



February 20, 2024

**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 by The Options Clearing Corporation Concerning  
Interpretative Guidance on Contract Adjustments for Cash Dividends and  
Distributions**

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 a rule change concerning interpretative guidance relating to the adjustment of stock options for cash dividends and distributions on underlying securities. The date of implementation of the rule is at least 10 business days following receipt of the certification by the CFTC. The proposal has also been submitted to the Securities and Exchange Commission (“SEC”) under Section 19(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 19b-4 thereunder. The change will not be implemented until OCC has obtained all necessary regulatory approvals.

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

**Explanation and Analysis**

The purpose of this rule certification is to re-issue interpretative guidance relating to the adjustment of stock options for cash dividends and distributions on underlying securities with certain amendments, including (1) to reflect previously approved changes in the process for making such adjustment determinations; and (2) to address OCC’s general approach to certain additional scenarios. Amendments to the interpretative guidance, are included in Exhibit A to this letter.

**Overview**

OCC is the issuer of and sole clearing agency for standardized equity options listed on national securities exchanges registered with the SEC. OCC is also registered with the CFTC as a derivatives clearing organization (“DCO”) for purposes of clearing certain futures transactions,

including securities futures.<sup>1</sup> In accordance with OCC's By-Laws, adjustments may be made to some of the standardized terms of outstanding options or securities futures upon the occurrence of certain events related to the underlying security, such as a stock dividend, stock distribution, stock split, reverse stock split, rights offering, distribution, reorganization, recapitalization, reclassification in respect of an underlying security, or a merger, consolidation, dissolution or liquidation of the issuer of the underlying security.<sup>2</sup> The determination whether to adjust outstanding options in response to a particular event, and, if so, what the adjustment should be, is made by OCC, taking into consideration policies and interpretations established in OCC's By-Laws and any policies and interpretations having general application to specific types of events or specified kinds of cleared contracts established by a committee (the "Securities Committee") consisting of representatives of each of the U.S. options markets and a representative of OCC.<sup>3</sup>

OCC previously filed with the SEC and issued interpretative guidance concerning the application of OCC's adjustment policies and procedures and other adjustment rules for cash dividends.<sup>4</sup> In the interest of promoting clarity and transparency for market participants, OCC is proposing to re-issue that interpretative guidance subject to proposed amendments that would (1) update the interpretative guidance's discussion of how adjustment determinations are made to reflect subsequent changes to the determination process since the interpretative guidance was last issued, and (2) provide additional guidance on certain underlying events. OCC does not propose to change its policies or practices with respect to such contract adjustments. OCC merely proposes to publish guidance reflecting its current policies and practices. Accordingly, OCC does not believe that this proposed change would have any impact on market participants other than to provide them with additional information.

## **Proposed Changes**

### **Background**

OCC's By-Laws and Rules authorize OCC to make adjustments to listed options when certain events occur related to the underlying security, such as a stock dividend, stock distribution, stock split, reverse stock split, rights offering, distribution, reorganization, recapitalization, or reclassification with respect to the underlying security or the merger, consolidation, dissolution or liquidation of the issuer of the underlying security. The By-Laws provide policies and procedures

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<sup>1</sup> Currently, none of OCC's participant exchanges list securities futures.

<sup>2</sup> Adjustments for listed options are discussed at length in the Characteristics and Risks of Standardized Options ("Options Disclosure Document" or "ODD"), which broker-dealers are required to provide to a customer prior to accepting an order to purchase or sell a listed option. See 17 CFR 240.9b-1. The Options Disclosure Document is also available on OCC's website: <https://www.theocc.com/company-information/documents-and-archives/options-disclosure-document>.

<sup>3</sup> See OCC By-Laws, Art. VI § 11.

<sup>4</sup> See, e.g., Exchange Act Release No. 68531 (Dec. 21, 2012), [77 FR 77157](#) (Dec. 31, 2012) (SR-OCC-2012-26).

for making such determinations, including that OCC determines whether to adjust a contract, taking into account such factors as fairness to holders and writers (or purchasers and sellers) of the affected contracts, the maintenance of a fair and orderly market in the affected contracts, consistency of interpretation and practice, efficiency of exercise settlement procedures, and the coordination with other clearing agencies of the clearance and settlement of transactions in the underlying interest.<sup>5</sup> OCC applies these factors to a particular corporate action on a case-by-case basis, considering the circumstances known to it at the time the determination is made, subject to OCC's discretion to depart from policy and precedent when the Corporation determines that unusual circumstances make such a departure appropriate.<sup>6</sup>

