk profile, which are reasonable proxies for a Clearing Member's ''use'' of OCC's clearance and settlement services, and the specific operational risk that that Clearing Member poses to OCC.

Further, the Commission does not agree with the assertion that Clearing Members that ''use'' OCC's clearance and settlement services more derive more benefit from those services, and therefore should be allocated a larger portion of the Operational Loss Fee. As an initial matter, OCC has been designated as a SIFMU and its role as the sole CCP for all listed options contracts in the U.S. makes it an integral part of the national system for clearance and settlement. Clearing Members, their customers, investors, and the markets as a whole derive significant benefit from that national system and the overall market system it supports, regardless of their specific utilization of that system. As such, Clearing Members benefit from OCC's efforts to ensure that it is and remains well capitalized, that it has sufficient financial resources to withstand operational or general business losses, and that it has a plan in place to replenish those resources in the event that it incurs such losses. The Commission is not aware of evidence demonstrating that those benefits are tied directly or positively correlated to an individual Clearing Member's rate of utilization of OCC's clearance and settlement services. Further, as noted, the Commission has reviewed data provided by OCC that demonstrates a lack of correlation between use (as represented by volume) and operational risk.[75] Such data is consistent with the Commission's regulatory and

[67] *See* Securities Exchange Act Release No. 85121 (Feb. 13, 2019), 84 FR 5157 (Feb. 20, 2019) (File No. SR–OCC–2015–02); *see id.,* 84 FR at 5158.

[68] *See* Financial Stability Oversight Council (''FSOC'') 2012 Annual Report, Appendix A, *https://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf* (last visited November 25, 2019).

[69] *See id.* As a registered clearing agency, OCC plays an important role in fostering the proper functioning of financial markets and, by centralizing the clearance and settlement of listed options, allows market participants to reduce costs, increase operational efficiency, and manage risks more effectively. *See* Covered Clearing Agency Standards, 81 FR at 70860–61.

[70] Letter from Steven Morrison, SVP, Associate General Counsel, LPL, dated September 17, 2019 (received September 26, 2019) to Brent J. Fields, Secretary, Commission, (''LPL Letter'') at 1–2.

[71] LPL Letter at 1–2.

[72] LPL Letter at 3.

[73] LPL Letter at 3.

[74] The Commission notes that these operational and business risk metrics correspond to the Basel II Advanced Measurement Approach. *See* International Convergence of Capital Measurements and Capital Standards: a Revised Framework, Basel Committee on Banking Supervision, 2005, available at *https://www.bis.org/publ/bcbs128.pdf.*

[75] *See* Notice of Filing, 84, FR at 44947 (noting that OCC included as confidential Exhibit 3e a comparison of its quantification of operational risks to contract volume and the amount of Clearing Fund deposits).

supervisory experience, which demonstrates that operational risks can arise from a variety of disparate sources that are represented in different ways and to different degrees among OCC's diverse membership, such that, as noted above, the level of operational risk presented to OCC by a given Clearing Member does not appear to be positively correlated to the number, type, or volume of contracts that that Clearing Member clears through OCC.

Taken together, the Commission believes that OCC's current proposal to fund replenishment capital through the Operational Loss Fee includes a sizing and allocation methodology that, as discussed above, is reasonably designed to minimize the potential burden of the fee on Clearing Members, as supported by data on the record, and would result in both the reasonable sizing and the equitable allocation of the Operational Loss Fee. Accordingly, for the reasons discussed above, the Commission believes that the proposed allocation method is consistent with the requirement that OCC's rules provide for the equitable allocation of fees. The Commission finds, therefore, that OCC's proposal to adopt the Operational Loss Fee is consistent with the requirements of Section 17A(b)(3)(D) of the Exchange Act.[76]

*C. Consistency With Rule 17Ad–22(e)(2) Under the Exchange Act*

Rule 17Ad–22(e)(2) under the Exchange Act requires, in part, that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that, among other things, are clear and transparent; clearly prioritize the safety and efficiency of the covered clearing agency; and support the public interest requirements of the Exchange Act.[77] Based on its review of the record, the Commission finds the proposal is consistent with Rule 17Ad–22(e)(2) under the Exchange Act.

