

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03-1712 Filed 1-24-03; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47199; File No. SR-OCC-2002-25]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Amending the Definition of Market-Maker in OCC's By-Laws

January 15, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on October 17, 2002, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as 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 persons.

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

The proposed rule change amends the definition of the term market-maker as used in OCC's by-laws and rules. Specifically, OCC proposes to exclude from such definition any person who is required to be treated as a customer under Commission Rule 15c3-3.²

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 such statements.³

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

The primary purpose of the proposed rule change is to exclude from the definition of market-maker in Article I of OCC's By-Laws any person that is required to be treated as a customer for purposes of Rule 15c3-3 so that OCC may have a lien on all securities in a market-maker's account without causing clearing members to be in violation of Rule 15c3-3. The proposed rule change also: (1) Clarifies that OCC's lien on assets in a customers' account may be enforced to satisfy only those clearing member obligations arising from the account and (2) eliminates outdated references in OCC's rules to specialists and specialists' accounts.

Under Rule 15c3-3, fully paid or excess margin securities of customers must be maintained by broker dealers, including OCC clearing members, in a control location.⁴ The Commission staff has informally stated that securities that are held subject to a lien to secure obligations of the carrying broker are not deemed to be in a control location for purposes of Rule 15c3-3.⁵ Broker dealers, however, are excluded from the definition of customer in Rule 15c3-3(a)(1).⁶

Under Article VI, "Clearance of Exchange Transactions," Section 3, "Maintenance of Accounts," of OCC's By-Laws, an OCC clearing member grants OCC a lien on all positions in a market-maker's account to secure the obligations of the clearing member with respect to that account (or to secure all obligations of the clearing member, if the market-maker is a proprietary market-maker). Therefore, a clearing member could not permit positions of a Rule 15c3-3 customer to be carried in a market-maker account without risk of violating Rule 15c3-3. In order to avoid inadvertent violations of Rule 15c3-3, OCC is amending the definition of market-maker in its by-laws to exclude

any person treated as a customer for purposes of Rule 15c3-3.

This change is advisable because the definition of market-maker as amended in SR-OCC-2001-07⁷ includes persons performing market-maker functions on futures exchanges or security futures markets that are primarily regulated as futures exchanges and only notice-registered as national securities exchanges. Such persons may not be brokers or dealers as defined in Section 3(a)(4) and (5) of the Act and therefore may not automatically be excluded from the Rule 15c3-3 definition of customer. The proposed rule change will allow positions of futures floor traders and other market-makers that are customers under Rule 15c3-3 to be included in a securities customers' account under Article VI, Section 3(e) or if the positions are carried in a futures customer account of the books of the clearing member, in a segregated futures account under Article VI, Section 3(f). Under the futures regulatory scheme, positions of floor traders and other professionals that are not affiliated with the carrying futures commission merchant are ordinarily required to be carried in the segregated funds account.⁸

Article VI, Section 3 of OCC's By-Laws describes the various types of accounts that clearing members may carry at OCC. Each paragraph in Section 3 describes the extent of any lien that OCC may have on the assets in that particular account and with respect to all accounts except the customers' account, describes the scope of the obligations collateralized by those assets. Assets in proprietary accounts generally secure any obligation of the clearing member to OCC whereas assets in certain other account types secure only obligations arising from the particular account in which the assets are held. For example, Article VI, Section 3(f), states that OCC's lien on assets in a segregated futures account acts as security for all obligations of the clearing member with respect to such account.

The proposed rule change brings Section 3(e) in conformity with the other paragraphs in Section 3 by clarifying that OCC's lien on a securities customers' account secures only the

⁴ Rule 15c3-3(a) defines fully paid excess margin securities. Rule 15c3-3(c) identifies various means by which broker dealers may hold securities that meet the control requirement.

⁵ See, e.g., Michael P. Jamroz, *The Customer Protection Rule*, 57 *The Business Lawyer* 1069, 1085 (May 2002).

⁶ Rule 15c3-3(a)(1) defines customer as any person from whom or on whose behalf a broker or dealer has received or acquired or holds funds or securities for the account of that person. The term shall not include a broker or dealer, a municipal securities dealer, or a government securities broker, or government securities dealer. The term shall, however, include another broker or dealer to the extent that broker or dealer maintains an omnibus account for the account of customers of the broker or dealer in compliance with Regulation T (12 CFR 220.1 through 220.19).

⁷ Securities Exchange Act Release No. 44727 (August 20, 2001), 66 FR 45351 (order approving rules for clearance of security futures).

⁸ See CFTC Reg. 1.3(k) (defining customer as a person other than an owner or holder of a proprietary account); CFTC Reg. 1.3(y) (defining proprietary account in a manner that excludes an account owned or held by an unaffiliated entity); CFTC Reg. 1.20 (requiring that customer funds be separately accounted for and segregated).

⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.15c3-3.

³ The Commission has modified parts of these statements.