

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52752A; File No. SR-NASD-2004-044]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendments Nos. 1 and 2 Thereto Relating to Short Sale Delivery Requirements

November 17, 2005.

#### Correction

In FR Document No. E5-6306, beginning on page 69614 for Wednesday, November 16, 2005, in the first sentence of the first paragraph of the Notice the date should read March 10, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>1</sup>

Jonathan G. Katz,  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52783; File No. SR-OCC-2003-13]

### Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Proposed Rule Change To Establish a Comprehensive Standard of Care and Limitation of Liability With Respect to Clearing Members

November 16, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on November 5, 2003, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") and on August 18, 2004, amended<sup>2</sup> the proposed rule change as described in Items I, II, and III below, which items have been prepared by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

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

OCC is seeking to establish gross negligence as its comprehensive

standard of care and limitation of liability with respect to its clearing members.<sup>3</sup>

#### 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 these statements.<sup>4</sup>

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

In 1980 in its release setting forth standards for registration of clearing agencies, the Division of Market Regulation stated that it was "of the view that clearing agencies should undertake to perform their obligations with a high degree of care."<sup>5</sup> Later, in 1983 in its release registering nine clearing agencies, the Commission stated that it did "not believe sufficient justification exists at this time to require a unique federal standard of care for registered clearing agencies."<sup>6</sup> The Commission has left to user-governed clearing agencies the question of how to allocate losses associated with, among other things, clearing agency functions. Along this line, in 1986 in its order approving a proposed rule change of the Midwest Securities Trust Company ("MSTC") to clarify the rights and liabilities of the MSTC and its participants with respect to certain services, the Commission stated:

The Act does not specify the standard of care that must be exercised by registered clearing agencies and the Commission has determined that imposition of a unique Federal standard of care for registered clearing agencies is not appropriate at this time. [citing Securities Exchange Act Release No. 20221, *supra* note 5] For those reasons the Commission believes that the clearing agency standard of care and the allocation of rights and responsibilities between a clearing

agency and its participants applicable to clearing agency services generally may be set by the clearing agency and its participants. The Commission believes it should review clearing agency proposed rule changes in this area on a case-by-case basis and balance the need for a high degree of clearing agency care with the effect resulting liabilities may have on clearing agency operations, costs, and safeguarding of securities and funds.<sup>7</sup>

Because standards of care represent an allocation of rights and liabilities between a clearing agency and its users, which are generally sophisticated financial entities, the Commission has continued to refrain from establishing a unique federal standard of care and has allowed clearing agencies and other self-regulatory organizations and their users to establish their own standards of care.<sup>8</sup>

With this proposed rule change, OCC is seeking to establish a comprehensive gross negligence standard of care and limitation of liability with respect to its clearing members and makes the following representations. OCC states in the filing that since its founding in 1973, it has performed its clearing services with an exemplary level of care. Its record of fulfilling its commitments to its clearing members for over 30 years reflects OCC's commitment to serving the best interests of its clearing members. It has comprehensive systems and operating procedures in place to ensure that its clearing functions are executed with the highest level of accuracy. In addition to its own concern for accuracy, it is subject to extensive regulatory oversight by the Commission. Furthermore, in its amendment to the filing, OCC states that gross negligence is the standard of care generally used by other clearing agencies such as the Fixed Income Clearing Corporation, the decision to apply a gross negligence standard of care to OCC is a conscious allocation of risk between OCC and its members, the filing was unanimously approved by OCC's directors, a majority of whom are officers of clearing members, and the proposed rule change in no way will affect the very high level of care to which OCC has always held itself and to which it is held through the regulatory oversight of the Commission.<sup>9</sup> As such, OCC believes

<sup>7</sup> Securities Exchange Act Release No. 22940 (February 24, 1986), 51 FR 7169 (February 28, 1986).

<sup>8</sup> See, e.g., Securities Exchange Act Release Nos. 51669 (May 9, 2005), 70 FR 25634 (May 13, 2005) [File No. SR-NASD-2004-09]; 48201 (July 21, 2003), 68 FR 44128 (July 25, 2003) [File No. SR-GSCC-2002-10]; 37563 (August 14, 1996), 61 FR 43285 (August 21, 1996) [SR-PSE-96-21]; and 37421 (July 11, 1996), 61 FR 37513 (July 18, 1996) [SR-CBOE-96-02].

<sup>9</sup> *Supra*, letter from William H. Navin, n. 2.

<sup>1</sup> 17 CFR 200.30-3(a)(12).

<sup>2</sup> 15 U.S.C. 78s(b)(1).

<sup>3</sup> Letter from William H. Navin, Executive Vice President, General Counsel, and Secretary, OCC (August 17, 2005).

<sup>4</sup> OCC's proposed rule change would not affect the regulatory standards (e.g., section 17A of the Act) that apply to OCC or the way in which OCC conducts its clearing agency operations.

<sup>5</sup> The Commission has modified the text of the summaries prepared by OCC.

<sup>6</sup> Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 45167 (June 23, 1980).

<sup>7</sup> Securities Exchange Act Release No. 20221 (September 23, 1983), 48 FR 45167 (October 3, 1983).