As described in more detail above, under the proposal OCC would introduce a skin-in-the-game component to its existing default waterfall to offset losses in the event of a Clearing Member default. The FIA stated that it is unclear how material these skin-in-the-game contributions would be and whether they would be meaningful enough to result in an alignment of interest from a shareholder perspective.[78] The FIA notes that capital expenditures planned and approved by the OCC Board can be met through amounts in excess of the Target Capital Requirement and, as such, it is unclear how this may tie in with OCC's plans to contribute skin-in-the-game.[79] The FIA also notes that ''capital levels in excess of 110% of threshold could result in OCC revisiting the fee schedule,'' and that it is ''unclear if/how this may impact the funded level of skin in the game.'' [80] As such, the FIA seeks ''greater transparency on the size of these resources,'' states that OCC should have a minimum amount of skin-in-the-game that ''scales with risk and is defined and funded upfront,'' and urges OCC ''to define a level of [skin-in-the-game] *ex ante* that would always be readily available in case of a default loss.'' [81]

OCC responds that the Commission has not imposed a skin-in-the-game requirement, but that OCC nevertheless believes it is prudent to align OCC's incentives with those of the broader industry with respect to the management of risks faced by OCC and, as a result, has determined to propose the skin-in-the-game provisions included in its proposal.[82] OCC states that, under the proposed Capital Management Policy, it would provide a layer of skin-in-the-game to be used for both default losses and non-default losses, and that the skin-in-the-game would be a combination of two sources: Current and retained earnings of OCC and available funds in OCC's EDCP.[83] OCC acknowledges that, because it would be determined based on a function of available funds at a specific point in time, the specific amount of skin-in-the-game will be unknown until the time of an operational loss event, but emphasizes its belief that the skin-in-the-game component of the proposed Capital Management Policy, particularly with respect to the EDCP funds that would be a direct contribution from OCC management, is sufficient to ensure the alignment of incentives for risk management between OCC and the Clearing Member community.[84]

We conclude that OCC's skin-in-the-game proposal is consistent with the Exchange Act and the rules and regulations thereunder. In adopting Rule 17Ad–22(e)(2), the Commission discussed comments it received regarding the concept of skin-in-the-game as a potential tool to align the various incentives of a covered clearing agency's stakeholders, including management and clearing members.[85] And, while the Commission declined to include a specific skin-in-the-game requirement, it stated its belief that ''the proper alignment of incentives is an important element of a covered clearing agency's risk management practices,'' and noted that skin-in-the-game ''may play a role in those risk management practices in many instances.'' [86]

Here, OCC has considered its financial resources, ownership structure, existing risk management framework, and other factors and, in light of these considerations, proposes to add to its current default waterfall two potential sources of skin-in-the-game for offsetting losses associated with Clearing Member defaults: (i) Deferred compensation in the form of the EDCP Unvested Balance (*i.e.,* executive bonuses awarded but not yet paid) and (ii) capital reserves (*i.e.,* Shareholder equity) in excess of 110 percent of the Target Capital Requirement. OCC proposes to modify its current default waterfall such that it would be required to use these skin-in-the-game resources *before* utilizing non-defaulting members' Clearing Fund contributions.[87]

In the Commission's view, with this aspect of the Proposed Rule Change OCC would be taking an important step toward incorporating a skin-in-the-game component into its existing risk management framework, which in turn should help further align the interests of OCC's stakeholders, including OCC management and Clearing Members. The direct contribution of the EDCP Unvested Balance in particular would represent a direct contribution of executive compensation by OCC's senior managers and therefore would help align the incentives of OCC's

[76] 15 U.S.C. 78q–1(b)(3)(D).

[77] 17 CFR 240.17Ad–22(e)(2).

[78] FIA Letter at 1.

[79] FIA Letter at 2.

[80] FIA Letter at 2.

[81] FIA Letter at 1–2.

[82] OCC Letter at 1.

[83] OCC Letter at 1–2.

[84] OCC Letter at 2.

[85] Covered Clearing Agency Standards, 81 FR at 70805–06.

[86] Covered Clearing Agency Standards, 81 FR at 70806.

