SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 240

[Release Nos. 33–8114; 34–46264; File No. S7–29–02]

RIN 3235–AI55

Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From the Registration Requirements of the Securities Exchange Act of 1934

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We propose new exemptions under the Securities Act of 1933 and the Securities Exchange Act of 1934 for most standardized options. The proposals would exempt standardized options issued by registered clearing agencies and traded on a registered national securities exchange or an automated quotation system of a registered national securities association from all provisions of the Securities Act, other than the Section 17 antifraud provision, as well as the Exchange Act registration requirements. The proposals further would clarify that a security futures product that is cleared by a registered clearing agency and traded on a registered national securities exchange or an automated quotation system of a registered national securities association is exempt from the registration requirements of Exchange Act Section 12(g). The proposed rules would ensure comparable regulatory treatment of standardized options and security futures products.

DATES: You should send us your comments so that they arrive at the Commission by September 3, 2002.

ADDRESSES: To help us process and review your comments more efficiently, comments should be sent by one method only.

Please send three copies of your comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Alternatively, you may submit your comments electronically to the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. S7–29–02; please include this file number in the subject line if you use e-mail. We will make all comment letters available for public inspection and copying in our public reference room at the same address. We will post electronically submitted comment letters on the Commission's Internet Web site (http://www.sec.gov).[1]

FOR FURTHER INFORMATION CONTACT: N. Sean Harrison, Special Counsel, Office of Rulemaking, Division of Corporation Finance at (202) 942–2910, at the Securities and Exchange Commission, 450 Fifth Street NW, Washington, DC 20549–0312.

SUPPLEMENTARY INFORMATION: We are proposing new Rule 238 under the Securities Act of 1933 [2] and new Rule 12a-9 under the Securities Exchange Act of 1934.[3] We also propose to amend Exchange Act Rules 9b–1 [4] and 12h–1.[5]

I. Background

In 1973, we first permitted national securities exchanges to establish pilot programs for the trading of standardized options.[6] The Chicago Board Options Exchange (''CBOE'') established the first of these pilot programs.[7] The American Stock Exchange,[8] Philadelphia Stock Exchange,[9] Pacific Exchange [10] and the Midwest Stock Exchange [11] also later began to list standardized options.

Before CBOE could commence trading of standardized options, it had to register the options under both the Securities Act and the Exchange Act.[12] The Commission determined that the Options Clearing Corporation (''OCC'')[13] should be deemed to be the sole issuer of the standardized options to be listed on CBOE.[14] Therefore, OCC registered standardized options under both the Securities Act and the Exchange Act.[15] At that time, all transactions in standardized options were registered under the Securities Act on Form S–1, our general registration form. OCC filed a registration statement on Form 10 to register standardized options under the Exchange Act.[16]

In 1977, we placed a moratorium on any further expansion of standardized option trading in connection with a comprehensive examination of the trading and regulation of these securities.[17] As part of this examination, consideration was given as to whether the disclosure regime existing at the time was meeting the informational needs of buyers and sellers of standardized options. The results of this examination were presented to Congress in December 1978. The Report of the Special Study of Options Markets (''Options Study'') [18] concluded that,

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[1] We do not edit personal identifying information, such as names or e-mail addresses, from electronic submissions. You should only submit information that you wish to make publicly available.

[2] 15 U.S.C. 77a *et seq.*

[3] 15 U.S.C. 78a *et seq.*

[4] 17 CFR 240.9b–1.

[5] 17 CFR 240.12h–1.

[6] See Release No. 34–9985 (February 1, 1973). Section 9(b) of the Exchange Act [15 U.S.C. 78i(b)] prohibits the trading of options, by use of any facility of a national securities exchange, ''in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.''

[7] The Commission granted CBOE's application to register as a national securities exchange to trade standardized options in February 1973. See Release No. 34–9985.

[8] *See* Release No. 34–11144 (December 19, 1974) [40 FR 3258].

[9] *See* Release No. 34–11423 (May 15, 1975).

[10] *See* Release No. 34–12283 (March 30, 1976) [41 FR 14454].

[11] *See* Release No. 34–13045 (December 8, 1976) [41 FR 54783].

