



May 8, 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 Modifications to its Board Charter and Risk Committee Charter to Align with Recently Adopted CFTC Governance Requirements for Derivatives Clearing Organizations.**

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 modifications to its Board Charter and Risk Committee Charter to align with recently adopted CFTC Governance requirements. 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” or “Commission”) 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 make modifications to OCC’s Board of Directors Charter and Corporate Governance Principles (“Board Charter”) and Risk Committee Charter (“Risk Committee Charter”) to comply with recently adopted governance requirements<sup>1</sup> by the Commodity Futures Trading Commission (“CFTC”) for derivatives clearing organizations (“DCOs”) that became effective on July 13, 2023, and with which DCOs, like OCC, must comply by July 12, 2024.

The proposed changes to OCC’s Board Charter are included as Exhibit A to File No. SR-OCC-2024-005 and proposed changes to the Risk Committee Charter are included as Exhibit B to

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<sup>1</sup> See 88 FR 44675 (July 13, 2023)(“CFTC Adopting Release”), <https://www.govinfo.gov/content/pkg/FR-2023-07-13/pdf/2023-14361.pdf>

File No. SR-OCC-2024-005. Material proposed to be added is underlined and material proposed to be deleted is marked in strikethrough text.

All terms with initial capitalization that are not defined herein have the same meaning as set forth in the OCC By-Laws and Rules.<sup>2</sup>

## **Overview**

OCC is the sole clearing agency registered with the Commission for standardized equity options listed on national securities exchanges. OCC also clears and settles certain stock loan transactions and transactions in futures and options on futures. In connection with its clearance and settlement of transactions in securities, OCC is a “covered clearing agency”<sup>3</sup> regulated by the Commission. In connection with its clearance and settlement activities for transactions in futures and options on futures, OCC is a DCO regulated by the CFTC. OCC is also designated as a systemically important financial market utility by the Financial Stability Oversight Council pursuant to Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

As a covered clearing agency and DCO, OCC maintains a robust governance structure that is designed to comply with existing requirements of the Commission and the CFTC. Recently, the CFTC adopted new regulations regarding governance requirements for DCOs that supplement the existing governance requirements applicable to OCC as a DCO (“Governance Rules”).<sup>4</sup> The CFTC Governance Rules require, among other things, that: (i) DCOs establish and consult with a risk management committee on all matters that could materially affect the risk profile of the DCO; (ii) DCOs implement certain composition, rotation, and documentation requirements for the risk management committee; and (iii) DCOs establish a risk advisory working group that must convene at least two times per year, and adopt written policies and procedures related to the formation and role of the risk management working group. While OCC’s current governance structure meets many of the requirements of the Governance Rules, OCC is proposing to clarify: (i) a smaller subset of OCC’s existing Financial Risk Advisory Committee (“FRAC”) will serve as a non-Board-level risk management committee described in the Governance Rules; (ii) the entire FRAC will serve as a non-Board-level risk advisory working group described in the Governance Rules; and (iii) governance charters to reflect the requirements in the Governance Rules described above. DCOs, including OCC, are required to comply with these new regulations by July 12, 2024.

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<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>.

<sup>3</sup> The term “covered clearing agency” is defined in Exchange Act Rule 17Ad-22(a)(5) to mean “a registered clearing agency that provides the services of a central counterparty or central securities depository.”

<sup>4</sup> See 88 FR 44675 (July 13, 2023)(“CFTC Adopting Release”), <https://www.govinfo.gov/content/pkg/FR-2023-07-13/pdf/2023-14361.pdf>

## **Proposed Changes**

The purpose of this proposed rule change by OCC is to modify its Board Charter and Risk Committee Charter to implement changes that are designed to comply with certain of the Governance Rules. The Governance Rules are found in CFTC Regulation 39.24.<sup>5</sup> As part of the Governance Rules, DCOs are required to establish one or more risk management committees that meet certain composition requirements and to require the DCO's board of directors to consult with such risk management committee(s) on all matters that could materially affect the risk profile of the DCO and to consider and respond to input from the risk management committee(s) on such matters. In the CFTC Adopting Release, the CFTC clarifies that a DCO may structure the required risk management committee as either a non-Board-level advisory committee or as a Board-level committee.<sup>6</sup> In this proposed rule change, OCC intends to structure the required risk management committee as a non-Board-level committee. Therefore, OCC is revising its Board Charter and Risk Committee Charter to articulate the role of the non-Board-level committee and its responsibility to provide OCC's existing Board-level Risk Committee with pertinent information to be disseminated, as appropriate, for the Board's review and consideration on all matters that could materially affect OCC's risk profile.