[87] Specifically, OCC's current default waterfall, in general, utilizes the following resources in the following order: (i) The defaulting Clearing Member's margin deposit; (ii) the defaulting Clearing Member's Clearing Fund contribution; and (iii) non-defaulting Clearing Members' Clearing Fund contributions. Under the proposal the new default waterfall would require OCC to utilize the following resources in the following order: (i) The defaulting Clearing Member's margin deposit; (ii) the defaulting Clearing Member's Clearing Fund contribution; (iii) skin-in-the-game in the form of capital reserves above 110 percent of the Target Capital Requirement at the time of the default; and (iv) skin-in-the-game in the form of the aggregate value of the EDCP Unvested Balance at the time of the default *and* non-defaulting Clearing Members' Clearing Fund contributions, both charged on a pro rata basis. In addition, under the proposal, OCC would be *permitted* (but would not be required) to also utilize capital reserves between 100 percent and 110 percent of the Target Capital Requirement.

senior management with those of the broader industry with respect to the management of risks faced by OCC. Further, the EDCP Unvested Balance would not be affected directly by the issues relating to capital expenditures and revisions to the fee schedule noted by the FIA. Finally, although the size of OCC's skin-in-the-game resources in absolute terms would not be set unless and until they were utilized, the Proposed Rule Change establishes a clear and transparent methodology for establishing the amount of skin-in-the-game that would be available at the time and in the event of a Clearing Member default. As such, the Commission believes that the skin-in-the-game aspects of the Proposed Rule Change are consistent with Section 17Ad–22(e)(2) of the Exchange Act.

In addition to the skin-in-the-game components discussed above, the Proposed Rule Change includes the various components that would govern the sizing and imposition of the Operational Loss Fee. The FIA comment letter expresses the belief that any Board decision that results in the imposition of an Operational Loss Fee should be ''syndicated with'' Clearing Members and that any resulting feedback from Clearing Members should be ''presented to the Board before any decisions are taken.'' [88] In response, OCC refers to the requirements of its By-Laws that result in more than two-thirds of OCC's directors being either Clearing Member directors or public directors.[89] Further, OCC expresses its strong belief that part of the viability of a plan to replenish capital is the speed at which that replenishment capital is accessible.

We find that the Operational Loss Fee is consistent with Rule 17Ad–22(e)(2)(iii). That rule requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that support the public interest requirements of Section 17A of the Exchange Act applicable to clearing agencies, and the objectives of owners and participants.[90] In adopting Rule 17Ad–22(e)(2), the Commission added paragraph (vi) in response to comments regarding the scope of Rule 17Ad–22(e)(2)(iii).[91] Paragraph (vi) of Rule 17Ad–22(e)(2) specifically addresses the consideration of the interests of participants' customers, securities issuers and holders, and other relevant stakeholders of the covered clearing agency.[92] In adopting Rule 17Ad–22(e)(2), the Commission noted that the inclusion of independent directors on a clearing agency's board may be one mechanism for helping to ensure that the relevant views of stakeholders are presented and considered.[93] In the context of default management, the Commission has acknowledged that risk exposures can change rapidly during periods of market stress.[94] Similarly, the Commission believes that the general business risk exposures, and related losses, may change rapidly during periods of stress, and, in turn, that there is a benefit to a covered clearing agency's ability to respond to such changes in a timely fashion.

The FIA also expresses a concern that OCC's Board has a fiduciary duty to OCC, and by implication, not to Clearing Members; however, OCC responds that, in furtherance of the Exchange Act requirement that OCC's rules must assure a fair representation of its shareholders (or members) and participants in the selection of its directors and the administration of its affairs, OCC's By-Laws ''state that nine of the twenty directorships are reserved for representatives of OCC clearing members,'' and that, in addition, five of the twenty directorships are reserved for public directors, who are charged with representing the interests of all stakeholders, such that more than two-thirds of OCC's directors are either Clearing Member directors or public directors.[95] OCC also describes the formal and informal mechanisms that OCC employs to solicit feedback from Clearing Members and other interested stakeholders, including its Financial Risk Advisory Committee, Operations Roundtable, multiple letters and open calls with Clearing Members and other interested stakeholders, and routine in-person meetings with trade groups and individual firms.[96] As such, OCC contends that the Capital Management Policy was constructed with the benefit of the perspective of the Clearing Member community, and any further discussions at the Board will benefit from this same perspective.[97]