[12] Offers and sales of standardized options listed on national securities exchanges or traded through the facilities of a registered securities association must be registered under section 5 of the Securities Act [15 U.S.C. 77e]. Section 12(a) of the Exchange Act [15 U.S.C. 78l(a)] prohibits any broker or dealer from engaging in any transaction in a security on a national exchange unless the security is registered under the Exchange Act.

[13] Founded in 1973, OCC was the successor to CBOE's original clearing agency, the Chicago Board Options Exchange Clearing Corporation. OCC, which is a registered clearing agency under section 17A of the Exchange Act [15 U.S.C. 78q–1], is the issuer and clearing facility for all U.S. exchange listed securities options. The American Stock Exchange, Chicago Board Options Exchange, Pacific Exchange, Philadelphia Stock Exchange and International Securities Exchange share equal ownership of OCC.

[14] *See* Release No. 33–6411 (June 24, 1982) [47 FR 28688].

[15] In 1974, the Commission approved OCC's registration as a common clearing agency for exchange listed options. See Release No. 34–11146 (December 19, 1974).

[16] Registration of a class of securities under section 12 of the Exchange Act [15 U.S.C. 78*l*] generally imposes several reporting duties on the registrant, including the duty to file periodic and current reports under Section 13(a) [15 U.S.C. 78m(a)]. Additionally, the rules under Exchange Act Sections 13(d), 13(e), 13(g), 14(d) and Section 16 [15 U.S.C. 78m(d), 78m(e), 78m(g), 78n(d) and 78p] apply to classes of equity securities registered under Section 12. Because the securities underlying standardized options are issued by persons other than the clearing agency and are themselves registered under Section 12, it serves no purpose to require the clearing agency to file Exchange Act reports. The value of standardized options derives primarily from the value of the underlying security or index, not from matters peculiar to the issuing clearing agency. Moreover, because there is no possibility that a purchaser of standardized options could gain control over the clearing agency, there is no need for the disclosure mandated by sections 13(d) and 14(d) of the Exchange Act, which govern stock accumulations and tender offers. Clearing agency insiders have no informational advantages with respect to the issuers of the securities underlying standardized options. In recognition of these unique circumstances, we issued an order under Section 12(h) [15 U.S.C. 78l(h)] exempting OCC from Sections 13(a), 13(d), 13(e), 14(d), 15(d) and 16 of the Exchange Act. See Release No. 34–10483 (Nov. 7, 1973). If we adopt these proposals, this order would remain in effect to prevent OCC from becoming subject to reporting obligations pursuant to Exchange Act Section 15(d) [15 U.S.C. 78o(d)].

[17] *See* Release No. 34–14056 (October 17, 1977) [42 FR 56706].

[18] 96th Cong., 1st Sess. (Comm. Print 1978).

while OCC had simplified the disclosure about standardized options, the Form S–1 registration statement was lengthy, complicated and not particularly well-suited to satisfying investors' informational needs.[19] The Options Study also found that options investors were frustrated by the available disclosure. Furthermore, OCC, as the nominal issuer of standardized options, was incurring substantial costs related to the annual revision and redistribution of the Form S–1 prospectus.

In 1982, we extensively revised our system of regulation of standardized options in accordance with the recommendations included in the Options Study.[20] First, we adopted Form S–20 as a simplified Securities Act registration form customized for standardized options.[21] Form S–20 requires limited information about the clearing agency registrant and the options being registered.[22] We also adopted Securities Act Rule 153b[23] to provide that the prospectus delivery requirement in Securities Act Section 5(b)(2)[24] is satisfied by delivery of copies of the Form S–20 prospectus to each options market trading the options covered by the prospectus.[25] These changes simplified the registration process for options and eliminated some of the costs associated with the distribution and annual redistribution of options prospectuses to investors.

The central element of the reformed registration system was the newly created options disclosure document (''ODD''), required by Exchange Act Rule 9b–1.[26] The ODD discloses information relevant to standardized options trading generally, instead of information about the issuing clearing agency.[27] Broker-dealers are precluded from accepting orders to purchase or sell standardized options from a customer or from approving a customer's account for trading in these options unless the broker-dealer has furnished the customer with the ODD. The ODD is the only document required to be provided to options investors and thus has supplanted the options prospectus as the primary disclosure document with respect to trading in standardized options.[28] Under these proposals, broker-dealers would continue to be required to furnish the ODD to their customers investing in standardized options.

