

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66070; File No. SR-OCC-2011-13]

### Self-Regulatory Organizations; Options Clearing Corporation; Order Approving Proposed Rule Change, as Modified by Amendments No. 1, No. 2, and No. 3, Relating to Relative Performance Indexes

December 29, 2011.

#### I. Introduction

On September 21, 2011, the Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change SR-OCC-2011-13 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> On October 4, 2011, OCC filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on October 11, 2011.<sup>3</sup> On November 17, 2011, OCC filed Amendment No. 2 and Amendment No. 3 to the proposed rule change. The proposed rule change, as modified by Amendments No. 1, No. 2 and No. 3 was published in the **Federal Register** on November 29, 2011.<sup>4</sup> The Commission received no comment letters on the proposed rule change, as modified by Amendments No. 1, No. 2, and No. 3. This order approves the proposed rule change as modified by Amendments No. 1, No. 2, and No. 3.

#### II. Description

The purpose of the proposed rule change is to remove any potential cloud on the jurisdictional status of relative performance indexes. NASDAQ OMX PHLX has proposed to trade options on indexes ("Alpha Index Options") that measure the relative total returns of a stock or exchange-traded fund ("ETF")

against another stock or ETF, including where one of the reference ETFs measured by the index is a gold- or silver-based ETF.<sup>5</sup> Generally, OCC believes that a relative performance index should be considered to be an index of securities since the components of a relative performance index are ETFs or other securities. However, OCC would like to confirm the jurisdictional treatment of relative performance indexes in situations in which a reference security of an underlying relative performance index is an ETF designed to measure the return of gold or silver. To accomplish this purpose, OCC is adding an interpretation following Section 2 in Article XVII of its By-Laws,<sup>6</sup> clarifying that OCC will clear and treat as securities any relative performance index. The Commission and Commodity Futures Trading Commission ("CFTC") have previously approved changes to OCC's By-Laws clarifying that options on the CBOE Gold ETF Volatility Index will be cleared and treated as securities.<sup>7</sup>

In its capacity as a "derivatives clearing organization" registered as such with the CFTC, OCC filed the proposed rule change for prior approval by the CFTC pursuant to provisions of the Commodity Exchange Act (the "CEA") in order to foreclose any potential liability under the CEA based on an argument that the clearing by OCC of such options as securities options constitutes a violation of the CEA. OCC amended the rule filing at the request of the CFTC to clarify that OCC will clear and treat as options on securities any options on relative performance indexes for which a reference security is an exchange-traded fund designed to measure the return of gold or silver.<sup>8</sup>

<sup>5</sup> The staff notes that on August 17, 2011, the Commission issued an Order granting approval to this proposed rule change. See Securities Exchange Act Release No. 34-65149, 76 FR 52729 (August 23, 2011).

<sup>6</sup> The staff notes that OCC is also adding a definition of "relative performance index" to Section 1, which will be defined as an index designed to measure the relative performance of a reference security or reference index in relation to another reference security or reference index.

<sup>7</sup> See Securities Exchange Act Release No. 34-62290, 75 FR 35861 (June 23, 2010); CFTC Order Exempting the Trading and Clearing of Certain Products Related to the CBOE Gold ETF Volatility Index and Similar Products, 75 FR 81977 (December 29, 2010).

<sup>8</sup> The staff notes that Amendment Nos. 2 and 3 provide that the interpretation will not include options on relative performance indexes for which a reference security is an exchange-traded fund designed to measure the return of a commodity other than gold or silver.

#### III. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and derivative transactions.<sup>9</sup> The proposed rule change is similar to a proposed rule change the Commission approved previously with respect to the jurisdictional status CBOE Gold ETF Volatility Index and clarifies that OCC will clear and treat as securities any relative performance index, including in situations in which one of the reference securities of a relative performance index is an ETF designed to measure the return of gold or silver. Any uncertainty regarding the jurisdictional status of a product could presumably interfere with OCC's ability to provide clearance and settlement services with respect to the product. The proposed rule change, by allowing OCC to clarify in its rules the treatment of a relative performance index, should facilitate the clearance and settlement of such products and, thus, should help promote the prompt and accurate clearance and settlement of securities transactions and of derivative transactions.

#### 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>10</sup> and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>11</sup> that the proposed rule change, as modified by Amendments No. 1, No. 2, and No. 3, (File No. SR-OCC-2011-13) be, and hereby is, approved.<sup>12</sup>

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

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<sup>9</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>10</sup> 15 U.S.C. 78q-1.

<sup>11</sup> 15 U.S.C. 78s(b)(2).

<sup>12</sup> In approving this proposed rule change the Commission has considered the proposed rule's impact of efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<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. 65483 (October 4, 2011), 76 FR 62981 (October 11, 2011).

<sup>4</sup> Securities Exchange Act Release No. 65807 (September 21, 2011), 76 FR 73752 (November 29, 2011).