Again, we agree that the proposal is consistent with Rule 17Ad–22(e)(2). In adopting Rule 17Ad–22(e)(2), the Commission noted that the approach a covered clearing agency may take in considering the views of stakeholders could vary depending on the ownership structure or organizational form of the covered clearing agency.[98] The Commission believes that the governance arrangements currently in existence and proposed by OCC in connection with the Proposed Rule Change, as discussed above, are consistent with the requirement to consider the interests of OCC's participants, and are therefore consistent with Rule 17Ad–22(e)(2).

Accordingly, and for the reasons stated above, the Commission finds the changes proposed in the Proposed Rule Change are consistent with Rule 17Ad–22(e)(2) under the Exchange Act.[99]

### *D. Consistency With Rule 17Ad–22(e)(15) Under the Exchange Act*

Rule 17Ad–22(e)(15) under the Exchange Act requires, in part, that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to identify, monitor, and manage the covered clearing agency's general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that the covered clearing agency can continue operations and services as a going concern if those losses materialize, including by taking the actions described in Rules 17Ad–22(e)(15)(i)–(iii) under the Exchange Act.[100] As discussed below, based on its review of the record, the Commission finds that the proposal is consistent with Rule 17Ad–22(e)(15) of the Exchange Act.

#### 1. Rule 17Ad–22(e)(15)(i)

Rule 17Ad–22(e)(15)(i) under the Exchange Act requires that the policies and procedures described under Rule 17Ad–22(e)(15) include determining the amount of liquid net assets funded by equity based upon a covered clearing agency's general business risk profile and the length of time required to achieve a recovery or orderly wind-down, as appropriate, of its critical operations and services if such action is taken.[101]

As described above, OCC proposes to adopt rules governing OCC's process for determining the amount of Equity required to support the LNAFBE necessary to cover potential general business losses, which would then be

[88] FIA Letter at 3.

[89] OCC Letter at 3.

[90] 17 CFR 240.17Ad–22(e)(2)(iii).

[91] Covered Clearing Agency Standards, 81 FR at 70803.

[92] 17 CFR 240.17Ad–22(e)(2)(vi).

[93] Covered Clearing Agency Standards, 81 FR at 70803.

[94] Covered Clearing Agency Standards, 81 FR at 70806.

[95] OCC Letter at 3–4.

[96] OCC Letter at 4.

[97] OCC Letter at 4.

[98] Covered Clearing Agency Standards, 81 FR at 70803.

[99] 17 CFR 240.17Ad–22(e)(2).

[100] 17 CFR 240.17Ad–22(e)(15).

[101] 17 CFR 240.17Ad–22(e)(15)(i).

used to help set its Target Capital Requirement.[102] In turn, the Target Capital Requirement would be designed to ensure, among other things, that OCC holds sufficient capital to continue operations and services as a going concern if general business losses materialize, which OCC refers to as the Potential Loss Amount.[103] To set the Potential Loss Amount, OCC would conduct an annual analysis of its capital requirements by analyzing and aggregating potential losses from individual operational risk scenarios, aggregating the loss events, and conducting loss modeling at or above the 99 percent confidence level.[104] The Commission did not receive any comments on this aspect of the proposal. Taken together, the Commission believes the proposal is designed to identify and maintain the resources necessary for OCC to recover or wind-down its critical operations or services as well as to remain a going concern following the realization of losses due to general business risk, and therefore finds that it is consistent with Rule 17Ad–22(e)(15)(i).[105]

2. Rule 17Ad–22(e)(15)(ii)

Rule 17Ad–22(e)(15)(ii) under the Exchange Act requires that the policies and procedures described under Rule 17Ad–22(e)(15) include holding liquid net assets funded by equity equal to the greater of either (i) six months of the covered clearing agency's current operating expenses, or (ii) the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of the covered clearing agency, as contemplated by the plans established under Rule 17Ad–22(e)(3)(ii), and which shall be in addition to resources held to cover participant defaults or other risks covered under applicable credit risk and the liquidity risk standards, and shall be of high quality and sufficiently liquid to allow the covered clearing agency to meet its current and projected operating expenses under a range of scenarios, including in adverse market conditions.[106]

