James E. Brown
Executive Vice President
General Counsel and Secretary

October 4, 2012

Via Electronic Mail
Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File Number S7-07-12: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings

Dear Ms. Murphy:

The Options Clearing Corporation ("OCC") appreciates the opportunity to comment on the Commission's recent release (the "Release")[1] proposing new Rule 506(c). Founded in 1973, OCC is currently the world's largest equity derivatives clearing organization. OCC clears securities options, security futures and other securities contracts subject to the Commission's jurisdiction, and commodity futures and commodity options subject to the jurisdiction of the Commodity Futures Trading Commission. OCC clears derivatives for all nine U.S. securities options exchanges and five U.S. futures exchanges and is the clearing agency for all standardized options listed on national securities exchanges in the United States.

Since the Commission first permitted trading of standardized options in 1973, OCC has been deemed to be the issuer of the options it clears for purposes of both the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"). Until 2003, when Securities Act Rule 238 and Exchange Act Rule 12a-9 became effective, OCC was required to register the options it cleared under both statutes.

OCC currently proposes to clear over-the-counter options on the S&P 500 index ("OTC Options").[2] OCC's clearing of OTC Options would further a central objective of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act by facilitating the central clearing of such options. Central clearing reduces the counterparty risk in uncleared OTC Options and may decrease risk to end-users and systemic risk. Because Securities Act Rule 238 and

[1] Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Release No. 33-6354, 77 Fed. Reg. 54464 (September 5, 2012).

[2] *See* SR-OCC-2012-14, published for comment in Commission Rel. No. 34-67834, 77 Fed. Reg. 57602 (September 18, 2012). OCC's proposal was originally submitted in SR-OCC-2011-19, published in Commission Rel. No. 34-66090 (January 3, 2012), 77 FR 1107 (January 9, 2012).

1 N. Wacker Drive, Suite 500, Chicago, IL 60606 312.322.6855 jbrown@theocc.com www.theocc.com

Act[3] that would exempt OTC Options from the registration and prospectus delivery requirements of the Securities Act and Exchange Act. We continue to believe that the amendments we proposed in the foregoing petition should be put in place in order to ensure consistent regulatory treatment of OTC Options and other cleared derivatives.

Pending any Commission action on the proposed amendments (or other exemptive action to accomplish the same purpose), OCC has considered relying on Securities Act Rule 506 with respect to the OTC Options. On August 30, 2012, OCC filed amended rules (the "OTC Options Rules")[4] with respect to OTC Options. Among other things, the OTC Options Rules would require counterparties to OTC Options to be both "eligible contract participants" as defined in Section 3(a)(65) of the Exchange Act ("ECPs") and accredited investors as defined in Rule 501(a) of Regulation D. The OTC Option Rules also include a deemed representation from each clearing member that submits a transaction in OTC Options for clearance that any customer for whose account the transaction is effected qualifies as such. In addition, all transactions must be cleared through a clearing member of OCC that is registered with the Commission as a broker-dealer or through one of the small number of clearing members that are "non-U.S. securities firms," as defined in OCC's By-Laws.

While OCC has authority in the proposed OTC Options Rules to require its clearing members to refrain from any general solicitation or general advertising in connection with their transactions in OTC Options, imposition of such a restriction would forego the increased efficiencies that were intended to be created by the elimination of that prohibition in the case of transactions that are limited to accredited investors and may also conflict with the goal of transparency in derivatives markets. Notwithstanding our reluctance to prohibit general solicitation, the imposition of the "reasonable steps" requirement as a condition to the exemption coupled with the absence of a safe harbor means of compliance with that requirement could create uncertainty for OCC. Some issuers such as private investment vehicles may be very familiar with the circumstances of their investors. By contrast, industrial or commercial companies generally have no direct relationship with the purchasers of the securities issued by them. Rather, such issuers rely—and have relied for many decades—on intermediary broker-dealers to identify prospective investors as accredited investors. Like these issuers, OCC would have no relationship with the counterparties to OTC Options who are not OCC clearing members. OCC would therefore necessarily have to rely on its clearing members to comply with their contractual agreements to identify counterparties as ECPs and accredited investors.

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[3] *See* Petition for Rulemaking and Request for Exemption from Provisions of the Securities Act of 1933 and Securities Exchange Act of 1934 for Cleared OTC Options, Commission File No. 4-644 (January 13, 2012).

[4] See *supra*, note 2.

