

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91445; File No. SR-OCC-2021-004]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Proposed Rule Change Relating to Revisions to OCC's Auction Participation Requirements

March 31, 2021.

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

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

The proposed rule change by OCC would amend the auction participation requirements set forth Interpretation and Policy ("I&P") .02(c) to OCC Rule 1104 (Creation of Liquidating Settlement Account). The proposed changes to OCC Rules are included in Exhibit 5 of File No. SR-OCC-2021-004. Material proposed to be added to OCC's Rules as currently in effect is underlined and material proposed to be deleted is marked in strikethrough text. All capitalized terms not defined herein have the same meaning as set forth in the OCC By-Laws and Rules.³

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

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

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

(1) Purpose Background

Rule 1102 enumerates the grounds upon which OCC may suspend one of its Clearing Members.⁴ Following the suspension of any Clearing Member, OCC would take a number of steps designed to reasonably ensure that the Clearing Member's suspension is managed in an orderly fashion. Among the steps that OCC may take to manage a Clearing Member's suspension is liquidating the remaining collateral, open positions and/or exercised/matured contracts (*i.e.*, the remaining portfolio) of the suspended Clearing Member. Interpretation and Policy .02(a) to Rule 1104 clarifies that OCC "may elect to use one or more private auctions to liquidate all or any part" of a suspended Clearing Member's remaining portfolio. In this context, the term "private auction" means an auction open to bidders who are invited by OCC and in which such bidders submit bids on a confidential basis.⁵

Interpretation and Policy .02(c) to Rule 1104 ("I&P .02(c)") establishes certain basic requirements for OCC's private auction process. I&P .02(c) states that OCC "will invite all Clearing Members to apply to become pre-qualified auction bidders" and that "[a]ny Clearing Member may be included in the pool of pre-qualified auction bidders by completing required auction documentation in advance." Further, I&P .02(c) states that "[b]y posting notices on the [OCC]'s website from time to time, [OCC] will also invite non-Clearing Members to apply to become pre-qualified auction bidders." I&P .02(c) also establishes that for a non-Clearing Member to be pre-qualified as an auction bidder, it "must (i) actively trade in the asset class in which it proposes to submit bids, (ii) actively

trade in markets cleared by [OCC], (iii) be sponsored by, and submit its bids through, a Clearing Member that has agreed to guarantee and settle any accepted bid made by such non-Clearing Member and (iv) complete required auction documentation in advance." I&P .02(c) also states that OCC "will endeavor to maintain a pool of pre-qualified auction bidders by periodically reviewing such bidders and their qualifications" and that OCC "will promptly notify any pre-qualified auction bidder removed from the pool of pre-qualified auction bidders."

Proposed Change

OCC is proposing to change I&P .02(c) in order to clarify and further facilitate the process of on-boarding Clearing Members and non-Clearing Members as potential bidders in future auctions of a suspended Clearing Member's remaining portfolio. To achieve a successful auction pursuant to Rule 1104 and enable OCC to take timely action to contain any losses and liquidity pressures that may be caused by a Clearing Member's default, it is important for OCC to encourage participation in such auctions. OCC believes that participation by more bidders generally facilitates more competitive bids on a suspended Clearing Member's portfolio. Competitive bids are necessary for OCC to sell the portfolio at a market price that minimizes the loss to OCC and its Clearing Members, and enable OCC to successfully complete an auction in a timely manner and thereby manage a Clearing Member default in a timely manner. Therefore, OCC proposes to make two related revisions to I&P .02(c), as described below. OCC also proposes to delete current rule text in I&P .02 related to OCC's internal administration of pre-qualified auction bidders, also described below.