As described above, OCC proposes to adopt rules that would require it to hold at least the minimum amount of Equity necessary to meet the Target Capital Requirement. In turn, the Target Capital Requirement would be set at a level at least sufficient to comply with Rule 17Ad–22(e)(15)(ii) under the Exchange Act. Specifically, the Target Capital Requirement would equal or exceed, at a minimum, the greater of (i) six months of OCC's current operating expenses; (ii) the RWD Amount (which would equal or exceed the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services); or (iii) the Potential Loss Amount. Thus, under the proposal, OCC would maintain LNAFBE in an amount that would equal or exceed the amount determined by OCC to correspond to the amounts described in Rule 17Ad–22(e)(15)(ii).

To ensure that OCC continues to hold the amount of LNAFBE required under Rule 17Ad–22(e)(ii), as detailed above, OCC would also, on a monthly basis, monitor its Equity relative to the Target Capital Requirement to determine whether an Early Warning or Trigger Event had occurred. In addition, in response to such monitoring and any associated Early Warnings, OCC would use fee-related tools currently available under its existing Rules (*e.g.,* increases, decreases, refunds, or fee waivers) to manage and maintain its capital levels at or near the Target Capital Requirement. For example, OCC proposes to require OCC Management to notify OCC's Board promptly if Equity were to fall below the Early Warning threshold and to recommend to the Board whether to implement a fee increase in an amount that the Board determines necessary and appropriate to raise additional Equity. The requirement to notify the Board, and recommend appropriate action, would help to ensure that OCC continues to hold sufficient resources to meet the Target Capital Requirement. As such, the proposal would be designed to ensure that OCC holds Equity sufficient to support the amount of LNAFBE equal to the Target Capital Requirement, which requirement would correspond to the amounts specified under Rule 17Ad–22(e)(15)(ii).

The Capital Management Policy would provide objective, quantifiable metrics and tools that OCC would use to determine its forward six-months operating expenses and RWD Amount (*i.e.,* the cost of recovery or orderly wind-down) and ensure that it holds at least those amounts in LNAFBE at all times.[107] Specifically, to determine the RWD Amount, on an annual basis OCC would follow the process and use the assumptions laid out in its Recovery and Wind-Down Plan (''RWD Plan''), which the Commission previously reviewed and approved.[108] Under the RWD Plan, on an annual basis, OCC identifies its critical services and determines the cost to maintain those critical services over the prescribed recovery or wind-down period, assuming costs remain at historical levels.[109] As noted above, OCC would also set the Target Capital Requirement at a level designed to cover the Potential Loss Amount, which would be designed to address losses arising out of operational risk. On an annual basis, OCC would quantify the amount of capital to be held against OCC's operational risks by analyzing and aggregating potential losses from individual operational risk scenarios, aggregating the loss events, and conducting loss modeling at or above the 99 percent confidence level.[110]

The Commission also finds that the proposed rules concerning the form of OCC's LNAFBE and manner in which it would be held are consistent with the requirements of Rule 17Ad–22(e)(15)(ii). OCC proposes to define LNAFBE such that it would consist of only cash and cash equivalents. OCC's LNAFBE would, therefore, be liquid by definition. Further, OCC proposes to adopt rules requiring that OCC hold Equity equal to 110 percent of the Target Capital Requirement separate from OCC's resources to cover participant defaults, which would help ensure that the Equity it holds to comply with Rule 17Ad–22(e)(ii) is in addition to OCC's resources to cover participant defaults and other risks covered under applicable credit risk and liquidity risk standards. The Commission did not receive any comments opposing OCC's proposed approach to determining its forward six-months operating expenses and cost of recovery or orderly wind-down. For the reasons discussed above, the Commission believes that the

[102] *See supra* Section V.A; *see also* Notice of Filing, 84 FR at 44945.

[103] *See id.*

[104] *See id.;* OCC Letter at 4.

[105] 17 CFR 240.17Ad–22(e)(15)(i).

[106] 17 CFR 240.17Ad–22(e)(15)(ii).