II. Reasons for the Proposals

Although our 1982 rulemaking streamlined and improved disclosure regarding standardized options, it continued to apply the Securities Act registration provisions to offers and sales of standardized options. This always has been somewhat anomalous because, in its role as an issuer, a registered clearing agency is fundamentally different than a conventional issuer that registers transactions in its securities under the Securities Act. For example, the purchaser of a standardized option does not invest in the clearing agency that registers transactions in standardized options. As a result, information about the registrant's business, its officers and directors, and its financial statements, is less relevant to investors in standardized options.[29] In standardized options transactions, the investment risk is determined by the market performance of the underlying security rather than the performance of the clearing agency registrant.

Moreover, registered clearing agencies are self-regulatory organizations subject to Commission oversight under section 17A of the Exchange Act.[30] Furthermore, unlike a conventional issuer, a registered clearing agency does not receive the proceeds from sales of the securities that it issues.[31] Registration does not appear to provide any additional protections to investors in standardized options. In this regard, as a result of the proposals, registered clearing agencies would not be subject to sections 11 and 12 of the Securities Act.[32]

Compliance with Exchange Act registration requirements also has been more burdensome for the clearing agency issuer of standardized options than for a conventional issuer. Section 12(a) of the Exchange Act makes it unlawful for any broker or dealer to effect a transaction in a non-exempt security on a national securities exchange unless the security has been registered for trading on that exchange. Section 12(g)(1),[33] as modified by rule, requires any issuer with more than $10,000,000 in total assets and a class of equity securities held by 500 or more persons to register such security with the Commission.

Regulation 12B prescribes the procedures for registration under both Section 12(b) and Section 12(g).[34] Standardized options are listed on national securities exchanges and, therefore, must be registered under section 12(b) of the Exchange Act. OCC, a clearing agency registered under Exchange Act Section 17A, currently acts as the issuer of all standardized

[19] Options Study at 39.

[20] See Release No. 33–6426 (September 16, 1982) [47 FR 41950].

[21] 17 CFR 239.20.

[22] Part I of Form S–20 requires the prospectus to include a description of the registrant and a brief summary of the securities being registered. Part II specifies information required to be included in the registration statement but not in the prospectus, including information as to the directors and executive officers of the registrant, material legal proceedings involving the registrant, certain exhibits and undertakings, and the registrant's financial statements.

[23] 17 CFR 230.153b.

[24] 15 U.S.C. 77e(b)(2).

[25] The options market must deliver the prospectus to any investor requesting it.

[26] 17 CFR 240.9b–1. Rule 9b–1 requires an options market, defined in Rule 9b–1(a)(1) as a national securities exchange, an automated quotation system of a registered securities association or a foreign securities exchange on which standardized options are traded, to file the ODD with the Commission at least 60 days before the date that definitive copies are furnished to customers, or at least 30 days before that date with respect to an amended ODD if the information contained in the ODD becomes or will become materially inaccurate or incomplete or there is or will be an omission of material information necessary to make the ODD not misleading. Form S–20 prohibits the issuance of an option registered on the form unless a definitive ODD meeting the requirements of Rule 9b–1 for the options class is available. As a practical matter, OCC works with the options markets to prepare and file the ODD. Rule 9b–1 allows an options exchange to use an ODD only if there is also an effective Form S–20 registration statement for the same options classes that are the subject of the ODD. The proposals would revise Rules 9b–1(b)(1) and 9b–1(c)(8) [17 CFR 240.9b–1(b)(1) and 9b–1(c)(8)] to permit use of the ODD if the option class is the subject of an effective Form S–20 registration statement or is exempt from registration.

[27] The ODD describes: the mechanics of buying, writing and exercising standardized options; the risks of trading these options; the market for the options; the tax consequences of standardized options trading; the issuer of standardized options; the instruments underlying an options class; the Form S–20 registration process; and the availability of the options prospectus. We revised Rule 9b–1 to explicitly state that amendments and supplements to the ODD are part of the ODD, and to describe more clearly the type of information to be included in the ODD. *See* Release No. 34–43461 (October 19, 2000) [65 FR 64137].