First, OCC proposes to revise I&P .02(c) to reflect that Clearing Members would not need to be invited by OCC to become pre-qualified auction bidders; instead, the revised language in I&P .02(c) would make clear that all Clearing Members are invited to participate in auctions of a suspended Clearing Member's remaining portfolio. OCC would retain, but slightly rephrase, the existing requirement that any Clearing Member seeking to be included in the pool of pre-qualified auction bidders must complete required auction documentation in advance; OCC's proposed changes would explain that in order for a Clearing Member to be pre-qualified as an auction bidder, the Clearing Member would need to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

⁴ The grounds for suspension, as summarized, include a Clearing Member (i) having been expelled or suspended from any self-regulatory organization; (ii) failing to make any delivery of cash, securities or other property to OCC in a timely manner as required by OCC's By-Laws or Rules; (iii) failing to make any delivery of funds or securities to another Clearing Member required pursuant to OCC's By-Laws or Rules; (iv) failing to make any delivery of funds or securities to the correspondent clearing corporation in a timely manner; (v) being in such financial or operating difficulty that OCC's Board of Directors or a Designated Officer determines that suspension is necessary for the protection of OCC, other Clearing Members, or the general public; or (vi) in the case of a non-U.S. Clearing Member, having been expelled or suspended by its non-U.S. regulator or any securities exchange or clearing organization of which it is a member.

⁵ Interpretation and Policy .02(a) to Rule 1104.

complete any required auction documentation in advance.

Second, OCC proposes to revise I&P .02(c) to reflect that non-Clearing Members would no longer need to be invited to become pre-qualified auction bidders by OCC posting notices to its website from time-to-time. Further, the revisions to I&P .02(c) would remove the existing requirements that a non-Clearing Member must actively trade in the asset class in which it proposes to submit bids and must actively trade in markets cleared by OCC. Instead, the revisions to I&P .02(c) would make clear that non-Clearing Members could become pre-qualified auction bidders by (i) having a Clearing Member sponsor to submit bids on behalf of the non-Clearing Member, (ii) having a Clearing Member agree to guarantee and settle any accepted bid made by the non-Clearing Member, and (iii) completing any required auction documentation in advance.

OCC is also proposing to delete from I&P .02(c) two sentences that discuss OCC's administration of the pool of pre-qualified auction bidders. Currently, I&P .02(c) explains that OCC maintains a pool of pre-qualified auction bidders, periodically reviews the pool of such bidders and their qualifications, and notifies any pre-qualified auction bidder that is removed from the pool. OCC is concerned that the trading activity review process contemplated by I&P .02(c) could inappropriately limit the number of pre-qualified bidders by excluding, *inter alia*, prospective bidders who did not have sufficient trading activity that was visible to OCC at the time of pre-qualification or review but were suitable bidders at the time of a particular auction. Accordingly, OCC proposes to eliminate the pre-qualification requirements related to a non-Clearing Member's trading experience.

OCC will continue to perform the pre-auction review described in Interpretation & Policy .02(d) to Rule 1104 ("I&P .02(d)"). This will allow OCC to maximize the number of pre-qualified bidders and select bidders for a particular auction based on an objective review that gives due consideration to the specific portfolio that will be auctioned. The proposal also eliminates the need for a periodic review and removal process. Under the proposed rule, a Clearing Member that terminates its required auction documentation or ceases to maintain its status as a Clearing Member will no longer be considered a pre-qualified auction bidder. Likewise, a non-Clearing Member will no longer be considered a pre-qualified bidder if its Clearing

Member sponsorship or guarantee is revoked or its required auction documentation is terminated. OCC notes that it would continue its current practice of maintaining a list of pre-qualified bidders through OCC's default management testing and review of default management testing results.

(2) Statutory Basis

OCC believes that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Securities Exchange Act of 1934, as amended (the "Act"),⁶ and the rules and regulations thereunder because the proposed change is generally designed to (i) promote the prompt and accurate clearance and settlement of transactions cleared by OCC, (ii) assure the safeguarding of securities and funds in OCC's custody, and (iii) protect investors and the public interest by clarifying and further facilitating the process of on-boarding Clearing Members and non-Clearing Members as potential bidders in future auctions of a suspended Clearing Member's remaining portfolio. The proposed change would further facilitate on-boarding of potential bidders by removing certain administrative obstacles in the process of becoming a pre-qualified auction bidder (e.g., non-Clearing Members seeking invitations to become pre-qualified auction bidders posted to OCC's website from time-to-time). OCC believes that the removal of these administrative obstacles itself would not materially impact risks to OCC but would simplify the on-boarding process in a way that is intended to facilitate on-boarding potential bidders in future auctions, which potentially could have the result of increasing participation in future auctions.