As described below, OCC already maintains a robust governance structure that is designed to promote clear and transparent governance arrangements that, among other things, help effectively manage risks that arise in or are borne by OCC as a covered clearing agency and DCO. This structure is shaped by existing Commission and CFTC requirements, which are also described in part below. Within OCC's existing governance structure, the FRAC serves a similar purpose as the risk management committee and risk advisory working group described in the Governance Rules. OCC intends to make modifications to the FRAC to satisfy both the risk management committee and risk advisory working group Governance Rules requirements by designating a rotating smaller group of FRAC members to comprise the non-Board-level risk management committee, and the FRAC will function as the risk advisory working group. The changes that OCC is proposing to its Board Charter and Risk Committee Charter to address the Governance Rules for DCOs would become one facet of OCC's larger and overall governance structure. Because OCC treats the Board Charter and Risk Committee Charter as "rules" for purposes of Section 19(b) of the Exchange Act, it is therefore submitting the changes in connection with this proposed rule change.<sup>7</sup>

OCC believes that the material aspects of its operations will appropriately comply with the new Governance Rules by including the proposed provisions in OCC's Board Charter and Risk Committee Charter. As detailed below, these proposed provisions include requiring the Board and

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<sup>5</sup> 17 CFR 39.24.

<sup>6</sup> See CFTC Adopting Release at 44678.

<sup>7</sup> OCC intends to implement written policies and procedures to comply with the remaining requirements in the new CFTC requirements for DCOs, and OCC believes that those written policies and procedures will not require separate rule filings with the Commission or the CFTC.

the Risk Committee to consult with and respond to input from a new, non-Board-level risk management committee on all matters that could materially affect OCC's risk profile.

### **Existing Governance Structure**

As part of OCC's existing governance structure, OCC already maintains a Board-level Risk Committee. Therefore, the new non-Board-level risk management committee is not and will not be the only aspect of OCC's governance structure that is designed to provide appropriate consideration and supervision over matters that could materially affect OCC's risk profile. Rather, such governance structure mechanisms are already in place at OCC and compliance with the new Governance Rules will supplement those existing mechanisms.

For example, as specified in the Risk Committee Charter, the duties of the Risk Committee in discharging oversight include, but are not limited to, reviewing the adequacy of OCC's management of risks related to credit exposures (including margin and clearing fund methodologies), overseeing OCC's risk models and risk model validation process, reviewing and approving new products that materially impact OCC's established risk profile (and referring such products to the Board for potential approval), overseeing OCC's framework for membership of Clearing Members, and considering and discussing input and guidance from the FRAC relating to financial risk issues.<sup>8</sup>

The Risk Committee is also just one part of the more robust overall governance structure that OCC maintains to promote best practices and to comply with existing Commission and CFTC regulatory requirements that apply to OCC as a covered clearing agency and as a DCO. Certain of these regulatory requirements concerning OCC's governance structure are described in more detail below to provide greater context about the existing regulatory landscape to which the new Governance Rules are being added.

In connection with OCC's existing Board and Board committee structure, OCC maintains charters for the Board and all Board committees, Fitness Standards for Directors, Clearing Members and Others ("Fitness Standards"), and a Code of Conduct for OCC Directors ("Code of Conduct"). The charters, Fitness Standards, and Code of Conduct are all publicly available on OCC's website.<sup>9</sup>

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<sup>8</sup> As described in more detail below, the participants in the FRAC include members of OCC's management as well as representatives of parties that participate in the markets that OCC serves, such as Clearing Members, customers of Clearing Members, exchanges, and other stakeholders.

<sup>9</sup> See Board Charters, Board Committee Charters and Other Governance Documents, available at <https://www.theocc.com/company-information/documents-and-archives/board-charters>.

The Board is composed of directors who are Public Directors,<sup>10</sup> Exchange Directors,<sup>11</sup> Member Directors,<sup>12</sup> and a Management Director.<sup>13</sup> In this way, the directors serving on the Board represent a range of different stakeholders from the markets that OCC serves. In addition, the Board oversees six Board-level committees that are composed of certain Board directors and that assist the Board in carrying out its supervisory responsibilities. Aside from the Risk Committee, the other committees are the Audit Committee, Compensation and Performance Committee, Governance and Nominating Committee, Regulatory Committee, and Technology Committee. OCC also maintains the FRAC that operates as a forum in which OCC seeks feedback on financial risk initiatives. Members of OCC management participate in the FRAC along with representatives of parties that participate in the markets that OCC serves, such as Clearing Members, customers of Clearing Members, exchanges, and other stakeholders.

### **Existing Regulatory Requirements Regarding OCC's Governance Structure**

OCC's existing governance structure, as partially described above, is already shaped by significant regulatory requirements under the Exchange Act and the Commodity Exchange Act ("CEA") that apply to OCC as a covered clearing agency and DCO. Accordingly, the Governance Rules for DCOs are supplementary to these existing regulatory obligations applicable to OCC's governance structure.