[28] Securities Act Rules 134a and 135b also are part of the revised options disclosure regime [17 CFR 230.134a and 135b]. Rule 134a provides that written materials, including advertisements, containing limited information concerning standardized options may be disseminated without being deemed to be a prospectus. Rule 135b provides that, solely for purposes of section 5 of the Securities Act, materials meeting the requirements of Rule 9b–1 of the Exchange Act will not be deemed an ''offer to sell'' or ''offer to buy'' a security, nor will the materials be deemed a prospectus for purposes of sections 2(a)(10) and 12(a)(2) of the Securities Act. Rule 135b would remain in effect if we adopt these proposals. Similarly, although Rule 134a would not apply to standardized options exempted under proposed Rule 238, it would continue to apply to any standardized options that remain subject to the registration provisions of the Securities Act.

[29] Options Study at 378.

[30] 15 U.S.C. 78q–1.

[31] OCC does receive a clearing fee of up to $0.09 per option contract from its members.

[32] 15 U.S.C. 77k and 771.

[33] 15 U.S.C. 78*l*(g)(1).

[34] 15 U.S.C. 78*l*(b) and (g).

options listed on national securities exchanges. As the issuer, OCC registers standardized options on Form 8–A.[35] Whenever an exchange introduces options on a new underlying security or index of securities, OCC files an amended Form 8–A to identify the underlying security or index of securities and the exchange or exchanges on which the option is to be traded. OCC also provides an updated list of all classes of options being traded on all exchanges as part of the amendment. Because it must file a Form 8–A amendment every time a new class of options opens for trading, OCC typically files more than 200 Form 8–A amendments each year. It is not clear that these numerous amendments benefit investors.

The National Securities Markets Improvement Act of 1996 (''NSMIA'')[36] conferred on the Commission authority to adopt exemptive rules under the Securities Act and the Exchange Act. By virtue of this authority, we can resolve the anomalies associated with registration of standardized options that we were unable to resolve when standardized options began to trade nearly three decades ago or when we streamlined the registration of standardized options 20 years ago. Section 28 of the Securities Act authorizes us to exempt any person, security or transaction from any provision of the Securities Act by rule or regulation to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors.[37] Similarly, Section 36 of the Exchange Act gives us the authority to exempt any person, security or transaction from any Exchange Act provision by rule, regulation or order, to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors. [38]

The enactment of the Commodity Futures Modernization Act of 2000 (''CFMA'')[39] is another factor motivating the issuance of these proposals. The CFMA addressed the regulation of security futures products.[40] Because these products are both securities and futures, the CFMA established a framework for the joint regulation of these products by the Commission and the Commodity Futures Trading Commission.

The CFMA permits national securities exchanges registered under section 6(a) of the Exchange Act [41] and national securities associations registered under Section 15A(a) to trade futures on individual securities and on narrow-based security indices. The CFMA amended the Securities Act in the following manner:

- It amended Section 2(a)(1)[42] to include a security future [43] within the definition of ''security.''
- It added Section 3(a)(14) [44] to exempt from all provisions of the Securities Act, except as expressly provided,[45] any security futures product that is traded on a national securities exchange or a national securities association registered under section 15A(a) of the Exchange Act, [46] and cleared by a clearing agency that is registered under section 17A of the Exchange Act or exempt from registration under Section 17A(b)(7).[47]
- It amended Section 2(a)(3)[48] to ensure that a security futures product could not be used by an issuer, affiliate of an issuer or underwriter to circumvent the registration requirements of Section 5 with respect to an issuer's securities underlying the security futures product.[49]

In addition, the CFMA exempted security futures products from the provisions of section 12(a) of the Exchange Act [50] and stated that a security futures product will not be considered a class of equity security of the issuer of the securities underlying the security futures product.[51] Because security futures products can be used for financial purposes similar to those served by standardized options, such as portfolio management and risk reduction, we believe that it is appropriate to propose comparable regulatory treatment for standardized options by adopting parallel exemptions under the Securities Act and Exchange Act.

