

Standards<sup>5</sup> in order to assure compliance with subparagraph (ii) of Core Principle O.

#### *Description of Fitness Standards*

OCC believes that its Fitness Standards comply with Core Principle O by establishing minimum standards for directors and clearing members, as well as affiliates of such directors and clearing members.<sup>6</sup> The Fitness Standards are generally similar to fitness standards adopted by the Depository Trust and Clearing Corporation.

OCC believes that the Fitness Standards incorporate the Proposed Rule's minimum fitness standards for directors and clearing members, including the bases for refusal to register a person under Section 8a(2) of the CEA and, for directors only, the absence of a significant history of serious disciplinary offences, such as those that would be disqualifying under Section 1.63 of the CFTC's regulations. The Fitness Standards do not establish criteria for members of the disciplinary committee or for persons "with direct access to the settlement or clearing activities" of OCC ("Access Persons"). In OCC's case, all members of disciplinary committees<sup>7</sup> are directors of the Corporation and will be subject to the Fitness Standards as such. With respect to Access Persons, neither the CEA nor the Proposed Rules provide any explicit guidance as to the persons intended to be included in the phrase "any other individual or entity with direct access to the settlement or clearing activities of the [DCO]." Similarly, the term "direct access" is not defined in the CEA or the Proposed Rules. However, Core Principle O is closely modeled on existing designated contract market ("DCM") Core Principle 14, which also requires that fitness standards be established for directors, members and "any other persons with direct access to the facility." The CFTC has previously issued guidance on DCM Core Principle 14 and interpreted "persons with direct access to the facility" to include "non-member market participants who are not intermediated and do not have [member] privileges, obligations,

responsibilities or disciplinary authority." This interpretation suggests that "access" is intended to mean the type of access that a member would have. OCC believes that by analogy "persons with direct access to the settlement or clearing activities" of a DCO, as used in Core Principle O, is intended to refer to persons with access to submit transactions for clearing or to give instructions to OCC regarding accounts or transactions or otherwise have access to the clearing system in a manner similar to the access that a Clearing Member would have. OCC also does not read "any other individual or entity with direct access to the settlement or clearing activities of the [DCO]" to include OCC employees or service providers such as settlement banks. Accordingly, OCC believes that there are presently no persons with "direct access" to the settlement and clearing activities of OCC other than clearing members.

#### *By-Law Changes*

Article III (Board of Directors) and Article V (Clearing Members) set forth qualifications for directors and clearing members, respectively. The Interpretations and Policies under the appropriate sections of both Articles are being amended to incorporate the applicable Fitness Standards by reference.

#### **III. Discussion**

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder and particularly with the requirements of Sections 17A(b)(3)(A) and (C) of the Act.<sup>8</sup> Section 17A(b)(3)(A) of the Act requires that a clearing agency is so organized to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible. The proposed rule change establishes Fitness Standards for the purpose of permitting OCC to comply with new Core Principle O, applicable to DCOs under the CEA. The proposed rule change is consistent with 17A(b)(3)(A) because it is designed to assure that OCC has the governance structure in place to clear and settle the transactions that it clears and settles as DCO. Furthermore, the Commission notes that the proposed rule change does not affect OCC's governance structure with respect to the fair representation of its shareholders and participants in the selection of its directors and

administration of its affairs. Accordingly, OCC's rules should continue to assure the fair representation of its shareholders and participants as required by Section 17A(b)(3)(C).

#### **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>9</sup> and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (File No. SR-OCC-2011-12) be, and hereby is, approved.<sup>11</sup>

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-65653; File No. SR-NASDAQ-2011-122]**

### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Describe Complimentary Services That Are Offered to Certain New Listings on NASDAQ's Global and Global Select Markets**

October 28, 2011.

On August 30, 2011, 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 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to add rule text explaining services offered by NASDAQ to certain newly listing companies and the retail value of such services. The proposed rule change was published for comment in the **Federal**

<sup>5</sup> This rule change adds Interpretations and Policies entitled "Fitness Standards" to Sections 2, 6, 6A, and 7 of Article III and Section 1 of Article V of OCC's By-Laws.

<sup>6</sup> OCC has noted that in a prior discussion with the CFTC staff, the CFTC staff indicated that the proposed rule change may become effective after July 16, 2011 without impacting OCC's status as a DCO.

<sup>7</sup> OCC has no standing disciplinary committee. Disciplinary committees are formed on an *ad hoc* basis. See OCC Rule 1202(a).

<sup>8</sup> 15 U.S.C. 78q-1(b)(3)(A) and (C).

<sup>9</sup> 15 U.S.C. 78q-1.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</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>12</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.

Register on September 16, 2011.<sup>3</sup> The Commission received four comment letters on the proposal.<sup>4</sup>

Section 19(b)(2) of the Act<sup>5</sup> provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is October 31, 2011.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the Exchange's proposal, as described above, and to consider the comment letters that have been submitted in connection with the proposed rule change.

