

trades in Nasdaq-listed securities through the NNMS. Although ITS Securities are now traded on SuperMontage, the fees for trades in these securities continue to be governed by NASD Rule 7010(d).

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,<sup>19</sup> in general, and with section 15A(b)(5) of the Act,<sup>20</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. According to Nasdaq, the proposed rule change bases the level of credits for providing liquidity through SuperMontage on the extent to which a member provides liquidity during the month, thereby taking account of the lower per share costs and the economies of scope associated with higher volumes of liquidity provision.

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

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments were neither solicited nor received.

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

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act<sup>21</sup> and Rule 19b-4(f)(2) thereunder,<sup>22</sup> because it establishes or changes a due, fee, or other charge imposed by the self-regulatory organization. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## 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. Comments may be submitted by any of the following methods:

### *Electronic comments:*

- Use the Commission's Internet comment form for (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2004-062 on the subject line.

### *Paper comments:*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-062. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2004-062 and should be submitted on or before May 21, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>23</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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<sup>23</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49582; File No. SR-OCC-2004-02]

### Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Clearing Member Accounts

April 19, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on March 11, 2004, 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 OCC's by-laws and rules to permit clearing members to open and maintain with OCC two new types of accounts and to clarify that clearing members may carry multiple combined market makers' accounts that are separate from one another.

#### 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.<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 twofold. First, the rule change permits clearing members to open and maintain with OCC two new types of accounts: (1) A segregated futures professional account, in which a clearing member may carry the

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

<sup>2</sup> The Commission has modified parts of these statements.

<sup>19</sup> 15 U.S.C. 78o-3.

<sup>20</sup> 15 U.S.C. 78o-3(b)(5).

<sup>21</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

<sup>22</sup> 17 CFR 240.19b-4(f)(2).

positions and assets of futures floor traders and similar futures market professionals that are required to be segregated in accordance with Section 4d of the Commodity Exchange Act ("CEA")<sup>3</sup> and the regulations of the Commodity Futures Trading Commission ("CFTC") and (2) an account in which a clearing member may carry the positions and assets of futures professionals that are not required to be segregated under those provisions. These new account types are intended to accommodate clearing members' requests in connection with the anticipated start of trading of the CBOE Futures Exchange, LLC ("CFE"). Second, the rule change clarifies that a clearing member is permitted to carry its market maker positions and the positions of proprietary market makers in a combined market makers' account, separate from other combined market makers' accounts; and that similarly a clearing member may commingle positions of associated market makers in a combined market makers' account, separate from other combined market makers' accounts.

Futures clearing organizations have traditionally used only two account types: a "firm" or "proprietary" account and a "customer" account. OCC anticipated that clearing members clearing futures products would follow this practice and carry the positions of futures professionals in the same account as positions of all other futures customers. However, some clearing members view the structure of the combined market makers' account, which allows clearing firms to carry the positions of multiple options market makers, as providing a significant benefit from an administrative perspective. Although the combined market makers' account is margined on a net basis and treated as a single account for most purposes, it contains subaccounts so that positions of different market makers can be separately identified as a convenience to market makers and their clearing firms. In anticipation of the start of trading on CFE, clearing members have asked OCC to provide similar accounts for clearing the transactions of futures floor traders or other members of futures markets performing similar market making or liquidity providing functions ("futures professionals"). One account would be for futures professionals whose funds and positions are required to be segregated pursuant to Section 4d of the CEA and the CFTC's regulations governing customer segregated funds. The other account would be for futures

professionals whose funds and positions are required to be treated as proprietary and therefore are not required to be segregated.

In order to accommodate this request, OCC proposes to add three new defined terms to Article I, Section 1, Definitions, of its By-Laws. The new term "futures professional" means floor traders and persons who serve similar market making functions. The new term "proprietary futures professional" account means an account carrying positions only of futures professionals who are not futures customers. And the new term "segregated futures professional" account means a segregated futures account that carries positions only of futures professionals that are futures customers. Thus, these new definitions incorporate existing Article, I, Section 1 defined terms: segregated futures account, which is an account that carries positions only of futures customers, and futures customer, which is a person whose positions are carried by a futures commission merchant in a futures account required to be segregated under Section 4d of the CEA and the CFTC regulations.

OCC also proposes to amend Article VI, Clearance of Exchange Transactions, of its By-Laws and Chapters VI, Margins, and XI, Suspension of a Clearing Member, of its Rules. New paragraph (j) to Article VI, Section 3, permits clearing members to open a segregated futures account solely for the positions of futures professionals who are futures customers and new paragraph (k) to that section permits clearing members to open a proprietary futures professional account for futures professionals who are not futures customers. Both accounts would be functionally identical to the existing combined market makers' account. Article VI, Section 3(f), is amended to clarify that a clearing member need not maintain a segregated futures account other than the segregated futures professional account if the clearing member effects transactions only for futures customers that are futures professionals and will carry the positions of such futures professionals in the segregated futures professional account instead of in the segregated futures account. Parenthetical language is added to Article VI, Section 4, merely as a reminder that a segregated futures professional account is a segregated futures account and, therefore, that upon liquidation of a clearing member all amounts in such accounts will be commingled in the segregated liquidating settlement account as segregated customer funds, reserved to

pay the claims of future customers. Similarly, Rules 604 and 606 are amended to make clear that a clearing member may maintain more than one segregated futures account (*i.e.*, a "segregated futures account" and a "segregated futures professional account"), and Rules 1104 through 1107 are amended to provide that all segregated futures accounts will be liquidated together in the segregated liquidating settlement account. Finally, OCC is amending Rule 1105(c) to state that assets in the proprietary futures professional account of a suspended clearing member will be placed in the regular liquidating settlement account.