[107] OCC has, in prior filings, discussed the quantitative analyses underlying the calculation of operating expenses and potential recovery and wind-down costs. *See* Securities Exchange Act Release No. 85322 (Mar. 14, 2019), 84 FR 10377, 10378 (Mar. 20, 2019) (File No. SR–OCC–2019–001) (stating that such quantitative assumptions are based on a number of assumptions and projections, including, among other things, (i) projected average daily volumes; (ii) projected expenses and known cash flows; (iii) an operating margin based on historical volumes; and (iv) known capital needs to replace and modernize OCC's technology infrastructure).

[108] *See* Notice of Filing, 84 FR at 44945. *See also* Securities Exchange Act Release No. 83918 (Aug. 23, 2018), 83 FR 44091 (Aug. 29, 2018) (File No. SR–OCC–2017–021) (approving OCC's proposal to formalize and update its Recovery and Orderly Wind-Down Plan).

[109] *See* Notice of Filing, 84 FR at 44945.

[110] *See* Notice of Filing, 84 FR at 44945.

proposal is consistent with Rule 17Ad–22(e)(15)(ii) of the Exchange Act.

The Commission did receive one comment regarding the degree of transparency OCC proposes to maintain in respect of the Target Capital Requirement. In its comment letter, the FIA states that the Target Capital Requirement information that OCC would publish on its website quarterly is ''important for transparency purposes'' and that OCC should ''also provide disclosures on any expenses/losses that could result in the operational loss fee being charged as this will assist members in their own risk management.'' [111] Rule 17Ad–22(e)(15) does not require OCC to publish the information to which the FIA refers, and Clearing Members already receive from OCC a wide range of information to assist with their own risk management and to help them anticipate and satisfy their obligations as Clearing Members of OCC, such as the Daily Position Report,[112] Daily Margin Report,[113] X–M Margin and Settlement Report,[114] Expiration Exercise Report,[115] Exercise and Assignment Activity Report,[116] and reports listing the current amount and form of a Clearing Member's required contribution to the Clearing Fund.[117] The Commission believes that such information already provides Clearing Members with timely, relevant information that Clearing Members are able to incorporate into their existing risk management efforts. As such, the Commission does not believe that OCC's failure to propose to provide the type of additional disclosures advocated by the FIA renders the Proposed Rule Change inconsistent with Rule 17Ad–22(e)(15)(ii) under the Exchange Act.

3. Rule 17Ad–22(e)(15)(iii)

Rule 17Ad–22(e)(15)(iii) under the Exchange Act requires that the policies and procedures described under Rule 17Ad–22(e)(15) include maintaining a viable plan, approved by the board of directors and updated at least annually, for raising additional equity should a covered clearing agency's equity fall close to or below the amount required under Rule 17Ad–22(e)(15)(ii).[118]

As described above, the proposed Replenishment Plan would govern OCC's process for replenishing its capital in the event that Equity were to fall close to or below the Target Capital Requirement by, among other things, implementing tools that would allow OCC to replenish its capital levels in the event that routine monitoring and management through its existing fee-related tools is insufficient to avoid a Trigger Event, which would only occur if OCC's Equity fell below 100% of the Target Capital Requirement and stayed there for 90 consecutive days *or* OCC's Equity fell below 90% of the Target Capital Requirement at any point in time. The proposed Replenishment Plan would require OCC's Management to monitor changes in Equity and to notify OCC's Board of a Trigger Event. If a Trigger Event were to occur, OCC would attempt to replenish its capital levels first through the contribution of the EDCP Unvested Balance. If and only if the entire EDCP Unvested Balance were insufficient to bring OCC's Equity back to or above 100% of the Target Capital Requirement, OCC would be required to levy the Operational Loss Fee on Clearing Members. The Operational Loss Fee would be sized to the Adjusted RWD Amount, and therefore would be designed to provide OCC with at least enough capital either to continue as a going concern or to wind-down in an orderly fashion.

Under the proposal, on an annual basis OCC's Management would be obligated to recommend that the Board approve or, as appropriate, modify the proposed Replenishment Plan. In turn, OCC's Board would be obligated annually to approve or, as appropriate, modify the proposed Replenishment Plan based on Management recommendation.

