



THE OPTIONS CLEARING  
CORPORATION

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March 13, 2007

**VIA E-MAIL**

Ms. Eileen A. Donovan  
Office of the Secretariat  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, DC 20581

**Re: Rule Filing SR-OCC-2007-03 Rule Certification**

Dear Ms. Donovan:

Attached is a copy of the above-referenced rule filing, which The Options Clearing Corporation ("OCC") is submitting pursuant to the self-certification procedures of Commission Regulation 40.6. This rule filing has been, or is concurrently being, submitted to the Securities and Exchange Commission (the "SEC") under the Securities Exchange Act of 1934 (the "Exchange Act").

In conformity with the requirements of Regulation 40.6(a)(3), OCC states the following: The text of the rule is set forth at Item 1 of the enclosed filing. The date of implementation of the rule is when the proposed rule has been approved by the SEC. No substantive opposing views were expressed to OCC by governing board or committee members, clearing members of OCC, or market participants, that were not incorporated into the rule.

OCC hereby certifies that the rule set forth at Item 1 of the enclosed filing complies with the Commodity Exchange Act and the Commission's regulations thereunder.

JEAN M. CAWLEY

FIRST VICE PRESIDENT AND DEPUTY GENERAL COUNSEL

ONE N. WACKER DRIVE, SUITE 500 CHICAGO, ILLINOIS 60606 TEL 312.322.6269 FAX 312.322.6280

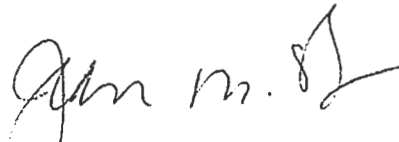
JCAWLEY@THEOCC.COM WWW.OPTIONSCLEARING.COM



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Should you have any questions regarding this matter, please do not hesitate to contact the undersigned at (312) 322-6269.

Sincerely,

  
Jean M. Cawley

Attachments

cc: CFTC Central Region (w/ enclosure)  
525 West Monroe Street, Suite 1100  
Chicago, IL 60661  
Attn: Frank Zimmerle

2007-03 cftc.ltr

**SECURITIES AND EXCHANGE COMMISSION**  
**Washington, D.C. 20549**

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Form 19b-4

Proposed Rule Change  
by

**THE OPTIONS CLEARING CORPORATION**

Pursuant to Rule 19b-4 under the  
Securities Exchange Act of 1934

**Item 1. Text of the Proposed Rule Change**

As described more fully in Item 3 below, the proposed rule change consists of an amendment to the Restated Participant Exchange Agreement (“RPEA”) among OCC and its participant exchanges. The amendment, designated as Amendment No. 5, is attached hereto as Exhibit 5.

**Item 2. Procedures of the Self-Regulatory Organization**

The proposed rule change was approved by the Board of Directors of OCC at a meeting held on July 26, 2005. It was signed by the last of OCC’s six participant exchanges on or about February 23, 2007.

Questions regarding the proposed rule change should be addressed to Jean M. Cawley, First Vice President and Deputy General Counsel, at (312) 322-6269.

**Item 3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

The proposed rule change consists of an amendment to the Restated Participant Exchange Agreement (“RPEA”) among OCC and its participant exchanges to obligate such exchanges to indemnify OCC against specified losses incurred in connection with the introduction of new products.

Background

New derivative products can pose a variety of legal risks for OCC. Some products may raise jurisdictional issues, which may in turn raise legality issues OCC and its counsel analyze such issues carefully, and OCC will decline to clear a product if it believes that there is an issue as to the product's legality. Nevertheless, there can be no assurance that a product's legality will not be questioned. Litigating such issues can be expensive, and an adverse outcome or settlement could result in substantial liabilities.

New products may also raise intellectual property ("IP") issues. For example, in January, 2005, when International Securities Exchange, LLC ("ISE") proposed to trade unlicensed options on SPDRs, Standard & Poor's parent company sued both ISE and OCC, asserting that a license was required not only to trade options on a proprietary index, but also options on an ETF based on a proprietary index.<sup>1</sup> In May, 2005, when ISE proposed to trade unlicensed options on DIAMONDS, Dow Jones filed a similar action against ISE and OCC.<sup>2</sup> (The two lawsuits were later consolidated and eventually dismissed by court order, which order was upheld on appeal.<sup>3</sup>) More recently, ISE and OCC were sued by the Chicago Board Options Exchange, Incorporated ("CBOE") and two co-plaintiffs, asserting that ISE had proposed to trade unlicensed options on the S&P 500 Index and the DJIA in violation of exclusive license

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<sup>1</sup> The McGraw-Hill Companies, Inc. v. International Securities Exchange, Inc. and The Options Clearing Corporation, 05 Civ. 112 (HB), (U.S.D.C. S.D.N.Y.) In consideration of OCC's agreeing to clear unlicensed SPDR options, ISE agreed to indemnify OCC against any resulting liabilities or expenses.

<sup>2</sup> Dow Jones & Company, Inc. v. International Securities Exchange, Inc. and The Options Clearing Corporation, 05 CV 4954 (U.S.D.C. S.D.N.Y.) As in the SPDR case, ISE agreed to indemnify OCC against any resulting liabilities or expenses.