OCC's By-Laws also provide general rules applicable to specific types of corporate actions, including with respect to cash dividends or distributions made by the issuer of an underlying security. For example, the By-Laws establish a general rule that OCC does not adjust listed options to reflect "ordinary cash dividends or distributions," which the By-Laws define to mean "[c]ash dividends or distributions (regardless of size) by the issuer of the underlying security which [OCC] believes to have been declared pursuant to a policy or practice of paying such dividends or distributions on a quarterly or other regular basis or which [OCC] believes represents an acceleration or deferral of such payments."<sup>7</sup> OCC established this general rule because when an issuer's policy or practice of paying such dividends is public, such ordinary dividends can be priced into options premiums.<sup>8</sup> OCC's By-Laws also provide that for cash dividends not declared pursuant to an issuer's policy or practice of paying such distributions at regular intervals (i.e., "special" cash dividends and distributions), OCC will not adjust if the amount distributed is less than \$0.125 per share (or \$12.50 per contract for listed options with a unit of trading larger than 100 shares). OCC established this de minimis threshold in part to avoid the proliferation of outstanding option symbols and series.<sup>9</sup>

In connection with the adoption of the general rules against adjustments for cash dividends and distributions that are ordinary or below the de minimis threshold, OCC previously filed and published interpretative guidance promulgated by its Securities Committee to address questions about how those rules would be administered and applied.<sup>10</sup> Presented in question and answer ("Q&A") format, the interpretative guidance provided an overview of OCC's adjustment policies with respect to cash dividends and guidance on the application of those policies in a variety of

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<sup>5</sup> See OCC By-Laws, Art. VI § 11(a).

<sup>6</sup> Id.

<sup>7</sup> See OCC By-Laws, Art. VI § 11A, Interpretation and Policy .01.

<sup>8</sup> See Exchange Act Release No. 55258 (Feb 8, 2007), [72 FR 7701](#), 7703 (Feb. 16, 2007) (SR-OCC-2006-01).

<sup>9</sup> Symbols can proliferate when a dividend amount is added to the deliverable, yielding a non-standard option. Id., at note 14 and accompanying text. The resulting non-standard options may be illiquid and difficult to trade. Following an adjustment, exchanges typically introduce standard options with the same strikes.

<sup>10</sup> See Exchange Act Release No. 58059 (June 30, 2008), [73 FR 39367](#) (July 9, 2008) (SR-OCC-2008-10).

scenarios. OCC has since updated and re-issued that interpretative guidance, the last time in 2012.<sup>11</sup> Based on its continued relevance to market participants seeking to understand how OCC applies its adjustment policies, OCC proposes to re-issue the interpretative guidance with certain updates discussed below.

### **(1) Conforming Changes to Reflect the Current Determination Process**

The proposed changes would remove references to the adjustment panel of the Securities Committee in the interpretative guidance's discussion of how options adjustments are made. Since the interpretative guidance was last issued in 2012, the SEC approved a proposed rule change that affected the determination process.<sup>12</sup> Previously, an adjustment panel of the Securities Committee, consisting of representatives from the exchanges on which an option was listed and OCC's Chairman, would make determinations about whether that option should be adjusted in response to a corporate action. Currently, adjustment determinations are made by OCC rather than adjustment panels of the Securities Committee.<sup>13</sup> However, the Securities Committee still maintains a role in promulgating statements of policy and interpretations having general application to specified types of corporate actions or specified kinds of cleared contracts.<sup>14</sup> In making adjustment determinations, OCC must consider such policy statements and interpretations in addition to the factors and general rules set forth in the By-Laws in light of the circumstances known to OCC at the time such determination is made, subject to OCC's discretion to depart from policy or precedent when the OCC determines that unusual circumstances make such a departure appropriate.<sup>15</sup> OCC assumed sole responsibility for making adjustment determinations after corresponding updates to the Options Disclosure Document were approved by the SEC in 2018.<sup>16</sup> Accordingly, when OCC re-issues the interpretative guidance on cash dividends and distributions, OCC proposes to replace references to determinations made by an adjustment panel of the Securities Committee with references to OCC and make other non-substantive, textual edits to the interpretative guidance consistent with that change. These changes are intended to reflect the current, SEC-approved process for adjustment determinations made by OCC.

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<sup>11</sup> See Exchange Act Release No. 68531, *supra* note 4. See also Exchange Act Release No. 66742 (Apr. 5, 2012), [77 FR 21819](#) (Apr. 11, 2012) (SR-OCC-2012-05); Exchange Act Release No. 59442 (Feb. 24, 2009), [74 FR 9654](#) (Mar. 5, 2009) (SR-OCC-2009-01).

<sup>12</sup> See Exchange Act Release No. 69977 (July 11, 2013), [78 FR 42815](#) (July 17, 2013) (SR-OCC-2013-05).