As described herein, the potential for increased participation in future auctions would improve the likelihood that in any particular auction there is greater competition among auction bidders that results in a qualified bidder submitting a bid that OCC deems acceptable and that minimizes loss to OCC's default management resources. If OCC does not obtain a satisfactory bid, OCC may need to conduct additional auctions on subsequent days or else determine the auction process has been unsuccessful and utilize other default management tools.⁷ Similarly, a lack of competitive bidding may require OCC to accept a best bid that results in greater

loss to OCC's default management resources than OCC would have been able to accept through more competitive bidding that resulted in a higher best bid. Accordingly, to the extent OCC receives more competitive bids OCC could liquidate a suspended Clearing Member's remaining portfolio without the need for additional auctions or the use of other default management tools, and similarly increase the likelihood that OCC receives a best bid that minimizes loss to its default management resources. OCC believes these improvements, generally, would (i) promote prompt and accurate clearance and settlement as a result of shorter close-out periods and more competitive auction prices; (ii) help assure the safeguarding of securities and funds in OCC's custody by reducing the risk of loss to such securities and funds from unallocated open positions; and (iii) inure to the benefit of investors and the public for the same reasons.

The proposed change would also remove existing limitations on non-Clearing Members seeking to become pre-qualified bidders (e.g., a non-Clearing Member must actively trade in the asset class in which it proposes to submit bids and must actively trade in markets cleared by OCC). OCC similarly believes that the removal of these requirements would not materially impact risks to OCC. Any Clearing Member sponsoring, submitting bids on behalf of, and guaranteeing a non-Clearing Member auction bidder would itself need to have been approved by OCC to clear the products on which its sponsored non-Clearing Member might bid. In addition, the Clearing Member would need to have approved its sponsored non-Clearing Member to trade in the products on which the sponsored non-Clearing Member intends to bid. Finally, before submitting a bid on behalf of any sponsored non-Clearing Member, the Clearing Member would need to accept that it is willing to guarantee the sponsored non-Clearing Member's performance should its bid be selected as the winning bid in the auction. OCC believes these safeguards obviate the need for maintaining the requirements in current I&P .02(c) that any non-Clearing Member seeking to become pre-qualified auction bidders must actively trade in the asset class in which it proposes to submit bids and must actively trade in markets cleared by OCC, because they allow OCC to consider a non-Clearing Member's (and/or its sponsor Clearing Member's) financial strength, demonstrated activity in the products being auctioned and

⁶ 15 U.S.C. 78q-1(b)(3)(F).

⁷ See e.g., Securities Exchange Act Release No. 34-82351 (December 19, 2017); 82 FR 61107 (December 26, 2017) (File No. SR-OCC-2017-020).

qualification to clear transactions in the relevant asset classes at the time of a particular auction.

Furthermore, a bidder's pre-qualification does not mean that OCC would automatically include that bidder in any particular auction. Rather, OCC would continue to determine an appropriate pool of auction bidders on a case-by-case basis using the criteria established in I&P .02(d). OCC believes that reviewing the criteria set forth in I&P .02(d) with respect to a particular auction is the most appropriate way for OCC to identify, monitor and manage the material risks arising from a non-Clearing Member auction participant in accordance with Rule 17Ad-22(e)(19).⁸ The financial strength, trading activity and Clearing Member relationships of a non-Clearing Member may vary over time. OCC in the best position to identify, monitor and manage the material risks arising from a non-Clearing Member auction participant if it considers the criteria set forth in I&P .02(d) with respect to a particular auction portfolio at the time it selects bidders. For the reasons described above, OCC believes that the removal of the pre-qualification requirements related to a non-Clearing Member's trading activities would not materially impact risks to OCC, but would simplify the on-boarding process in a way that is intended to facilitate on-boarding potential bidders in future auctions, which potentially could have the result of increasing participation in future auctions. The potential for increased participation in future auctions could improve the ability of OCC to timely liquidate a suspended Clearing Member's remaining portfolio, which generally would inure to the benefit of investors and the public.