We note the statement in the Release that a registered broker-dealer is "a reasonably reliable third party" for the purpose of identifying accredited investors for the reason that "registered broker-dealers are subject to existing regulatory schemes, including Commission oversight." We believe that an issuer's reliance on a registered broker-dealer to identify accredited investors—particularly where the broker-dealer is subject to heightened SRO suitability standards for the product in question as is the case with respect to options issued by OCC—should automatically constitute "reasonable steps" for purposes of Rule 506(c) and that the Commission should so provide in the final rule or in the adopting release.

We understand and support the Commission's desire not to impose "onerous and prescriptive" conditions on the new Rule 506(c). However, making "reasonable steps" a condition of the exemption without providing safe harbor guidance on what constitutes "reasonable steps" may undermine the usefulness of the exemption. We believe that permitting—not requiring—an issuer to rely conclusively (absent any reason to know that the broker-dealer is not complying with its undertakings) on a registered broker-dealer under the circumstances described is not overly prescriptive. We also note that many other Commission rules – not least the provision in Rule 502(d) regarding anti-underwriter precautions—specify conditions for safe harbor exemptions from the requirements of Section 5 of the Securities Act without providing that these safe harbors are the exclusive means of qualifying for an exemption.

OCC operates as an industry utility, refunding to its clearing members the amount by which clearing fees collected each year exceed OCC's operating costs and increased capital needs. In fiscal year 2011, OCC's costs averaged only 1.5 cents per cleared contract after refunds. Such a cost structure, which benefits both clearing members and their customers, could not be maintained if OCC were required to second-guess the certifications of its clearing members or to review the underlying documentation that such clearing members produce in the ordinary course of business to "know their customers" under SRO rules and to comply with SRO heightened suitability standards for options transactions. For example, FINRA Rule 2360(b)(16) contains detailed standards for diligence in approving a customer's account for options trading and requiring supervision by specially qualified personnel. Members are required to ascertain the essential facts relative to the customer including financial situation and investment objectives. Special provisions relate to obtaining and verifying information relating to customers who are natural persons. It would be duplicative and cost prohibitive for OCC to involve itself in this verification endeavor, with little likelihood of being able to improve upon the scrutiny already required to be provided by clearing members under the regulatory regimes to which they are subject. Such an endeavor is outside the traditional scope of responsibilities of a registered clearing agency.

We also note that the mandate in Section 201(a) of the JOBS Act for an issuer to take "reasonable steps" is accompanied by a mandate to "us[e] such methods as determined by the Commission." We believe this language can be understood to require the Commission to specify at least some steps that are automatically reasonable for this purpose. The specification need not (and should not) be exclusive, but we believe that Section 201(a) implies that there should be some specification. We believe that a true "safe" harbor is particularly important in the context of a cleared product, such as the OTC Options, as any lack of certainly surrounding whether the

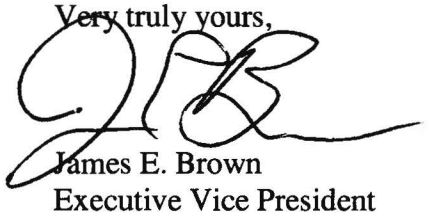
securities in question have been properly offered and sold does not merely affect the issuer and the offerees and purchasers of the securities, but could also affect other purchasers of products cleared through the relevant clearing agency, as well as financial intermediaries that have relationships with the clearing agencies, and the broader financial markets.

OCC further believes that the requirement to take "reasonable steps" regarding the accredited investor status of counterparties should not be a condition of the Rule 506(c) exemption but a free-standing obligation that the Commission should enforce by periodic inquiry. There is no reason to believe from the text of Section 201(a) of the JOBS Act that the mandate for issuers to take "reasonable steps" was intended to be a condition to the availability of the exemption. If Congress had so intended, it could have written Section 201(a) accordingly.

A safe harbor that is subject to a "reasonableness" condition is no safe harbor. As Chairman Schapiro noted in recent correspondence with Chairman Issa of the House Committee on Oversight and Government Reform, the Commission's Rule 175 is seldom used because of its requirement that the issuer have a reasonable basis for a forward-looking statement.

To the extent that the Commission believes that Section 201(a) is at all ambiguous on whether the "reasonable belief" requirement should be a condition of the exemption, we note that the Commission retains its exemptive authority under Section 28 of the Securities Act to accomplish Congress' manifest intent in Section 201(a): to expand the Rule 506 safe harbor by eliminating the prohibition on general solicitation and general advertising.

Very truly yours,



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