

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47691; File No. SR-OCC-2002-10]

### Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Proposed Rule Change Relating to Market-Maker Account Agreements

April 17, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on May 21, 2002, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") and on October 18, 2002, amended the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change will amend OCC's By-Laws and Rules to eliminate the requirement that a clearing member must obtain a specified form of account agreement from each market-maker for whom it carries an account and submit the agreement to OCC for approval. The proposed rule change will also add two new interpretive statements to Article VI, Section 3 of OCC's By-Laws to clarify the application of certain amendments to Article 8 and Article 9 of the Uniform Commercial Code to OCC clearing accounts and to clarify the application of OCC's lien on clearing member account positions and clearing member obligations.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.<sup>2</sup>

#### (A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to amend Article VI, Section 3 of OCC's By-Laws and Chapter XI, Rule 1105 of OCC's Rules to eliminate the requirement that a clearing member must obtain and must submit to OCC for approval a specified form of account agreement from each market-maker for whom it carries an account. OCC believes that such submissions are no longer necessary to perfect its security interest in clearing members' market-maker accounts under the Uniform Commercial Code ("UCC") and are administratively burdensome for OCC and its clearing members. In order to incorporate the changes to Article IV, Section 3 into its rules, OCC proposes to make conforming changes to Rule 1105.

The proposed rule change also includes two interpretive statements. The first interpretative statement is intended to clarify the application to OCC clearing accounts of certain UCC amendments to Article 8 and to Article 9, which were adopted in 1994 and 1995. The other is intended to clarify that OCC's lien on positions in clearing member accounts extends to short security futures positions, as well as all other assets, and that OCC's lien secures clearing member obligations on long security futures positions, as well as all other obligations arising from the applicable account or accounts.

##### 1. Background

Article VI, Section 3, of OCC's By-Laws specifies the types of clearing accounts that a clearing member may have at OCC, including accounts (referred to collectively herein as "market-maker accounts") in which a clearing member may carry positions of market professionals such as options market-makers, JBO participants,<sup>3</sup> and stock specialists (referred to collectively herein as "market-makers"). Clearing members that maintain market-maker accounts at OCC must, according to the current provisions of Section 3, obtain

and submit to OCC for approval certain agreements from each market-maker whose funds and positions are included in such market-maker accounts.

The principal reason for requiring the filing of these agreements was to ensure that OCC's security interest in and setoff rights against long option positions and assets deposited as margin in market-maker Accounts would be protected under the UCC as it existed prior to the UCC amendments in the event of a clearing member insolvency. The contents of the required agreements vary depending upon the type of market-maker Account. In all cases, however, the agreements provide that OCC has: (a) A lien on positions and margin in the account as security for obligations of the clearing member to OCC arising in the account; (b) the right to net writing and purchase transactions in the account (*i.e.*, to carry positions "net"); and (c) the right to close out positions and apply proceeds without notice. In addition, market-makers whose assets are carried at OCC in combined accounts with other market-makers are required to consent to the commingling of their positions with the positions of other market-makers. Because OCC's lien on all assets in a combined market-makers' Account covers any obligation arising from the commingled account, assets attributable to one market-maker may be used by OCC to offset obligations of the clearing member that are attributable to the activity of a different market-maker.

OCC currently requires that a clearing member file with OCC a specified form of account agreement, executed by the clearing member and each market-maker included in the account, containing the required consents for the applicable type of market-maker account. OCC reviews the agreement and executes the agreement under the caption "Approved." The procedure is cumbersome and imposes administrative burdens on both clearing members and OCC staff. Moreover, OCC believes that there may be potential for confusion in the legal relationships established through these documents. Although the agreements are not intended to create contractual privity between OCC and the market-maker, OCC believes it might be possible to misinterpret the agreements as doing so.

##### 2. Proposed Changes

As a result of the UCC amendments, OCC believes it is no longer necessary to require clearing members to file market-maker account agreements with OCC in order to protect OCC's security interest in and setoff rights against funds and positions in market-maker

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> The Commission has modified the text of the summaries prepared by OCC.

<sup>3</sup> Under Article I, Section 1 of OCC's By-Laws, a "JBO participant" is a registered broker-dealer that "(i) maintains a joint back office arrangement with a clearing member pursuant to the requirements of Regulation T promulgated by the Board of Governors of the Federal Reserve System; (ii) meets the requirements applicable to JBO participants as specified in exchange rules; and (iii) consents to having his exchange transactions cleared and positions carried in a JBO participants account." Unless the context requires otherwise, a JBO Participant is a Market-Maker for purposes of OCC's By-Laws and all of OCC's Rules except for Chapter IV.