

terms of the purchase, and the information or materials upon which the determinations of the Board were made.

9. Before investing in Shares in excess of the limits in section 12(d)(1)(A), each Investing Fund and a Fund will execute a FOF Participation Agreement stating, without limitation, that their boards of directors or trustees and their investment adviser(s), their Sponsors or trustees, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in Shares in excess of the limit in section 12(d)(1)(A)(i), an Investing Fund will notify the Fund of the investment. At such time, the Investing Fund will also transmit to the Fund a list of each Investing Fund Affiliate and Underwriting Affiliate. The Investing Fund will notify the Fund of any changes to the list of names as soon as reasonably practicable after a change occurs. The Fund and the Investing Fund will maintain and preserve a copy of the order, the FOF Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

10. Before approving any advisory contract under section 15 of the Act, the Board of each Investing Management Company, including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such advisory contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Investing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Investing Management Company.

11. Any sales charges and/or service fees charged with respect to shares of an Investing Fund will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

12. No Fund will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting the Fund to purchase shares of other investment companies for short-term cash management purposes.

For the Commission, by the Division of Investment Management, under delegated authority.

**Kevin M. O'Neill,**

*Deputy Secretary.*

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**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34-68602; File No. SR-OCC-2012-22]**

### **Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change To Clarify the Use of Certain Amounts Credited to the Liquidating Settlement Account To Settle Mark-to-Market Payments Arising From Stock Loan and Borrow Positions Carried in the Customers' Account**

January 9, 2013.

#### **I. Introduction**

On November 13, 2012, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change SR-OCC-2012-22 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder.<sup>2</sup> The proposed rule change was published for comment in the **Federal Register** on November 30, 2012.<sup>3</sup> The Commission received no comment letters. This order approves the proposed rule change.

#### **II. Description of the Proposed Rule Change**

The purpose of the proposed rule changes is to eliminate potential ambiguity as to OCC's right to use margin and other amounts credited to the Liquidating Settlement Account pursuant to OCC Rule 1104 to settle mark-to-market payments arising from stock loan and borrow positions carried in the clearing member's customers' account even though such payments are required by OCC's Rules to be settled in the clearing member's firm account or its combined market makers' account. In addition, a proposed amendment to Rule 1104 provides that any proceeds from stock loan and borrow positions carried in the customers' account could be applied only to obligations arising in such account as is the case with margin

assets deposited in respect of that account.

#### *Background*

OCC's By-Laws currently provide that stock loan and borrow positions (collectively, "Stock Loan Positions") may be carried at OCC in any eligible account of a clearing member, including the firm, market-maker, and customers' accounts. More specifically, under Section 5 of Articles XXI and XXIA of the OCC By-Laws, and notwithstanding the provisions of Section 3 of Article VI of the OCC By-Laws (requiring separation of firm and customer positions), clearing members have discretion as to which Stock Loan Positions may be carried in which eligible accounts, subject only to the clearing member's general representations under OCC Rules 2202(e) and 2202A(f) that the clearing member's participation in the lending and borrowing activity is in compliance with all applicable laws and regulations. However, Rules 2201(a) and 2201A(a) provide that a clearing member must designate either its firm account or its combined market-makers' account as the account to or from which all stock loan mark-to-market payments are to be made, regardless of the account in which particular Stock Loan Positions may be held.

OCC Rule 1104 generally provides that, upon suspension of a clearing member, OCC shall promptly liquidate, in the most orderly manner practicable, all margins deposited with OCC by such clearing member in all accounts (excluding securities held in a specific deposit or escrow deposit) and all of such clearing member's contributions to the clearing fund, subject to certain conditions. Under Rule 1104, in general, these and all other funds of the suspended clearing member subject to the control of OCC (except proceeds of segregated long positions, funds disposed of pursuant to Rules 1105 through 1107, and funds held in or payable to a segregated futures account) shall be credited by OCC to a special account, to be known as the Liquidating Settlement Account, in the name of the suspended clearing member, for the purposes specified in Chapter 11.

Under Rule 1104, therefore, in general, proceeds of all margin (other than margin held in segregated futures accounts) including margin in a clearing member's securities customers' account, are credited to the Liquidating Settlement Account. However, for purposes of administration of the liquidation, the margin does not lose its identity as being derived from the customers' account. Rules 2210 and

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

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

<sup>3</sup> Securities Exchange Act Release No. 68288 (November 26, 2012), 77 FR 71466 (November 30, 2012).

2210A (relating to the Stock Loan/Hedge Program and Market Loan Program, respectively) provide that net proceeds from, or amounts due in respect of, the termination of Stock Loan Positions shall be credited to or withdrawn from the Liquidating Settlement Account. The Liquidating Settlement Account will include any mark-to-market payments received that day. In addition, Rule 1104 provides that the proceeds from the liquidation of securities, or from drawing on letters of credit, held as margin in a restricted lien account (such as the customers' account) may be withdrawn and applied to the closing out of pending transactions, open positions, and exercised or matured contracts in such accounts pursuant to Rules 1105, 1106, and 1107, respectively.<sup>4</sup> To the extent that the proceeds derived from assets maintained in accounts subject to OCC's restricted lien exceed the proceeds used from such accounts for that purpose, such proceeds must be remitted by the Corporation to the suspended clearing member or its representative for distribution to the persons entitled thereto in accordance with applicable law.