Like security futures products, standardized options are derivative securities whose value is derived principally from the underlying security or index. Furthermore, standardized options represent the obligation of a registered clearing organization and are otherwise more similar to other exchange-traded derivative products than they are to conventional debt and equity securities. For these reasons, it seems appropriate to provide the same types of exemptions under the Securities Act and the Exchange Act for standardized options as were statutorily created for security futures products. By harmonizing the treatment of standardized options and security futures products in this respect, we would eliminate any unintended consequences that could result from differing regulatory treatment of these two types of securities.

III. Description of the Proposals

We propose new Securities Act Rule 238 to exempt standardized options that are issued by a registered clearing agency and traded on a national securities exchange registered under section 6(a) of the Exchange Act, or a national securities association registered under section 15A(a) of the Exchange Act, from all provisions of the Securities Act except:

- The antifraud provisions of section 17 of the Securities Act still would apply; and
- Any offer or sale of a standardized option by or on behalf of the issuer of the securities underlying the standardized option, an affiliate of the issuer, or an underwriter, would constitute a contract for sale of, sale of, offer for sale, or offer to sell (as these terms are defined in section 2(a)(3) of the Securities Act) the underlying securities.[52]

The proposed Rule 238 exemption would not make Form S–20 obsolete. We would retain Form S–20 for use by an issuer of standardized options that is not a clearing agency registered under section 17A of the Exchange Act, such

[35] 17 CFR 240.208a.

[36] Pub. L. 104–290, 110 Stat. 3416 (1996).

[37] 15 U.S.C. 77z–3.

[38] 15 U.S.C. 78mm.

[39] Pub. L. 106–554 Stat. 2763 (2000).

[40] Securities Act Section 2(a)(16) [15 U.S.C. 77b(a)(16)], Exchange Act Section 3(a)(56) [15 U.S.C. 78c(a)(56)], and CEA Section 1a(32) [7 U.S.C. 1a(32)] define ''security futures product'' as a security future or an option on a security future.

[41] 15 U.S.C. 78f(a).

[42] 15 U.S.C. 77b(a)(1).

[43] Securities Act Section 2(a)(16) [15 U.S.C. 77b(a)(16)] states that the term ''security future'' has the same meaning as provided in section 3(a)(55) of the Exchange Act [15 U.S.C. 78c(a)(55)]. Section 3(a)(55) defines a ''security future'' as a contact of sale for future delivery of a single security or of a narrow-based security index.

[44] 15 U.S.C. 77c(a)(14).

[45] Section 17(c) of the Securities Act [15 U.S.C. 77q(c)] states that the exemptions provided in section 3 of the Securities Act, including the exemption for security futures products, do not apply to the provisions of Section 17.

[46] 15 U.S.C. 78o–3.

[47] 15 U.S.C. 78q–l(b)(7).

[48] 15 U.S.C. 77b(a)(3).

[49] As amended, Section 2(a)(3) provides ''Any offer or sale of a security futures product by or on behalf of the issuer of the securities underlying the security futures product, an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for sale, or offer to sell the underlying securities.''

[50] 15 U.S.C. 78l(a).

[51] *See* Exchange Act Section 12(g)(5) [15 U.S.C. 78*l*(g)(5)].

[52] Consequently, a transaction in a standardized option on the securities of an issuer by such persons also is a transaction in the issuer's securities that must be registered under the Securities Act unless an exemption from registration is available.

as a foreign clearing agency.[53] Form S–20 also would continue to be available for use by issuers of standardized options that do not trade on a registered national securities exchange or on an automated quotation system of a registered national securities association.