<sup>3</sup> Dow Jones & Co. v. International Securities Exchange, Inc., 451 F.3d 295 (2d Cir. 2006).

arrangement between, respectively, CBOE and each of its co-plaintiffs.<sup>4</sup>

The RPEA between and among OCC and the six options exchanges obligates the exchanges to indemnify OCC against specified losses (e.g., losses resulting from an exchange's violation of the Securities Exchange Act or the RPEA or failure to make adequate disclosure regarding a product that it trades). However, the RPEA does not generally obligate the exchanges to indemnify OCC against losses resulting from a product's illegality, or against IP liability.<sup>5</sup>

#### Discussion

OCC is not obligated to clear a product if doing so would be illegal or would violate the IP rights of others.<sup>6</sup> However, legal issues are not always identifiable in advance. For example, claims that a new product violates IP rights of third parties may not surface until after the product is already trading. And even where an issue is identified in advance, OCC's assessment of its seriousness may be in error.

For these reasons, no matter how carefully OCC analyzes new products, there will often be some remaining legal risk. To mitigate this risk, OCC and its participant exchanges have entered into an amendment to the RPEA obligating an exchange introducing a new product

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<sup>4</sup> Chicago Board Options Exchange, Incorporated, et al v. International Securities Exchange, LLC and The Options Clearing Corporation, 06 CH 24798, Circuit Court of Cook County, Illinois, Chancery Division.

<sup>5</sup> OCC's clearing agreement for futures products, which was drafted more recently than the RPEA, contains broader indemnification provisions. It obligates the futures exchange to indemnify OCC against losses resulting from the exchange's violation of "any law or governmental regulation" and contains an express indemnity against IP liability.

<sup>6</sup> Section 3 of the RPEA provides that if a proposed underlying interest does not fall within certain specified categories, OCC cannot be required to clear options on it without the approval of its Board. Even where the interest does fall within the specified categories (e.g., a securities index), OCC could not be required to clear options on it if doing so would be unlawful.

to provide indemnification similar to that required of futures exchanges for which OCC provides clearing services.<sup>7</sup> Amendment No. 5 to RPEA is attached hereto as Exhibit 5. Its terms, which are self-explanatory, reflect the agreement of each participant exchange to severally, and not jointly, indemnify OCC and specified affiliates against losses and expenses incurred in connection with any action based on any options claim (i.e., a claim that the exchange does not have the right to trade an option or that the trading of such option by the exchange, or the issuance of such option or the clearance and settlement of trades therein or exercises thereof by OCC, would violate the IP or other rights of a third party).<sup>8</sup> In addition, the Amendment redesignates and makes certain technical changes in preexisting indemnification provisions.<sup>9</sup>

\* \* \*

The proposed change is consistent with Section 17A of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), because it reduces the legal exposure borne by OCC in connection with issuing and clearing new derivative products introduced by its participant exchanges, thereby strengthening OCC's ability to perform its duties as a registered clearing agency. Accordingly, the proposed change contributes to the safeguarding of securities and funds in the custody or control of OCC. The proposed rule change is not inconsistent with the existing rules of OCC, including any other rules proposed to be amended.

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<sup>7</sup> See e.g., Filings No. SR-OCC-2006-18 (futures clearing agreement with PBOT) and 2003-06 (futures clearing agreement with CFE).

<sup>8</sup> See new Sections 23(c) through (g) of the RPEA.

<sup>9</sup> See Section 1 of Amendment No. 5 and redesignated Sections 23(c) and (h) of the RPEA.

**Item 4. Self-Regulatory Organization's Statement on Burden on Competition**

OCC does not believe that the proposed rule change would impose any burden on competition.

**Item 5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others**

Written comments were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

**Item 6. Extension of Time Period for Commission Action**

OCC does not consent to an extension of the time period for Commission action on the proposed rule change.

**Item 7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)**

Pursuant to Section 19(b)(3)(A) of the Exchange Act and Rule 19b-4(f)(3) thereunder, the proposed rule change is filed for immediate effectiveness inasmuch as it deals solely with the administration of OCC (i.e., the business relationship between OCC and its participant exchanges).

**Item 8. Proposed Rule Change Based on Rule of Another Self-Regulatory Organization or of the Commission**

Not applicable.



Item 9. Exhibits

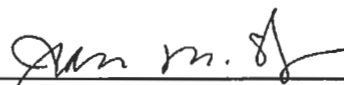
Exhibit 1. Completed Notice of Proposed Rule Change for publication in the  
Federal Register.

Exhibit 5. Amendment No. 5 to Restated Participant Exchange Agreement.

**SIGNATURE**

Pursuant to the requirements of the Securities Exchange Act of 1934, The Options Clearing Corporation has caused this filing to be signed on its behalf by the undersigned hereunto duly authorized.

**THE OPTIONS CLEARING CORPORATION**

By:   
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**Jean M. Cawley**  
**First Vice President and**  
**Deputy General Counsel**