#### *Description of Rule Change*

For the avoidance of doubt, OCC proposes to insert an interpretation indicating that when mark-to-market payments are owed with respect to Stock Loan Positions maintained in a clearing member's customers' account, proceeds of margin and unsegregated long positions, and all other amounts credited to the Liquidating Settlement Account in respect of the customers' account, may be used to satisfy the mark-to-market obligations arising from the Stock Loan Positions in such customers' account, even though such mark-to-market payments may settle in the clearing member's firm account or its combined market makers' account.

<sup>4</sup> The term "restricted lien account" is defined in Article I, Section 1 of OCC's By-Laws as follows: "Any account of a Clearing Member with the Corporation over which the Corporation has a restricted lien with respect to specified assets (including any proceeds thereof) in such account." The term "restricted lien" is defined in Article I, Section 1 of OCC's By-Laws as follows: "A security interest of the Corporation in specified assets (including any proceeds thereof) in an account of a Clearing Member with the Corporation as security for the Clearing Member's obligations to the Corporation arising from such account or, to the extent so provided in the By-Laws or Rules, a specified group of accounts that includes such account including, without limitation, obligations in respect of all Exchange transactions effected through such account or group of accounts, short positions maintained in such account or group of accounts, and exercise notices assigned to such account or group of accounts."

OCC's By-Laws clearly provide that Stock Loan Positions may be included in the customers' account and that such positions will be margined in that account along with positions in options and other cleared contracts in the account. It would therefore be inconsistent to conclude that margin required under OCC's Rules to be deposited in the customers' account to margin Stock Loan Positions cannot be used to settle mark-to-market payments in respect of those positions if the clearing member is suspended. OCC intends that the proposed rule changes are to eliminate any doubt in this regard.

In addition, as noted above, the liquidation rules for Stock Loan Positions in Rules 2210 and 2210A provide that any net proceeds of closing out Stock Loan Positions shall be credited to the Liquidating Settlement Account and that any net amounts payable in respect of such close-outs may be withdrawn from such account. However, Rule 1104 as currently drafted does not limit the use of proceeds of Stock Loan Positions carried in a restricted lien account to obligations arising from that restricted lien account as it does in the case of proceeds from a restricted lien account that are credited pursuant to Rules 1105 through 1107. While such a restriction might be implied from the fact that the Stock Loan Positions themselves are subject to a restricted lien and not a general lien pursuant to Section 3(e) of Article VI of the By-Laws, OCC believes that Rule 1104 should be amended to make this restriction explicit. Because margin and other proceeds from a restricted lien account that are credited to the Liquidating Settlement Account may be applied to mark-to-market payments owed in respect of Stock Loan Positions in the restricted lien account, any proceeds of such positions should be subject to the same restriction applicable to proceeds from other positions in the restricted lien account that are credited to the Liquidating Settlement Account. They should be applied only to obligations arising from that restricted lien account. OCC therefore also proposes to amend Rule 1104 to include references to Rules 2210 and 2210A to clearly provide that margin and other proceeds from the customers' account that are credited to the Liquidating Settlement Account may be applied to amounts payable with respect to Stock Loan Positions in the customers' account and that proceeds from Stock Loan Positions in such customers' account may be applied *only* to obligations arising in that account.

### III. Discussion

Section 17A(b)(3)(F) of the Act<sup>5</sup> requires that, among other things, that the rules of a clearing agency are designed to safeguard securities and funds in its custody or control or for which it is responsible and to protect investors and the public interest. The proposed rule change will further these ends by clarifying OCC's use collateral held. Specially the proposal clarifies that OCC may, in connection a clearing member's suspension, use the collateral that it holds in a clearing member's customers' account to settle mark-to-market payments arising from Stock Loan Positions carried in the clearing member's customers' account (notwithstanding that such payments are required by OCC's Rules to be settled in the clearing member's firm account or its combined market makers' account requiring a minimum clearing fund size that is designed to enable OCC to draw in full on its committed credit facilities that are secured by the clearing fund).

### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act<sup>6</sup> and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>7</sup> that the proposed rule change (File No. SR–OCC–2012–22) be and hereby is *approved*.<sup>8</sup>

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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<sup>5</sup> 15 U.S.C. 78q–1(b)(3) (F).

<sup>6</sup> 15 U.S.C. 78q–1.

<sup>7</sup> 15 U.S.C. 78s(b)(2).

<sup>8</sup> In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>9</sup> 17 CFR 200.30–3(a)(12).