

Commenters should provide specific examples to support their opinions where possible.

C. Privilege Issues

The Discovery Guide states in Part II.B. that "[t]he arbitrator(s) shall not issue an order or use a confidentiality agreement to require parties to produce documents otherwise subject to an established privilege." Those privileges that would be deemed "established," however, are not listed in the Guide. While the attorney-client privilege would clearly be an example of an established privilege, would it be helpful to parties and arbitrators to identify if other privileges also could be claimed? Do securities firms intend to assert any other types of privileges? Is the absence of specificity an invitation to argument about whether a privilege has been "established"?

As the NASD has stressed, the Lists of presumptively discoverable documents were the result of significant compromise between representatives of the industry, the plaintiffs' bar, and other interested persons. Each group agreed to include certain types of documents in the Lists that it could otherwise object to producing because it would receive other types of documents in return. Is the term "established privilege" sufficiently limited to assure that the balance between competing interests that the NASD sought to achieve through the Discovery Guide will not be upset?

The Commission therefore seeks comment on the privileges that should be considered "established" for purposes of the Discovery Guide. Should the only privilege recognized as "established" be the attorney/client privilege (and the related work product doctrine)? In light of the compromises reached in fashioning the Discovery Guide, should a party be precluded from asserting a blanket privilege to keep from producing an entire category of documents contained on one of the discovery Lists?

D. Internal Audit Reports

List 5, Item 3(a) calls for the production of those portions of internal audit reports that "focused on" the associated person(s) or transaction(s) at issue. There may be instances where an internal audit report does not "focus

on" a particular person or transaction, but may nonetheless relate to a claim made in arbitration. For example, an internal report that addresses a particular practice of the firm or branch office may be relevant to the customer's claim even if it does not "focus on" the associated person named in the customer's complaint.

Therefore, the Commission would like comment on whether the internal audit reports subject to production under List 5, Item 3(a) should be limited to those that "focus on" the associated person(s) or transaction(s) at issue in the claim, or whether the class of internal audit reports should be expanded to include those that "concern" or "relate to" the claims made in the arbitration. Is the limitation in List 5, Item 3(a) to reports that "focus on" the associated person(s) and transaction(s) at issue necessary to prevent production of audit reports that are unrelated to the claims in a particular arbitration, or does the limitation exclude particular types of reports that will almost always be relevant?

List 5, Item 3(b) requires production of those portions of internal audit reports that "were generated not earlier than one year before or not later than one year after the transaction(s) at issue and discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the statement of claim." Does this provision help ensure that all portions of internal audit reports that may be relevant to the claims asserted in an arbitration will be produced by firms? Would an expansion of the documents called for in List 5, Item 3(a) upset the balance strived for by the members of the NASD's drafting committee?

E. Particular Types of Claims

Lists 1 and 2 set forth documents to be produced in all customer cases by firms/associated persons and customers, respectively. Lists 3 through 14 call for the production of additional classes of documents in particular types of cases, including churning (Lists 3 and 4), failure to supervise (Lists 5 and 6), misrepresentation/omission (Lists 7 and 8), negligence/breach of fiduciary duty (Lists 9 and 10), unauthorized trading (Lists 11 and 12) and unsuitability (Lists 13 and 14). Are there other types of specific claims that should be included in particular lists in the Discovery Guide? For instance, claims alleging failure to obtain best execution on particular trades do not have individualized production lists. Because of the nature of best execution claims, the documents called for in List 11 may

be relevant in those cases. Should List 11 also apply to best execution claims as well as unauthorized trading claims? When commenting, commenters should take into account that recently best execution has become a topic of significant interest.²¹

Person making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549-0690. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-99-07 and should be submitted by May 14, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²²

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99-10200 Filed 4-22-99; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-41298; File No. SR-OCC-99-05]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Proposed Rule Change Regarding Joint Back Office Participants

April 16, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on March 3, 1999, The Options Clearing Corp. ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule

²¹ See, e.g., *Newton v. Merrill Lynch, Pierce, Fenner & Smith Incorporated, et al.*, 135 F.3d 266 (3d Cir. 1998); *Order Execution Obligations*, Exchange Act Release No. 37619A, 61 FR 48290 (Sept. 12, 1996) (duty of best execution requires broker-dealer to seek the most favorable terms reasonably available under the circumstances of the customer's transaction).