Accordingly, pursuant to Section 19(b)(2) of the Act,<sup>6</sup> the Commission designates December 15, 2011 as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File Number SR-NASDAQ-2011-122).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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<sup>3</sup> See Securities Exchange Act Release No. 65324 (September 12, 2011), 76 FR 57781 (September 16, 2011).

<sup>4</sup> See Letters to Elizabeth M. Murphy, Secretary, Commission, from Neil Hershberg, Senior Vice President, Business Wire Inc., dated September 28, 2011; John Viglotti, Vice President, PR Newswire Association LLC, dated October 7, 2011; Jesse W. Markham, Jr., Roger Myers, and Michael R. MacPhail, Holme Roberts & Owen LLP (writing on behalf of Business Wire, Inc.), dated October 7, 2011; and Patrick Healy, CEO, Issuer Advisory Group LLC, dated October 22, 2011.

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> 15 U.S.C. 78s(b)(2).

<sup>7</sup> 17 CFR 200.30-3(a)(31).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65654; File No. SR-OCC-2011-08]

### Self-Regulatory Organizations; Options Clearing Corporation; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, To Provide Specific Authority To Use an Auction Process as One of the Means To Liquidate a Defaulting Clearing Member's Accounts

October 28, 2011.

#### I. Introduction

On July 28, 2011, the Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change SR-OCC-2011-08 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> The proposed rule change was published for comment in the **Federal Register** on August 3, 2011.<sup>3</sup> On September 15, 2011, OCC filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1 was published in the **Federal Register** on September 27, 2011.<sup>4</sup> The Commission received no comment letters on the proposed rule change or Amendment No. 1. This order approves the proposed rule change as modified by Amendment No. 1.

#### II. Description

OCC is revising its rules to provide specific authority for OCC to use an auction process as one of the possible means by which OCC may liquidate a

<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. 64982 (July 28, 2011), 76 FR 46867 (August 3, 2011).

<sup>4</sup> Securities Exchange Act Release No. 65370 (September 21, 2011), 76 FR 59750 (September 27, 2011). The proposed rule change as originally filed revises OCC Rule 1104 (margins deposited and contributions to the Clearing Fund) to clarify that the auction process is one way to liquidate a defaulting members accounts with respect to positions and collateral in a defaulting member's accounts. Amendment No. 1 to the proposed rule change also revises OCC Rule 1106 (open positions of a suspended clearing member) in a similar manner. Accordingly, as amended, the proposed rule change clarifies that the auction process is one way to liquidate a defaulting members accounts with respect to positions and collateral in a defaulting member's accounts under both OCC Rule 1104 and OCC Rule 1106. Telephone conference between Stephen Szarmack, Vice President and Associate General Counsel, OCC, and Pamela Kesner, Special Counsel, Securities and Exchange Commission Division of Trading and Markets, on September 20, 2011.

defaulting clearing member's accounts.<sup>5</sup> An auction is likely to be the most efficient and orderly procedure practicable for closing out clearing member portfolios in some circumstances.

The liquidation of open long and short positions through exchange transactions is an obvious means of closing out the positions of a defaulting member. However, auctions are increasingly viewed as an efficient and cost effective alternative for liquidating some or all of a clearing member's positions and collateral, especially where the positions are very large or in unstable market conditions. As compared to liquidating positions through exchange transactions, an auction may usually be expected to result in a shorter liquidation period and reduced execution risk. During Lehman Brothers Holdings Inc.'s liquidation, clearinghouses such as LCH, Clearnet and CME Clearing liquidated certain derivatives positions through auctions.

Chapter XI of OCC's Rules, which governs the liquidation of a clearing member's accounts in the event of an insolvency, provides that open positions of a clearing member must be closed by OCC "in the most orderly manner practicable." While OCC and its counsel believe that this language is broad enough to authorize a private auction, *i.e.*, an auction limited to selected bidders, as a means of closing out open positions, OCC also believes that explicit authorization for a private auction procedure could reduce the likelihood of a legal challenge should such a procedure be utilized.

#### III. Discussion

Section 17A(b)(3)(F) of the Act requires that, among other things, the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, and, to the extent applicable, derivative agreements, contracts, and transactions.<sup>6</sup> The proposed rule change is designed to ensure OCC has the tools necessary to liquidate the open positions and margin of a defaulting member in order to meet its settlement obligations to non-defaulting members promptly and in a manner that is least disruptive to the securities markets. OCC has not yet established detailed procedures for conducting an auction; however, any such auction must comply with the

<sup>5</sup> The specific language of the proposed provision can be found at [http://www.optionsclearing.com/components/docs/legal/rules\\_and\\_bylaws/sr\\_occ\\_11\\_08\\_a\\_1.pdf](http://www.optionsclearing.com/components/docs/legal/rules_and_bylaws/sr_occ_11_08_a_1.pdf).

<sup>6</sup> 15 U.S.C. 78q-1(b)(3)(F).