The proposed rule would not affect the requirements under Exchange Act Rule 9b–1(d)(1)[54] that preclude broker-dealers from accepting orders to purchase or sell standardized options from a customer or from approving a customer's account for trading in standardized options unless the broker-dealer has furnished the customer with an ODD, other than to make conforming changes to reflect the fact that some standardized options would be exempt from Securities Act registration if the proposals are adopted. [55]

We also propose to create new Exchange Act Rule 12a–9 and to revise Rule 12h–1 to exempt standardized options from the registration requirements of section 12 of the Exchange Act.[56] The terms of the proposed rules are substantively comparable to the Securities Act and Exchange Act exemptions provided by the CFMA for security futures products. Proposed Exchange Act Rule 12a–9 states that the provisions of Exchange Act Section 12(a) do not apply in respect of any standardized option, as defined by Rule 9b–1, that is issued by a clearing agency registered under section 17A of the Exchange Act and traded on a national securities exchange registered pursuant to section 6(a) of the Exchange Act. Proposed Exchange Act Rule 12h–1(d) would exempt issuers from the provisions of section 12(g) of the Exchange Act with respect to a standardized option, as defined by Rule 9b–1, that is issued by a clearing agency registered under section 17A of the Exchange Act and traded on a national securities exchange registered pursuant to section 6(a) of the Exchange Act or an automated quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act.

We also propose to include a new paragraph in Rule 12h–1 to clarify that any security futures product that is traded on a registered national securities exchange or on an automated quotation system of a registered national securities association and cleared by a registered clearing agency is exempt from registration under Section 12(g).[57]

Request for Comment

We request and encourage any interested person to submit comments regarding the proposed changes that are the subject of this release.

- Do Securities Act and Exchange Act filings made to register standardized options benefit investors?
- Should we treat standardized options comparably to security futures products?
- Does registration of standardized options provide investor protection?
- Are there any differences between security futures products and standardized options that warrant different regulatory treatment?
- Should the exemptions for standardized options be broader or narrower than proposed? If so, how should we modify them?
- Should the exemptions apply only to standardized options cleared by a clearing agency that is registered under Exchange Act Section 17A? Should the proposed exemptions be available for standardized options issued by a clearing agency that qualifies for an exemption from Section 17A registration?
- Should the proposed exemptions be available for standardized options that are not traded on a registered national securities exchange or automated quotation system of a registered national securities association?
- Is there any information contained in the Form S–20 about the clearing agency issuer of standardized options that should be disclosed in the ODD? Should we otherwise amend the ODD in light of these proposals?

We request comment from the point of view of exchanges, clearing agencies, registrants, investors and other users of information about the sale of standardized options. With regard to any comments, we note that such comments are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

IV. Paperwork Reduction Act

The proposed amendments affect ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[58] We are submitting the proposed amendments to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[59] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The title for the collection of information affected by the proposed amendments is ''Form 8–A'' (OMB Control No. 3235–0056).[60]

There is no mandatory retention period for the information disclosed and Form 8–A is not kept confidential. We currently estimate that Form 8–A results in a total annual compliance burden of 5,934 hours. The burden was calculated by multiplying the estimated number of respondents filing Form 8–A annually (1,978) by the estimated average number of hours each entity spends completing the form (3 hours).

If adopted, the proposed amendments would eliminate the need for OCC, the only clearing agency currently registered under Exchange Act Section 17A that issues standardized options, to file Form 8–A and amendments thereto. During fiscal year 2001, OCC filed four Form 8–A registration statements and 214 Form 8–A amendments. Therefore, if the proposals are adopted, we estimate that the total annual burden for Form 8–A would be 5,280 hours, a decrease of 654 hours.

[53] Presently, no foreign clearing agencies are registered under Section 17A. Securities Act Rule 153b prospectus delivery requirements would continue to apply in connection with standardized option transactions registered on Form S–20.

[54] 17 CFR 240.9b–1(d)(1).

[55] See Proposed Rule 9b–1(b)(1) and (c)(8).

[56] Proposed Rule 12h–1(d) would be necessary even though standardized options currently are registered only pursuant to section 12(b) of the Exchange Act. In the event that we adopt proposed Rule 12a–9, standardized options no longer would qualify for the exemption in Section 12(g)(2)(A) [15 U.S.C. 78*l*(g)(2)(A)], which exempts any security listed and registered on a national securities exchange from registration under Section 12(g). Pursuant to Rule 12g–2 [17 CFR 240.12g–2], a class of securities that no longer is entitled to the Section 12(g)(2)(A) exemption is deemed to automatically be registered under Section 12(g) if, at the time that its Section 12(b) registration terminates, the securities are not exempt from registration under Section 12 or rules thereunder, and are held of record by 300 or more persons. Even if standardized options were not held of record by 300 or more persons when their Section 12(b) registration terminated (OCC currently has only 126 clearing members that would be considered record holders for purposes of Rule 12g–2), standardized options nevertheless would be required to be registered under Section 12(g) if, at the end of any fiscal year, standardized options issued by the registered clearing agency were held of record by 500 or more persons. Proposed Rule 12h–1(d) would exempt standardized options from Section 12(g), thereby avoiding the possibility that standardized options might automatically be registered or required to be registered under that section.