OCC believes that the proposed rule change is also consistent with Rule 17Ad-22(e)(13) because it is reasonably designed to ensure OCC has operational capacity to take timely action to contain losses.⁹ As explained above, OCC believes that by removing certain administrative obstacles in the process of becoming a pre-qualified auction bidder (e.g., non-Clearing Members seeking invitations to become pre-qualified auction bidders posted to OCC's website from time-to-time) and by removing existing limitations on non-Clearing Members seeking to become pre-qualified bidders (e.g., a non-Clearing Member must actively trade in the asset class in which it proposes to submit bids and must actively trade in markets cleared by

OCC), the proposed change would clarify and further facilitate the process of on-boarding Clearing Members and non-Clearing Members as potential bidders in future auctions of a suspended Clearing Member's remaining portfolio. OCC believes the proposed change would not materially impact risks to OCC and would simplify the on-boarding process in a way that is intended to facilitate on-boarding potential bidders in future auctions, which potentially could have the result of increasing participation in future auctions. By improving the potential for increased participation in future auctions, the proposed change is reasonably designed to ensure OCC has operational capacity to take timely action to contain losses from a suspended Clearing Member's remaining portfolio.

Finally, Section 19(b)(1) of the Act and Rule 19b-4 thereunder set forth the requirements for self-regulatory organization ("SRO") proposed rule changes, including the regulatory filing requirements for "stated policies, practices and interpretations" ("SPPIs").¹⁰ OCC proposes to delete current rule text in I&P .02(c) describing OCC's maintenance of the list of pre-qualified auction bidders. OCC believes that the current rule text describing OCC's internal administration of pre-qualified auction bidders is concerned solely with the administration of OCC, and also is reasonably and fairly implied by the existing rule text, described herein, establishing the requirements to become a pre-qualified auction bidder, including the completion any required auction documentation, and therefore the current rule text does not constitute an SPPI of OCC. Accordingly, OCC believes the proposed changes would be consistent with the requirements of

¹⁰ Section 19(b)(1) of the Exchange Act requires an SRO such as OCC to file with the Commission any proposed rule or any proposed change in, addition to, or deletion from the rules of such SRO. See 15 U.S.C. 78s(b)(1). Section 3(a)(27) of the Exchange Act defines "rules of a clearing agency" to mean its (1) constitution, (2) articles of incorporation, (3) bylaws, (4) rules, (5) instruments corresponding to the foregoing and (6) such "stated policies, practices and interpretations" as the Commission may determine by rule. See 15 U.S.C. 78c(a)(27). Exchange Act Rule 19b-4(a)(6) defines the term "SPPI" to mean, in addition to certain publicly facing statements, "any material aspect of the operation of the facilities of the [SRO]." See 17 CFR 240.19b-4(a)(6). Rule 19b-4(c) provides, however, that an SPPI may not be deemed to be a proposed rule change if it is (i) reasonably and fairly implied by an existing rule of the SRO or (ii) concerned solely with the administration of the SRO and is not an SPPI with respect to the meaning, administration, or enforcement of an existing rule of the SRO.