To the extent the Operational Loss Fee is levied, the FIA suggests that OCC should clarify the mechanism for returning such resources to Clearing Members.[119] In response, OCC states that if an Operational Loss Fee were charged and OCC's capital subsequently exceeded 110 percent of the Target Capital Requirement such that OCC determined to return to Clearing Members funds received pursuant to the charge, OCC would return the funds to Clearing Members in equal share to each Clearing Member that paid the Operational Loss Fee until such time as the aggregate amount of the Operational Loss Fee was returned.[120] OCC's comment included an example to further clarify OCC's explanation.[121] This information also is described in the Notice of Filing,[122] and is consistent with the Commission's understanding, based on its review of the record, of the mechanisms that OCC would use to return the Operational Loss Fee in the event that it is levied. Accordingly, the Commission believes that the information provided by OCC in the Notice of Filing and subsequently in its comment letter provides a comprehensive and sufficient response to the FIA's request for clarification.

The FIA also requests clarification regarding OCC's proposal to charge the Operational Loss Fee in an amount that would return OCC to a capitalization of 110 percent of the Target Capital Requirement, instead of just returning to the target capital levels.[123] OCC clarifies that the reason for this 10 percent buffer is ''embedded in the requirement itself: OCC's replenishment plan is to be used when OCC's Equity falls '*close to* or below the [Target Capital Requirement],''' [124] which OCC interprets as requiring it to maintain capital reserves, at a minimum, above 100 percent of the Target Capital Requirement. In determining how much above 100 percent of the Target Capital Requirement, OCC determined that maintaining capital reserves at or around 110 percent of the Target Capital Requirement was the appropriate amount, in part because 10 percent of the Target Capital Requirement represents approximately two months of earnings, and OCC believes that a two-month window would provide OCC's senior management and Board sufficient time to respond to a deterioration of OCC's capital.[125] The Commission has reviewed the analysis provided by OCC [126] and believes that a 110 percent buffer representing approximately two months of earnings is reasonable in light of the requirement set forth in Rule 17Ad–22(e)(15)(iii) that a viable replenishment plan be calibrated to circumstances where a covered clearing agency's capital level falls below *or close to* the required capital amount. Accordingly, here as well the

[111] FIA Letter at 4.

[112] *See* OCC Rule 501, available at *https://www.theocc.com/components/docs/legal/rules_and_bylaws/occ_rules.pdf.*

[113] *See* OCC Rule 605, available at *https://www.theocc.com/components/docs/legal/rules_and_bylaws/occ_rules.pdf.*

[114] *See* OCC Rule 706, available at *https://www.theocc.com/components/docs/legal/rules_and_bylaws/occ_rules.pdf.*

[115] *See* OCC Rule 805, available at *https://www.theocc.com/components/docs/legal/rules_and_bylaws/occ_rules.pdf.*

[116] *See* OCC Rule 901, available at *https://www.theocc.com/components/docs/legal/rules_and_bylaws/occ_rules.pdf.*

[117] *See* OCC Rule 1007, available at *https://www.theocc.com/components/docs/legal/rules_and_bylaws/occ_rules.pdf.*

[118] 17 CFR 240.17Ad–22(e)(15)(iii).

[119] FIA Letter at 3.

[120] OCC Letter at 3.

[121] *Id.*

[122] *See* Notice of Filing, 84 FR at 44946.

[123] FIA Letter at 3.

[124] OCC Letter at 3 (emphasis in original) (citation omitted).

[125] *See* Notice of Filing, 84, FR at 44946.

[126] *See* Notice of Filing, 84, FR at 44946, n. 17 (stating that OCC included its analysis in confidential exhibit 3d).

Commission believes that the information provided by OCC provides a comprehensive and sufficient response to the FIA's request for clarification.

The Commission believes that OCC's proposal with respect to the Operational Loss Fee will permit OCC to raise additional equity in the event that its equity falls close to or below the Target Capital Requirement and therefore finds that it is consistent with Rule 17Ad–22(e)(15)(iii) of the Exchange Act. The Commission finds, therefore, that adoption of these aspects of the proposed Capital Management Policy and supporting rule changes are consistent with Exchange Act Rule 17Ad–22(e)(15).[127]

**V. Conclusion**

On the basis of the foregoing, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Exchange Act, and in particular, the requirements of Section 17A of the Exchange Act [128] and the rules and regulations thereunder.