²² 17 CFR 200.30-3(a)(12)

¹ 15 U.S.C. 78s(b)(1).

identified in such forms, and all customer complaints of a similar nature against the Associated Person(s) handling the account(s) at issue." List 1, Item 12 calls for production of "[r]ecords of disciplinary action taken against the Associated Person(s) by any regulator or employer for all sales practices or conduct similar to the conduct alleged to be at issue," in all cases.

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 from interested persons on the proposed rule change.

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

Under the proposed rule change, OCC will amend its rules and by-laws to allow clearing members to maintain joint back office accounts in which long positions can be used to offset short positions in options for broker-dealers with which they have joint back office arrangements.

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.²

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 allow OCC clearing members to maintain joint back office accounts ("JBO accounts") for broker-dealers with whom the clearing members have joint back office arrangements. (These broker-dealers are referred to as JBO participants.) Under the proposed rule change, a broker-dealer registered with the Commission will be considered a JBO participant if it (1) maintains a joint back office arrangement with an OCC clearing member that satisfies the requirements of Regulation T,³ (2) meets the applicable requirements as specified in exchange rules, and (3) consents to having its exchange transactions cleared and its positions carried in a JBO participant account.

OCC will treat JBO participants like market makers and specialists and will

treat JBO participants' accounts like market maker's accounts and specialist's accounts. For example, long positions in a JBO participants' account will be treated as unsegregated long positions. The one exception to this treatment relates to Chapter IV of OCC's rules which pertains to matched trade reporting. OCC does not anticipate that its participant exchanges will report JBO transactions as market maker or specialist transactions for purposes of reporting matched trades. Accordingly, JBO participants will not be included within the term "market maker" or "specialist" for the purposes of the rules in Chapter IV.

To implement the above changes, OCC will add definitions for "JBO participant" and "JBO participants' account" in Article I, Section 1 of the by-laws. OCC will also amend the definition of "unsegregated long position" to include long positions in JBO participants' accounts. OCC will amend Interpretation .03 to Article V, Section 1 of the by-laws, which provides that applicants for clearing membership must agree to seek approval for the membership/margin committee to clear types of transactions for which the applicant did not initially seek approval in its membership application, by adding JBO participant transactions. Finally, Article VI, Section 3 of the by-laws will be amended to add JBO participants' accounts to the list of permissible accounts clearing members may maintain with OCC.

OCC believes that the proposed rule change is consistent with Section 17A of the Act⁴ and the rules and regulations thereunder because the proposal is consistent with OCC's requirement to assure the safeguarding of securities and funds which are in OCC's custody or control or for which OCC is responsible.

B. Self-Regulatory Organization's Statement on Burden on Competition

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

C. 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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which OCC consents, the Commission will:

(A) by order approve such proposed rule change or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing also will be available for inspection and copying at the principal office of OCC. All submissions should refer to File No. SR-OCC-99-05 and should be submitted by May 14, 1999.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁵

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99-10198 Filed 4-22-99; 8:45 am]

BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: Notice of reporting requirements submitted for OMB Review.

² The Commission has modified the text of the summaries prepared by OCC.

³ Joint back office arrangements are authorized under Section 220.7 of Regulation T of the Board of Governors of the Federal Reserve System and permit non-clearing broker-dealers to be deemed self-clearing for credit extension purposes if the non-clearing broker-dealer has an ownership interest in the clearing firm.

⁴ 15 U.S.C. 78q-1.

⁵ 17 CFR 200.30-3(a)(12).