



February 6, 2023

**VIA CFTC PORTAL**

Christopher J. Kirkpatrick  
Office of the Secretariat  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, DC 20581

**Re: Rule Certification for Updates to OCC's Operational Loss Fee**

Dear Secretary Kirkpatrick:

Pursuant to Section 5c(c)(1) of the Commodity Exchange Act, as amended ("Act"), and Commodity Futures Trading Commission ("CFTC") Regulation 40.6, The Options Clearing Corporation ("OCC") hereby certifies to the CFTC amendments to OCC's schedule of fees to reflect annual updates to OCC's Operational Loss Fee. The date of implementation of the rule is at least 10 business days following receipt of the certification by the CFTC or the date the proposed rule is approved by the Securities and Exchange Commission ("SEC") or otherwise becomes effective under the Securities Exchange Act of 1934 ("Exchange Act").

In conformity with the requirements of Regulation 40.6(a)(7), OCC states the following:

**Explanation and Analysis**

OCC proposes to revise its schedule of fees,<sup>1</sup> to implement a change in the maximum contingent Operational Loss Fee listed in OCC's schedule of fees in accordance with OCC's Capital Management Policy. Amendments to OCC's schedule of fees are included in Exhibit A. Material proposed to be added is marked by underlining, and material proposed to be deleted is marked with strikethrough text. All terms with initial capitalization that are not otherwise defined herein have the same meaning as set forth in the OCC By-Laws and Rules.<sup>2</sup>

The revised schedule of fees would update the maximum aggregate Operational Loss Fee that OCC would charge Clearing Members in equal shares in the unlikely event that OCC's

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<sup>1</sup> This rule filing will be submitted to the SEC under the Exchange Act and will not become effective until all necessary regulatory requirements to implement the proposed change have been satisfied.

<sup>2</sup> 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>.

shareholders' equity ("Equity") falls below certain thresholds defined in OCC's Capital Management Policy.

The proposed fee change is designed to enable OCC to replenish capital to comply with Rule 17Ad-22(e)(15) under the Exchange Act, which requires OCC, in pertinent part, to "hold[ ] liquid net assets funded by equity to the greater of either (x) six months . . . current operating expenses, or (y) the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and service"<sup>3</sup> and "[m]aintain[ ] a viable plan, approved by the board of directors and updated at least annually, for raising additional equity should its equity fall close to or below the amount required."<sup>4</sup> The proposed rule change would implement a change in the maximum contingent Operational Loss Fee listed in OCC's schedule of fees in accordance with OCC's Capital Management Policy.

OCC's Capital Management Policy includes OCC's replenishment plan.<sup>5</sup> Pursuant to the Capital Management Policy, OCC would charge an Operational Loss Fee in equal shares to Clearing Members to raise additional capital should OCC's Equity, less the Minimum Corporate Contribution,<sup>6</sup> fall below certain defined thresholds relative to OCC's Target Capital Requirement (i.e., a "Trigger Event"), after first applying the unvested balance held in respect of OCC's Executive Deferred Compensation Program.<sup>7</sup> Based on the Board-approved Target Capital Requirement for 2023 of \$303 million, a Trigger Event would occur if OCC's Equity less the Minimum Corporate Contribution falls below \$272.7 million at any time or below \$303 million for a period of 90 consecutive calendar days.

In the unlikely event those thresholds are breached, OCC would charge an Operational Loss Fee in an amount to raise Equity to 110% of OCC's Target Capital Requirement, up to the maximum

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<sup>3</sup> See 17 CFR 240.17Ad-22(e)(15)(ii).

<sup>4</sup> See 17 CFR 240.17Ad-22(e)(15)(iii).

<sup>5</sup> See Exchange Act Release No. 88029 (Jan. 24, 2020), 85 FR 5500 (Jan. 30, 2020) (File No. SR-OCC-2019-007) ("Order Approving OCC's Capital Management Policy").

<sup>6</sup> The Minimum Corporate Contribution is defined in the Capital Management Policy as the minimum level of OCC's own funds maintained exclusively to cover credit losses or liquidity shortfalls, the level of which the OCC's Board of Directors ("Board") shall determine from time to time. See Exchange Act Release No. 92038 (May 27, 2021), 86 FR 29861, 29862 (June 3, 2021) (File No. SR-OCC-2021-003). For 2023, the Board has approved a Minimum Corporate Contribution of \$69 million. When combined with the unvested funds held in respect of OCC's Executive Deferred Compensation Plan contributed after January 1, 2020 (the "EDCP Unvested Balance," as defined in OCC's Rules), OCC's persistent minimum level of skin-in-the-game for 2023 would be at least \$76 million, or 25% of OCC's Target Capital Requirement. In addition to this minimum level, OCC would also contribute liquid net assets funded by equity greater than 110% of the Target Capital Requirement. See OCC Rule 1006(e).

<sup>7</sup> See Exchange Act Release No. 91199 (Feb. 24, 2021), 86 FR 12237, 12241 (Mar. 2, 2021) (File No. SR-OCC-2021-003) (amending OCC's replenishment plan, including the measurement for a Trigger Event, to account for the establishment of OCC's persistent minimum skin-in-the-game).