[57] Proposed Exchange Act Rule 12h–1(e).

[58] 44 U.S.C. 3501 *et seq.*

[59] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[60] The PRA defines a ''collection of information'' as ''the obtaining, causing to be obtained, soliciting or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for * * * answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons * * *'' The Form S–20 does not constitute a ''collection of information'' under the PRA because fewer than ten entities file Form S–20 registration statements.

We request comment in order to: (a) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) evaluate the accuracy of our estimates of the burden of the proposed collections of information; (c) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (d) evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and (e) evaluate whether the proposed amendments would have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609, with reference to File No. S7–29–02. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7–29–02, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street NW, Washington DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

V. Cost-Benefit Analysis

The proposed changes are intended to harmonize the regulatory treatment of standardized options and security futures products under the Securities Act and the Exchange Act. It is anticipated that these proposals would benefit registered clearing agencies that issue standardized options covered by the exemptions by eliminating Form S–20 and Form 8–A filing requirements currently applicable to issuers of standardized options. No detrimental effects to investors are expected.

According to data provided to us by OCC, it estimates that Form 8–A filings, and amendments to Form 8–A, result in an annual compliance cost to it of $23,000. OCC estimates that Form S–20 filings, and post-effective amendments to Form S–20, result in a total annual compliance cost to it of $50,538 which includes $17,500 of in-house costs and $33,038 in fees for outside counsel and other expenses.

The proposed Securities Act and Exchange Act exemptions reflect our view that registration provides little useful information to investors in standardized options issued by registered clearing agencies and traded on a national securities exchange or on an automated quotation system of a registered national securities association and imposes costs on options market participants that are not justified by the benefits to investors. Commenters are requested to provide their views and data relating to any costs and benefits associated with these proposals to aid us in our evaluation of the costs and benefits that may result from the changes proposed in this release.

VI. Regulatory Flexibility Act Certification

The Commission hereby certifies pursuant to 5 U.S.C. § 605(b), that proposed Rule 238 under the Securities Act, proposed Rule 12a–9 under the Exchange Act, and amendments to Rules 9b–1 and 12h–1 under the Exchange Act contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposals would exempt standardized options issued by a clearing agency registered pursuant to section 17A of the Exchange Act and traded on a national securities exchange registered pursuant to section 6(a) of the Exchange Act or an automated quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act from all provisions of the Securities Act, other than Section 17, as well as from the Exchange Act registration requirements. Standardized options currently are traded on five registered national securities exchanges; these exchanges are not small entities. OCC is a registered clearing agency that is the sole issuer of standardized options trading on these options markets; it is not a small entity. For this reason, the proposed amendments should not have a significant economic impact on a substantial number of small entities.

We encourage written comments regarding this certification. We solicit comment as to whether the proposed changes could have an effect that we have not considered. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

VII. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''),[61] a rule is ''major'' if it has resulted, or is likely to result in:

- an annual effect on the economy of $100 million or more;
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment or innovation.

We request comment on the potential impact of the proposed amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views if possible.

Section 23(a)(2) of the Exchange Act[62] requires us to consider the anti-competitive effects of any rules that we adopt under the Exchange Act. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, section 2(b) of the Securities Act[63] and section 3(f) of the Exchange Act[64] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation.

The purpose of these proposed amendments is to harmonize the treatment of standardized options with security futures products under the Securities Act and the Exchange Act. We think that the proposals would promote efficiency by eliminating the potential for regulatory arbitrage opportunities that could result from discordant treatment of security futures products and standardized options. In fact, we expect that the proposals would encourage competition among issuers of standardized options by removing

[61] Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996).