<sup>13</sup> This change in governance arose from a request by the options exchanges promoted by a desire to consider ways to lessen investor confusion and enhance consistency in making option contract adjustments. See Exchange Act Release No. 69642 (May 28, 2013), [78 FR 33138](#), 33139 (June 3, 2013) (SR-OCC-2013-05).

<sup>14</sup> See OCC By-Laws, Art. VI § 11(a).

<sup>15</sup> *Id.*

<sup>16</sup> See Exchange Act Release No. 84565 (Nov. 9, 2018), [83 FR 57778](#), 57779 (Nov. 16, 2018) (SR-ODD-2018-01).

## (2) Additional Interpretative Guidance

OCC also proposes to add additional Q&As that would provide guidance for several situations OCC has observed since the interpretative guidance was last issued, including (a) specific guidance with respect to variable dividends, and (b) additional guidance with respect to dividends issued by real estate investment trusts (“REITs”).

### a. Variable Dividends

OCC has seen an increase in the number of issuers that have established policies or practices of distributing “variable dividends.” Typically, such variable dividends are paid at regular intervals if issuer-defined thresholds for paying the dividends are met. The amount of the variable dividend may increase or decrease (sometimes significantly) from dividend to dividend based on issuer-established thresholds and, on occasion, may not be paid at all if the issuer-established thresholds are not met. These variable dividends may also be in addition to regular dividends paid pursuant to the issuer’s policy or practice.

For example, on May 19, 2022, Arch Resources, Inc. (ARCH) announced an \$8.11 quarterly dividend, which included a fixed component of \$0.25 and a variable component of \$7.86 per share. In making its adjustment determination, OCC considered an ARCH press release, issued on February 15, 2022, communicating that ARCH was launching a capital return program pursuant to which it planned to “return to stockholders approximately 50 percent of the prior quarter’s discretionary cash flow . . . via a variable quarterly cash dividend in conjunction with its existing fixed quarterly cash dividend.”<sup>17</sup> OCC determined that the quarterly variable dividend was an “ordinary dividend” as defined in Interpretation and Policy .01 to Article VI, Section 11A of OCC’s By-Laws, and therefore not subject to adjustment, because the dividend had been declared pursuant to a policy or practice of paying such dividend on a quarterly or other regular basis.<sup>18</sup>

As another example, on March 9, 2022, Zim Integrated Shipping Services Ltd. (ZIM) announced a cash dividend of \$17.00 per share, representing 50% of ZIM’s 2021 net income, taking into account the quarterly dividends paid during the first three fiscal quarters of the year.<sup>19</sup> Pursuant to the issuer’s stated policy, ZIM intended to “distribute a dividend to shareholders on a quarterly basis at a rate of approximately 20% of the net income derived during such fiscal quarter with

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<sup>17</sup> See Arch Resources Reports Fourth Quarter 2021 Results (Feb. 15, 2022), <https://investor.archrsc.com/2022-02-15-Arch-Resources-Reports-Fourth-Quarter-2021-Results>.

<sup>18</sup> See Info Memo #50473 (May 20, 2022). OCC does not issue Info Memos notifying market participants that OCC has determined not to adjust options (a “No-Adjustment” Info Memo) each time an issuer announces a dividend OCC determines to be ordinary and therefore not subject to adjustment. In general, OCC considers whether a No-Adjustment Info Memo may be warranted based on inquiries made by Clearing Members or others with respect to a particular corporate action.

<sup>19</sup> See ZIM Reports Record Financial Results for the Fourth Quarter and Full Year 2021 (March 9, 2022), <https://investors.zim.com/news/news-details/2022/ZIM-Reports-Record-Financial-Results-for-the-Fourth-Quarter-and-Full-Year-2021/default.aspx>.

respect to the first three fiscal quarters of the year” and that the “cumulative annual dividend amount to be distributed by [ZIM] (including the interim dividends paid during the first three fiscal quarters of the year) [would] total 30-50% of the annual net income.”<sup>20</sup> OCC determined that the \$17 dividend was an “ordinary dividend” declared pursuant to a policy or practice of paying such dividend on a quarterly or other regular basis, and therefore not subject to adjustment.<sup>21</sup>

OCC proposes to add a Q&A to the interpretative guidance reflecting that if OCC determines such variable dividends are paid pursuant to an issuer’s policy or practice of paying such variable dividends at regular intervals, OCC generally considers them to be ordinary dividends and not adjustable, even if, on occasion, no variable dividend is paid or if the amount of the dividend increases or decreases based on the issuer-established thresholds. OCC believes this guidance would align with the precedent described above and provide market participants with greater clarity about how OCC applies the adjustment policies outlined in the By-Laws to variable dividends.