OCC will not require clearing members to clear transactions of futures professionals in either futures professional account. Because the segregated futures professional account would be separately margined without regard to positions or assets in the segregated futures account, some clearing members may prefer to keep the positions of futures professionals in the regular segregated futures account in order to obtain the benefit of such offsets or for other reasons.

Likewise, a clearing member may wish to maintain positions that could be carried in the proprietary futures professional account in the regular Article VI, Section 3(a), firm account. OCC believes that these alternatives should be preserved.

Article VI, Section 3(c), of OCC's By-Laws currently states that a clearing member may not include the positions of a proprietary or associated market maker in a combined market makers accounts. The prohibition on carrying proprietary market maker positions in a combined market makers' account was intended to avoid any commingling with customer positions that might be interpreted as violating Rules 8c-1 and 15c2-1 under the Exchange Act ("hypothecation rules"). With respect to associated market makers, the prohibition was intended to exclude from the combined market makers' account persons who, although customers for purposes of the hypothecation rules, are closely related to the clearing member and whose positions commingled in an account with positions of independent market makers could pose difficulties in transferring the account to another clearing member in an insolvency situation.<sup>4</sup>

Notwithstanding the foregoing prohibitions, it is fully consistent with

<sup>3</sup> 7 U.S.C. 1.

<sup>4</sup> See Securities Exchange Act Release No. 33492 (January 19, 1994), 59 FR 3896 (January 27, 1994) [File No. SR-OCC-90-11].

the intent of Article VI, Section 3(c), to permit OCC clearing members to use a combined market makers' account to carry the positions of multiple proprietary market makers or to carry the positions of multiple associated market makers, so long as such accounts are restricted to positions of proprietary market makers or associated market makers, respectively. OCC now proposes to amend Article VI, Section 3(c) to expressly so provide. In order to avoid compliance issues under the hypothecation rules, OCC would continue to prohibit the commingling of the positions of customer market makers, including associated market makers that have not elected to be treated as proprietary market makers, in the same combined accounts with proprietary market makers. And in order to avoid the difficulties associated with transferring a combined market makers' account holding the positions of both independent and associated market makers to another clearing member in an insolvency situation, OCC would continue to prohibit the commingling of the positions of associated market makers with the positions of independent market makers. As in the case of a separate market maker's account used for proprietary positions under Section 3(b) of Article VI, a combined market makers' account holding the positions of the clearing member or a proprietary market makers' account would be subject to a lien by OCC on all assets in such account to secure all of the clearing member's obligations to OCC, as provided in proposed subpart (v) of Section 3(c). Therefore, such proprietary market maker accounts are properly firm lien accounts, and the definition of firm account in Article 1 of the By-Laws, and related provisions in Article VI, Sections 3(b) and (c) and Interpretation and Policy .02, Rules 601 and 602, and Rule 1105(b) and (c) are amended to identify those accounts as such.

OCC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act and the rules and regulations thereunder because it is designed to promote the prompt and accurate clearance and settlement of derivative transactions, assure the safeguarding of securities and funds which are in the custody or control of OCC, and, in general, protect investors and the public interest.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

OCC does not believe that the proposed rule change would impose any burden 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**

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(iii) of the Act<sup>5</sup> and Rule 19b-4(f)(4)<sup>6</sup> promulgated thereunder because the proposal effects a change in an existing service of OCC that (A) does not adversely affect the safeguarding of securities or funds in the custody or control of OCC or for which it is responsible and (B) does not significantly affect the respective rights or obligations of OCC or persons using the service. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**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. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>) or
- Send an E-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-OCC-2004-02 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-OCC-2004-02. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's

Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's Web site at [www.optionsclearing.com](http://www.optionsclearing.com). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-OCC-2004-02 and should be submitted on or before May 21, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

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**DEPARTMENT OF STATE**

**Bureau of Economic and Business Affairs**

[Public Notice 4699]

**List of April 22, 2004, of Participating Countries and Entities (Hereinafter Known as "Participants") Under the Clean Diamond Trade Act of 2003 (Public Law 108-19) and Section 2 of Executive Order 13312 of July 29, 2003**

**AGENCY:** Department of State.

**ACTION:** Notice.

**SUMMARY:** In accordance with sections 3 and 6 of the Clean Diamond Trade Act of 2003 (Pub. L. 108-19) and Section 2 of Executive Order 13312 of July 29, 2003, the Department of State is identifying all the Participants eligible for trade in rough diamonds under the Act, and their respective Importing and Exporting Authorities, and revising the previously published list of November 17, 2003 (68 FR 66523-66524, November 26, 2003).

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>6</sup> 17 CFR 240.19b-4(f)(4).

<sup>7</sup> 17 CFR 200.30-3(a)(12).