For example, the DCO core principles in the CEA already require OCC to have governance arrangements that are transparent to permit the consideration of the views of owners and participants.<sup>14</sup> Similarly, because OCC is a registered clearing agency its rules must assure a fair representation of its shareholders and participants in the selection of its Directors and the administration of its affairs.<sup>15</sup> Part 39.24 of the CFTC's regulations for DCOs also requires OCC to have governance arrangements that, among other things, are clear and documented, describe the

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<sup>10</sup> Terms regarding service by Public Directors are set forth in OCC's By-Laws and in OCC's Fitness Standards. For example, a Public Director must have no affiliation with any national securities exchange, national securities association, designated contract market, futures commission merchant, or broker or dealer in securities. See e.g., OCC By-Laws Article III, Section 6A; Fitness Standards at "Additional Criteria for the Public Directors".

<sup>11</sup> Terms regarding service by Exchange Directors are set forth in OCC's By-Laws and in OCC's Fitness Standards. For example, the exchange nominating the Exchange Director must own common stock of OCC. See e.g., OCC By-Laws Article III, Section 6; Fitness Standards at "Additional Criteria for Exchange Directors".

<sup>12</sup> Terms regarding service by Member Directors are set forth in OCC's By-Laws and in OCC's Fitness Standards. See e.g., OCC By-Laws Article III, Section 2; Fitness Standards at "Additional Criteria for Member Directors".

<sup>13</sup> Terms regarding service by the Management Director are set forth in OCC's By-Laws and in OCC's Fitness Standards. For example, the Management Director must be an OCC employee. See e.g., OCC By-Laws Article III, Section 7.

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

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

structure in which the board of directors, committees, and management operate, and clearly specify the roles and responsibilities of the board of directors and its committees.<sup>16</sup> Similarly, Exchange Act Rules 17Ad-22(e)(2) and (3) require OCC as a covered clearing agency to have governance arrangements that, among other things, provide for governance arrangements that are clear and transparent, specify clear and direct lines of responsibility, consider the interests of Clearing Members' customers and other relevant stakeholders, and that establish a risk management committee of the board of directors and an independent audit committee of the board of directors.<sup>17</sup> These obligations work in coordination with a further obligation to maintain a sound risk management framework for managing risks that arise in or are borne by OCC and for Board review and approval of related policies and procedures.<sup>18</sup> In addition, provisions in the CEA and CFTC regulations and Commission rules under the Exchange Act obligate OCC to have fitness standards for Board directors, Clearing Members and others.<sup>19</sup> OCC's governance structure currently reflects all of these requirements.

### **New CFTC DCO Governance Requirements and Creation of a Non-Board-Level Risk Management Committee**

As part of OCC's approach to comply with the Governance Rules, OCC will create a separate, non-Board-level risk management committee. As noted above, OCC already has a Risk Committee that is a Board-level committee. Creation of the new risk management committee as a non-Board-level advisory committee will be consistent with the CFTC Adopting Release guidance that a DCO may structure the required risk management committee as either a non-Board-level advisory committee or as a Board-level committee.

While OCC's existing governance structure, including the consideration of the FRAC's input on risk initiatives, is robust and meets the CFTC's overall objective in requiring governance arrangements that are transparent, fulfill the public interest, and permit the consideration of the views of owners and participants, OCC's existing FRAC requires slight modifications to ensure continued compliance with the Governance Rules. Specifically, modifications are required to OCC's existing FRAC that are important to include within OCC's Risk Committee's delegation. These modifications, as outlined in the proposed Risk Committee Charter, (i) codify the required oversight and consultation between OCC's existing Board-level Risk Committee and the non-Board-level risk management committee, and (ii) establish the responsibility of OCC's existing Board-level Risk Committee to provide the Board with pertinent information for the Board's review and consideration for all matters that could materially affect OCC's risk profile from the non-Board-level risk management committee. Furthermore, modifications to OCC's existing FRAC are required to codify a regular rotation of membership and refine the current membership composition. By proposing

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<sup>16</sup> 17 CFR 39.24(b)(1), (3), (5).

<sup>17</sup> 17 CFR 240.17Ad-(22)(e)(2)(i), (v), (vi), (3)(iv) and (v).

<sup>18</sup> 17 CFR 240.17Ad-(22)(e)(3)(i).

<sup>19</sup> 7 U.S.C. 7a-1(c)(2)(O)(ii); 17 CFR 240.17Ad-22(e)(2)(iv); 17 CFR 240.17Ad-25(c)(3).

modifications to OCC's existing FRAC to create a non-Board-level risk management committee and a risk advisory working group, OCC will satisfy the membership composition and rotation requirements outlined in the Governance Rules.