b. REITs

OCC proposes to add further guidance about situations in which an issuer may pay a dividend outside of its normal schedule of dividend payments that the issuer describes as necessary to maintain its tax status as a particular type of organization, such as a REIT. The existing interpretative guidance answered several questions concerning dividends paid by REITs and similar companies. For example, the existing interpretative guidance addressed that while REITs may pay dividends at irregular intervals, these companies often have regular dividend policies, but will actually pay dividends only when certain conditions are met, or in response to market conditions. Similar to the variable dividend situation, in which, on occasion, no variable dividend is paid if issuer-established thresholds are not met, the prior interpretative guidance provided that such REIT distributions generally would be considered ordinary distributions when they occur pursuant to the policy of the company.

However, OCC has observed at least one case in which an issuer has declared a dividend outside of its normal schedule of dividend payments to maintain its tax status as a particular type of organization, such as a REIT. Specifically, On July 22, 2022, Public Storage (“PSA”) announced a “special,” “one-time” dividend of \$13.15 per common share.<sup>22</sup> As explained in the issuer’s press release, PSA was distributing a projected tax gain in connection with its investment in another company that had been acquired “in order to meet the distribution requirements as a [REIT].”<sup>23</sup>

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<sup>20</sup> Id.

<sup>21</sup> See Info Memo [#50158](#) (March 9, 2022).

<sup>22</sup> See Public Storage Announces \$2.3 Billion Special Dividend Related to PS Business Parks Merger Consideration (July 22, 2022), <https://investors.publicstorage.com/news-events/press-releases/news-details/2022/Public-Storage-Announces-2.3-Billion-Special-Dividend-Related-to-PS-Business-Parks-Merger-Consideration/default.aspx>.

<sup>23</sup> Id.

Nevertheless, OCC determined that the dividend was non-ordinary under its By-Laws and issued an Info Memo concerning an adjustment to options on PSA.<sup>24</sup>

As OCC would clarify in the further guidance, such a dividend would most likely be considered non-ordinary and warrant an adjustment if OCC determines that the dividend is not being made pursuant to the issuer's established dividend policies and practices based on the company's departure from its regular dividend schedule and any characterization the company may make about the pay-out as "special" or "one time." In other words, an issuer's characterization of a dividend as necessary to maintain its tax status as a particular type of organization is not determinative of whether a dividend is "ordinary" under OCC's By-Laws. Rather, the question is whether the dividend is paid pursuant to an issuer's policy of paying such a dividend at regular intervals to maintain its tax status. If such an issuer announces a special dividend outside of its regular dividend policies and practices, such dividend will most likely be considered non-ordinary and warrant an adjustment even if the issuer is paying the dividend to maintain its tax status. OCC proposes to add a Q&A to the interpretative guidance to reflect OCC's practices in this situation.

### **Consistency with DCO Core Principles**

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 ("Subpart C DCO"). During this review, OCC identified the following as potentially being impacted:

**Public Information.** CFTC Regulation 39.21(c) requires, among other things, that a DCO make readily available to the general public on its website the terms and conditions of each contract, agreement, and transaction cleared and settled by the DCO and any other information that is relevant to participation in the clearing and settlement activities of the DCO.<sup>25</sup> The proposed changes would allow OCC to update interpretative guidance that will be made available on OCC's public website concerning its adjustment policies and procedures previously filed as a rule, thereby facilitating the re-issuance of guidance about material procedures that remain relevant. OCC believes that by updating the guidance to reflect current precedent, the proposed changes will help participants in the listed options market to better understand the risks related to contract adjustments in the scenarios addressed, consistent with the requirements of CFTC Regulation 39.21.

For these reasons, OCC believes that the proposed changes are consistent with the requirements of the DCO Core Principles and the CFTC Regulations thereunder.

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<sup>24</sup> See Info Memo [#50775](#) (July 25, 2022).

<sup>25</sup> 17 CFR 39.21(c)(1), (9).

Opposing Views

No substantive opposing views were expressed related to the rule amendments by OCC's Board members, Clearing Members or market participants. Public comments on the proposed rule change filed with the SEC, if any, and may be viewed on the SEC's public website.<sup>26</sup>

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 this certification on OCC's website concurrently with the filing of this submission.

Certification

OCC hereby certifies that the rule set forth at Exhibit A 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/ Mark C. Brown  
Executive Director, Associate General Counsel  
The Options Clearing Corporation

Enclosure: Exhibit A

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<sup>26</sup> See Options Clearing Corporation (OCC) Rulemaking, <https://www.sec.gov/rules/sro/occ.htm>.