[62] 15 U.S.C. 78w(a)(2).

[63] 15 U.S.C 77b(b).

[64] 15 U.S.C. 78c(f).

regulatory obstacles to trading of these securities. We do not expect that the proposals would have any anti-competitive effects.

We solicit comment on these matters with respect to the proposed rules. Would the proposals have an adverse effect on competition that is neither necessary nor appropriate in furtherance of the purposes of the Securities Act or the Exchange Act? Would the proposed amendments, if adopted, promote efficiency, competition and capital formation? Commenters are requested to provide empirical data and other factual support for their views, if possible.

VIII. Statutory Authority

The amendments contained in this release are being proposed under the authority set forth in sections 19 and 28 of the Securities Act and sections 12(h), 23(a) and 36 of the Exchange Act.

List of Subjects in 17 CFR Parts 230 and 240

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The general authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77sss, 77z–3, 78c, 78d, 78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 79t, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

2. Section 230.238 is added to read as follows:

§ 230.238 Exemption for standardized options.

(a) *Exemption.* Except as expressly provided in paragraphs (b) and (c) of this section, the Act does not apply to any standardized option, as that term is defined by § 240.9b–1(a)(4) of this chapter, that is:

(1) Issued by a clearing agency registered under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1); and

(2) Traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)) or on a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–3(a)).

(b) *Limitation.* The exemption provided in paragraph (a) of this section does not apply to the provisions of section 17 of the Act (15 U.S.C. 77q).

(c) *Offers and sales.* Any offer or sale of a standardized option by or on behalf of the issuer of the securities underlying the standardized option, an affiliate of the issuer, or an underwriter, will constitute a contract for sale of, sale of, offer for sale, or offer to sell the underlying securities as defined in section 2(a)(3) of the Act (15 U.S.C. 77b(a)(3)).

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–l, 78k, 78k–l, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

4. Section 240.9b–1 is amended by:

a. Removing the authority citation following § 240.9b–1;

b. Revising the phrase ''under the Securities Act'' in the last sentence of paragraph (b)(1) to read ''under the Securities Act of 1933, or is exempt from registration under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*)''; and

c. Revising paragraph (c)(8).

The revisions read as follows:

§ 240.9b–1 Options disclosure document.

* * * * *

(c) * * *

(8) If the options are not exempt from registration under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the registration of the options on Form S–20 (17 CFR 239.20) and the availability of the prospectus and the information in Part II of the registration statement; and

* * * * *

5. Section 240.12a–9 is added to read as follows:

§ 240.12a–9 Exemption of standardized options from section 12(a) of the Act.

The provisions of section 12(a) of the Act (15 U.S.C. 78*l*(a)) do not apply in respect of any standardized option, as defined by § 240.9b–1(a)(4), issued by a clearing agency registered under section 17A of the Act (15 U.S.C. 78q–1) and traded on a national securities exchange registered pursuant to section 6(a) of the Act (15 U.S.C. 78f(a)).

6. Section 240.12h–1 is amended by:

a. Removing the authority citation following § 240.12h–1;

b. Removing ''and'' at the end of paragraph (b)(2);

c. Removing the period at the end of paragraph (c) and adding a semicolon; and

d. Adding paragraphs (d) and (e).

The addition reads as follows:

§ 240.12h–1 Exemptions from registration under section 12(g) of the Act.

* * * * *

(d) Any standardized option, as that term is defined in § 240.9b–1(a)(4), that is issued by a clearing agency registered under section 17A of the Act (15 U.S.C. 78q–1) and traded on a national securities exchange registered pursuant to section 6(a) of the Act (15 U.S.C. 78f(a)) or on a national securities association registered pursuant to section 15A(a) of the Act (15 U.S.C. 78o–3(a)); and

(e) Any security futures product that is traded on a national securities exchange registered pursuant to section 6(a) of the Act (15 U.S.C. 78f(a)) or on a national securities association registered pursuant to section 15A(a) of the Act (15 U.S.C. 78o–3(a)).

Dated: July 25, 2002.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–19393 Filed 7–31–02; 8:45 am]

BILLING CODE 8010–01–P