The operation of the non-Board-level risk management committee will be controlled by written policies and procedures that OCC will design to ensure compliance with the new DCO requirements. For example, the DCO must maintain written policies and procedures to make certain that the risk management committee consultation process is described in detail and to include requirements for the DCO to document the board's consideration of and response to risk management committee input.<sup>20</sup> A DCO is also required to have written policies and procedures related to the creation and maintenance of minutes for each risk management committee meeting.<sup>21</sup>

The changes that OCC is proposing to its Board Charter and Risk Committee Charter to comply with part of the Governance Rules are described below, and they are designed to ensure that the Risk Committee and the Board work in coordination to consult with the new non-Board-level risk management committee and to respond to input from that committee on all matters that could materially affect OCC's risk profile. Consistent with the descriptions above of OCC's existing governance structure and the current Commission and CFTC requirements that already shape it, the proposed changes to the Board Charter and Risk Committee Charter would become part of the larger overall governance structure that OCC maintains to promote clear and transparent governance arrangements and to effectively manage risks that arise within or are borne by OCC as a covered clearing agency and DCO.

### **Proposed Changes to Board Charter**

OCC proposes to modify the Board Charter to provide two new aspects of how the Board fulfills its oversight role. Specifically, the Board Charter would state that the Board would oversee OCC's process for consultation with the new, non-Board-level risk management committee and the consideration of, and responses to, input from the non-Board-level risk management committee by the Board through reports from the Risk Committee. The Board would provide oversight of this process and would review and consider the discussions with the Risk Committee regarding the Risk Committee's consultation with the non-Board-level risk management committee.<sup>22</sup> The Board would also become more directly involved in the consultation and response process led by the Risk Committee as it determines appropriate in its business judgment.

In addition to the proposed changes described above, OCC proposes to incorporate several non-substantive changes to the Board Charter, including but not limited to, using initial

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<sup>20</sup> 17 CFR 39.24(b)(11)(i).

<sup>21</sup> Id.

<sup>22</sup> The oversight process will be documented in OCC's FRAC Guiding Principles Document.

capitalization for the term “Executive Session” consistently throughout the document, eliminating unnecessary words, and adding minor grammatical updates and terms for clarity.

### **Proposed Changes to Risk Committee Charter**

OCC also proposes to modify the Risk Committee Charter in a manner consistent with the proposed changes to the Board Charter. Specifically, the Risk Committee Charter would be revised to state that the Risk Committee would have responsibility for consulting with the non-Board-level risk management committee<sup>23</sup> and for considering and responding to input from that committee on all matters that could materially affect OCC’s risk profile. It would also state that the Risk Committee would provide relevant non-Board-level risk management committee input to the Board for its review and consideration.

In addition to the proposed changes described above, OCC proposes to incorporate several non-substantive changes to the Risk Committee Charter, including but not limited to, eliminating unnecessary words, and adding minor grammatical updates and terms for clarity and consistency.

### **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:

**Governance Arrangements.** OCC believes that the proposed changes are consistent with Core Principle O.<sup>24</sup> CFTC Regulation 39.24 requires that each DCO establish governance arrangements that, among other things, are clear and transparent, place a high priority on the safety and efficiency of the DCO, and explicitly support the stability of the broader financial system and other relevant public interest considerations of clearing members, customers of clearing members and other relevant stakeholders. In addition, a DCO’s governance arrangement must include clear and direct lines of responsibility and accountability, and clearly specify the roles and responsibilities of management. OCC believes that the proposed rule changes are consistent with these requirements in the following way:

- Modifying the Board Charter and Risk Committee Charter through the proposed changes described above would be consistent with these requirements because the changes would document in a clear, direct and transparent way the material aspects of

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<sup>23</sup> As of the July 12, 2024, CFTC compliance date, OCC’s FRAC will act as the non-Board-level risk management committee. Although not anticipated, changes to the name of the committee serving as the non-Board-level risk committee could happen in the future.

<sup>24</sup> 7 U.S.C. 7a-1(c)(2)(O).



the process through which the Board and Risk Committee would work in coordination to consult with and consider input from a new, non-Board-level risk management committee on all matters that could materially affect OCC's risk profile and to consider and respond to input from the non-Board-level risk management committee on such matters.

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

#### 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 any OCC response to such comments may be viewed on the SEC's public website.<sup>25</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 Exhibit B 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/ Megan Cahill  
Assistant General Counsel

Enclosure: Exhibit A, Exhibit B

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<sup>25</sup> See Options Clearing Corporation (OCC) Rulemaking, <https://www.sec.gov/rules/sro/occ.htm>.