

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56930; File No. SR-OCC-2006-09)

December 7, 2007

Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Approval of a Proposed Rule Change Relating to Choice of Law and Forum Selection

I. Introduction

On May 22, 2006, The Options Clearing Corporation (“OCC”) filed with the Securities and Exchange Commission (“Commission”) proposed rule change SR-OCC-2006-09 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”).¹ Notice of the proposal was published in the Federal Register on April 27, 2007.² No comment letters were received. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

The proposed rule change will add new general choice of law and forum selection provisions to OCC’s By-Laws. The purpose of the proposed rule change is to ensure there are appropriate choice of law and forum selection provisions governing all contractual relations between OCC and each of its clearing members. The proposed provisions should provide greater clarity, consistency, and predictability in the application of the law to all contractual relations between OCC and each of its clearing members and in the choice of forum in the event of litigation on such matters.

OCC’s By-Laws and Rules each currently contain choice of law provisions that apply in somewhat limited circumstances. This approach is problematic as it could lead to

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 55653, (April 20, 2007), 72 FR 21062.

inconsistencies between the two provisions or because it may fail to properly specify a governing law with respect to certain contractual relations altogether.

Article VI, Section 9(c) of OCC's By-Laws provides that Illinois law, specifically the Illinois Uniform Commercial Code, is the governing law with respect to cleared contracts. A "cleared contract" is defined in Article I, Section 1 of OCC's By-Laws as "a cleared security or commodity future or futures option that is cleared by [OCC]." A "cleared security" is defined as "an option contract (other than a futures option), a security future or a BOUND." However, OCC has interactions and relationships with clearing members not directly involving cleared contracts (e.g., membership and financial requirements). Accordingly, the choice of law provisions in Article VI, Section 9(c) are not comprehensive.

OCC Rule 614(m), which clarifies the limited obligations of OCC in connection with pledges of cleared securities, incorporates certain provisions of Article VI, Section 9 of the By-Laws by reference and also contains special provisions applicable in the event that, notwithstanding the choice of law provisions of Article VI, Section 9(c), the laws of a jurisdiction that has not adopted the 1994 revisions to Article 8 and 9 of the UCC are applicable to security interests in pledged securities. However, because all 50 U.S. States, the District of Columbia, the U.S. Virgin Islands, and Puerto Rico have now adopted the 1994 revisions to Article 8 and 9 of the UCC, the special provisions are unnecessary.

Article V (Clearing Members), Section 3 (Conditions to Admission), paragraph (k) of OCC's By-Laws provides that as a condition to admission as a clearing member non-U.S. securities firms must consent to the jurisdiction of Illinois courts and to the application of U.S.

law in connection with any dispute with OCC arising from membership. However, this provision only applies to the limited context of disputes with OCC arising from membership.

The proposed rule change adds a general choice of law provision to OCC's By-Laws in order to provide consistency and predictability in the application of the law to all relations between OCC and its clearing members. This new provision will be particularly useful with respect to collateral posted by non-U.S. clearing members where a clear choice of law provision could provide further assurance that OCC's interests in such collateral are properly perfected. Such a provision will also decrease the likelihood of an inadvertent inconsistency among provisions of the various Articles of the By-Laws.

Illinois law is the most logical choice to be the governing law under the proposed choice of law provision given OCC's location and OCC's familiarity with Illinois law. Selecting Illinois law, along with federal law, as the governing law will also result in greatest consistency with current provisions of OCC's By-Laws and Rules. In addition, selection of Illinois as the forum for resolving any claims or disputes arising out of or relating to OCC's By-Laws or Rules will be most logical in light of the consistent application of Illinois law to relations between OCC and its clearing members.

The following revisions to OCC's By-Laws and Rules are necessary to create a general choice of law provision:

(1) New Choice of Law Provision: OCC will add a new Section 10 (General Choice of Law and Forum Selection) to Article IX (General Provisions) of its By-Laws. New Section 10 will specify Illinois law as the governing law with respect to OCC's By-Laws and Rules as well as any agreements between OCC and clearing members. It will also specify that any lawsuits

between clearing members and OCC be brought in a federal court or in the absence of federal jurisdiction in a state court located in Chicago, Illinois. Existing Sections 10-12 of Article IX will be renumbered as Sections 11-13 but will otherwise remain unchanged.

(2) Amendments to Other Sections of the By-Laws: OCC will remove Article VI, Section 9(c) of the By-Laws in its entirety and replace it with a reference to Article IX, Section 10 of the By-Laws and with a notice provision that persons desiring to perfect security interests in cleared securities should seek the advice of counsel.

(3) Amendments to Rules: OCC will make conforming amendments to Rule 604(b)(3)(ii) and to Interpretation and Policy .01 under Rule 614. These amendments are necessary in light of the adoption of the general choice of law provision described above. OCC will also delete language in Rule 614(m) providing for a contingency in the event of the application of the law of a jurisdiction that has not adopted the 1994 amendments to Articles 8 and 9 of the UCC as these are no longer necessary.

III. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in its custody or control or for which it is responsible.³ The proposed rule change is designed to eliminate any uncertainty about the law applicable to contractual disputes between OCC and its members and about the forum for any litigation between OCC and its members. Uncertainty about these matters could prolong contractual disputes or litigation, which ultimately could affect or interfere with OCC's ability to clear and settle securities transactions for one or more of its members.

³ 15 U.S.C. 78q-1(b)(3)(F).

Additionally, the proposed rule change is designed to assure that OCC's interests in members' collateral is perfected because the rule change clarifies that Illinois law applies to the securities on deposit at OCC by its foreign members. In the event of a member default, OCC uses such collateral either in the form of margin or clearing fund to meet its settlement obligations and to protect itself and its other members from financial loss. Accordingly, because the proposed rule change adds a new choice of law and forum selection provision to OCC's rules, the Commission finds that it is designed to assure the safeguarding of securities and funds which are in OCC's custody or control of for which it is responsible under Section 17A of the Act.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.⁴

⁴ In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-OCC-2006-09) be and hereby is approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.⁵

Florence E. Harmon
Deputy Secretary

⁵ 17 CFR 200.30-3(a)(12).