Operational Loss Fee identified in OCC’s schedule of fees less the amount of any Operational Loss Fees previously charged and not refunded.<sup>8</sup> OCC calculates the maximum aggregate Operational Loss Fee based on the amount determined by the Board to be sufficient for a recovery or orderly wind-down of critical operations and services (“RWD Amount”),<sup>9</sup> which is determined based on the assumptions in OCC’s Recovery and Orderly Wind-Down Plan (“RWD Plan”).<sup>10</sup> In order to account for OCC’s tax liability for retaining the Operational Loss Fee as earnings, OCC may apply a tax gross-up to the RWD Amount (“Adjusted RWD Amount”) depending on whether the operational loss that caused OCC’s Equity to fall below the Trigger Event thresholds is tax deductible.<sup>11</sup>

The RWD Amount and, in turn, the Adjusted RWD Amount are determined annually based on OCC’s corporate budget, the assumptions articulated in the RWD Plan, and OCC’s projected effective tax rate.<sup>12</sup> The current Operational Loss Fee listed in OCC’s schedule of fees is the Adjusted RWD Amount calculated based on OCC’s 2022 corporate budget. Budgeted operating expenses in 2023 are higher than the 2022 budgeted operating expenses. This proposed rule change would revise the maximum Operational Loss Fee to reflect the Adjusted RWD Amount based on OCC’s 2023 budget, as follows:

Current Fee Schedule	Proposed Fee Schedule
\$157,000,000.00 less the aggregate amount of Operational Loss Fees previously charged and not refunded as of the date calculated, divided by the number of Clearing Members at the time charged.	\$174,000,000.00 less the aggregate amount of Operational Loss Fees previously charged and not refunded as of the date calculated, divided by the number of Clearing Members at the time charged.

Since the allocation of the Operational Loss Fee is a function of the number of Clearing Members at the time of the charge, the maximum Operational Loss Fee per Clearing Member is subject to fluctuation during the course of the year. However, if the proposed Operational Loss Fee were charged to 111 Clearing Members, the number of Clearing Members as of December 13, 2022, for example, the maximum Operational Loss Fee per Clearing Member would be \$1,567,568.

OCC would also update the schedule of fees to reflect the levels of Equity at which OCC would charge the Operational Loss Fee according to the thresholds defined in the Capital

<sup>8</sup> See Order Approving OCC’s Capital Management Policy, 85 FR at 5503.

<sup>9</sup> Id.

<sup>10</sup> The RWD Plan states OCC’s basic assumptions concerning the resolution process, including assumptions about the duration of the resolution process, the cost of the resolution process, OCC’s capitalization through the resolution process, the maintenance of Critical Services and Critical Support Functions, as defined by the RWD Plan, and the retention of personnel and contractual relationships. See Exchange Act Release No. 83918 (Aug. 23, 2018), 83 FR 44091, 44094 (Aug. 29, 2018) (File No. SR-OCC-2017-021).

<sup>11</sup> See Order Approving OCC’s Capital Management Policy, 85 FR at 5503.

<sup>12</sup> See Order Approving OCC’s Capital Management Policy, 85 FR at 5501 n.20, 5503.

Management Policy, as well as the level of Equity at which OCC would limit the Operational Loss Fee charged, based on OCC's current Target Capital Requirement.<sup>13</sup> Consistent with OCC's approach to its persistent minimum skin-in-the-game, the threshold in the schedule of fees continues to reflect that consistent with OCC's Capital Management Policy, the Trigger Event threshold is measured against Equity less the Minimum Corporate Contribution.

OCC reviewed the DCO core principles ("Core Principles") as set forth in the Act, the regulations thereunder, and the provisions applicable to a DCO that elects to be subject to the provisions of 17 CFR Subpart C. During this review, OCC identified the following as potentially being impacted:

**Public Information.** OCC believes that implementing the proposed rule change will be aligned with Core Principle L,<sup>14</sup> which requires, in part, that each DCO provide to market participants sufficient information to enable the market participants to identify and evaluate accurately the costs associated with using the services of the DCO. OCC believes that by implementing the proposed changes to its schedule of fees and by publishing the modified schedule of fees to its public website it would provide Clearing Members with sufficient information to enable them to identify and evaluate their contingent obligation to pay the Operational Loss Fee in the unlikely event that OCC experiences an operational loss that necessitates it to charge the fee.

#### Opposing Views

No opposing views were expressed related to the rule amendments.

#### Notice of Pending Rule Certification

OCC hereby certifies that notice of this rule filing has been given to Clearing Members of OCC in compliance with Regulation 40.6(a)(2) by posting a copy of the proposed rule change on OCC's website concurrently with the filing of this submission.

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<sup>13</sup> OCC does not propose any change to the thresholds and limits defined in the Capital Management Policy. This proposed change merely conforms the disclosure in OCC's schedule of fees to the current amounts based on the Board-approved Target Capital Requirement of \$303 million.

<sup>14</sup> 7 U.S.C. 7a-1(c)(2)(L).

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Certification

OCC hereby certifies that the rule set forth at Item 1 of the enclosed filing complies with the Act and the CFTC's regulations thereunder.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

/s/ Maria Alarcon  
Assistant General Counsel

Enclosure: Exhibit A