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Exchange Act,[129] that the Proposed Rule Change (SR–OCC–2019–007), as modified by Partial Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[130]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–01643 Filed 1–29–20; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–88033; File No. SR–NYSE–2020–03]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Add New Rule 46B To Permit the Appointment of Regulatory Trading Officials and Amend Rules 47 and 75

January 24, 2020.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on January 14, 2020, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''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 a new Rule 46B to permit the appointment of Regulatory Trading Officials and corresponding amendments to Rules 47 and 75 to permit Regulatory Trading Officials to review whether a bid or offer was verbalized at the point of sale in time to be eligible for inclusion in the Closing Auction. The proposed rule change is available on the Exchange's website at *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 a new Rule 46B to permit the appointment of Regulatory Trading Officials and corresponding amendments to Rules 47 and 75 to permit Regulatory Trading Officials to review whether a bid or offer was verbalized at the point of sale in time to be eligible for inclusion in the Closing Auction.

Background

Rule 46 permits the Exchange to appoint active NYSE members [4] as Floor Officials. Rule 46 also permits the Exchange to appoint ''qualified'' [5] ICE employees to act as Floor Governors, one of the more senior types of Floor Officials (''Staff Governors'').[6] Floor Officials are delegated certain authority from the Board of Directors of the Exchange to supervise and regulate active openings and unusual situations that arise in connection with the making of bids, offers or transactions on the Trading Floor,[7] and to review and approve certain trading actions.

Currently, only Floor Officials are authorized to act under the Exchange's rules in connection with certain situations involving bids, offers or transactions on the Trading Floor. Specifically, Rule 75 (Disputes as to Bids and Offers) mandates that disputes arising on bids or offers that are not settled by agreement between the interested members shall be settled by a Floor Official. Under Rule 47 (Floor Officials—Unusual Situations), Floor Officials have the authority to ''supervise and regulate active openings and unusual situations that may arise in connection with the making of bids, offers or transactions on the Floor.''

Unusual situations may arise that could impede or prevent Floor brokers from representing customer interest before the end of Core Trading Hours.[8] In the event of such a potentially unusual situation,[9] a Floor broker may

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[127] 17 CFR 240.17Ad–22(e)(15).

[128] In approving this Proposed Rule Change, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[129] 15 U.S.C. 78s(b)(2).

[130] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Rule 2(a) states that the term ''member,'' when referring to a natural person, means a natural person associated with a member organization who has been approved by the Exchange and designated by such member organization to effect transactions on the Exchange Trading Floor or any facility thereof. *See also* note 7, *infra.*

[5] Supplementary Material .10 defines ''qualified'' employees as ''employees of ICE or any of its subsidiaries, excluding employees of NYSE Regulation, Inc., who shall have satisfied any applicable testing or qualification required by the NYSE for all Floor Governors.''

[6] Pursuant to Rules 46 and 46A, Floor Governors are one of several ranks of the broader category of Floor Officials, including, in order of increasing seniority, Floor Officials, Senior Floor Officials, Executive Floor Officials, Floor Governors and Executive Floor Governors. *See* Securities Exchange Act Release No. 57627 (April 4, 2008), 73 FR 19919 (April 11, 2008) (SR–NYSE–2008–19).

[7] The term ''Trading Floor'' is defined in Rule 6A to mean the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the ''Main Room'' and the ''Buttonwood Room.''

[8] *See* NYSE Rule 52. Core Trading Hours are defined in Rule 1.1(d) to mean the hours of 9:30 a.m. ET through 4:00 p.m. ET, or such other hours as may be determined by the Exchange, for example, an early scheduled closing time.

[9] Unusual situations may arise, for example, if the Floor broker hand-held device malfunctions or ceases to work or if a Floor broker is physically impeded, as a result of a crowd condition beyond that of normal traffic flow on the Exchange's trading Floor or some other circumstance beyond the Floor broker's control, in his or her ability to be present at a post before the DMM closes the security. *See*

Continued