Section 19(b)(1) of the Act and Rule 19b-4 thereunder.¹¹

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

OCC does not believe that the proposed rule change would impose any burden on competition.¹² OCC believes the proposed rule change would not unfairly inhibit access to OCC's services or disadvantage or favor any particular user in relationship to another user because the proposed rule change would apply equally to all Clearing Members. Similarly, OCC believes the proposed rule change would not unfairly inhibit access to OCC's services or disadvantage or favor any particular user in relationship to another user because the proposed rule change would equally impose on non-Clearing Members the minimum requirements necessary to permit them to participate in auctions (i.e., (i) having a Clearing Member sponsor and submit bids on behalf of the non-Clearing Member, (ii) having a Clearing Member agree to guarantee and settle any accepted bid made by the non-Clearing Member, and (iii) completing any required auction documentation in advance). Moreover, participation in any auction of a suspended Clearing Member's remaining portfolio is voluntary for Clearing Members and non-Clearing Members; so no particular user of OCC's services would be required to become a pre-qualified auction bidder or participate in an auction.

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

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

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

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

¹¹ See 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b-4.

¹² 15 U.S.C. 78-q1(b)(3)(I).

⁸ 17 CFR 240.17Ad-22(e)(19).

⁹ 17 CFR 240.17Ad-22(e)(13).

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

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-OCC-2021-004 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-OCC-2021-004. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's website at <https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules>.

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-OCC-2021-004 and should

be submitted on or before April 27, 2021.

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

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91446; File No. SR-NASDAQ-2020-017]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Disapproving a Proposed Rule Change To Amend Nasdaq Rule 5704

March 31, 2021.

I. Introduction

On July 23, 2020, 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 ("Exchange Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend certain listing requirements relating to maintaining a minimum number of beneficial holders and minimum number of shares outstanding. The proposed rule change was published for comment in the **Federal Register** on August 7, 2020.³

On September 10, 2020, pursuant to Section 19(b)(2) of the Exchange Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On November 5, 2020, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷ On January 26, 2021, the Commission designated a longer period for Commission action on the proposed rule change.⁸ The Commission has received

¹³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 89464 (August 4, 2020), 85 FR 48012 ("Notice").

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 89823, 85 FR 57895 (September 16, 2020).

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 90355, 85 FR 71977 (November 12, 2020) ("OIP").

⁸ See Securities Exchange Act Release No. 90994, 86 FR 7750 (February 1, 2021).

comment letters on the proposed rule change.⁹

This order disapproves the proposed rule change because, as discussed below, Nasdaq has not met its burden under the Exchange Act and the Commission's Rules of Practice to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5), and, in particular, the requirement that the rules of a national securities exchange be designed "to prevent fraudulent and manipulative acts and practices" and "to protect investors and the public interest."¹⁰

II. Description of the Proposal

As described in detail in the Notice and OIP, the Exchange proposes to amend Nasdaq Rule 5704 to: (1) Remove the requirement that, twelve months after the commencement of trading on the Exchange, a series of Exchange Traded Fund Shares must have 50 or more beneficial holders ("Beneficial Holders Rule"); and (2) replace its existing minimum number of shares requirement ("Minimum Shares Outstanding Rule") with a requirement that each series of Exchange Traded Fund Shares have a sufficient number of shares outstanding at the commencement of trading to facilitate the formation of at least one creation unit.¹¹

The Exchange asserts that the Beneficial Holders Rule is no longer necessary. The Exchange argues that the requirements of Rule 6c-11 under the Investment Company Act of 1940 ("1940 Act"), coupled with the existing creation and redemption process, mitigate the potential lack of liquidity that, according to the Exchange, the Beneficial Holders Rule was intended to address.¹² The Exchange further asserts that requiring a sufficient number of shares to be outstanding at all times to facilitate the formation of at least one creation unit, together with the daily portfolio transparency and other enhanced disclosure requirements of

⁹ Comments on the proposed rule change can be found on the Commission's website at: <https://www.sec.gov/comments/sr-nasdaq-2020-017/srnasdaq2020017.htm>.

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ Currently, Nasdaq Rule 5704(b)(1)(A) provides that the Exchange will establish a minimum number of Exchange Traded Fund Shares required to be outstanding at the time of commencement of trading on the Exchange.

¹² In contrast, Nasdaq believes that the shareholder requirement applicable to common stock is a measure of liquidity designed to help assure that there will be sufficient investor interest and trading to support price discovery once a security is listed. See Notice, *supra* note 3 at 48012, n.6.