

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69496; File No. SR-CBOE-2013-044)

May 2, 2013

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Fingerprint-Based Background Checks of Exchange Directors, Officers, Employees and Others

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 18, 2013, Chicago Board Options Exchange, Incorporated filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. 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

Chicago Board Options Exchange, Incorporated (the “Exchange” or “CBOE”) proposes to adopt a rule codifying CBOE’s current practice of conducting fingerprint checks of directors, officers, employees, temporary personnel, independent contractors, consultants, vendors and service providers of the Exchange. Under the proposed rule, CBOE would conduct these fingerprint checks by submitting the fingerprints taken to the Attorney General of the United States or his or her designee for identification and processing. In conducting these fingerprint checks, CBOE would receive criminal history record information from the Attorney General of the United States or his or her designee for evaluation and use, in accordance with applicable law, in enhancing the security of the Exchange’s facilities, systems, data, and/or records (collectively, “facilities and records”).

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

<sup>2</sup> 17 CFR 240.19b-4.

The text of the proposed rule change is available on the Exchange's website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange 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. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange proposes to adopt a rule that would codify the Exchange's current practice of conducting fingerprint-based criminal records checks of (i) directors, officers and employees of the Exchange, and (ii) temporary personnel, independent contractors, consultants, vendors and service providers (collectively, "contractors") who have or are anticipated to have access to facilities and records. A number of securities markets have filed with the Securities and Exchange Commission ("Commission" or "SEC") rules to obtain fingerprints from certain enumerated parties.<sup>3</sup> The rule proposed by CBOE in this proposed rule change is consistent with these rules.

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<sup>3</sup> See Rule 1408 of the International Securities Exchange ("ISE"), Rule 28 of the New York Stock Exchange ("NYSE"), Rule 0140 of the Nasdaq Stock Market, Inc. ("Nasdaq") and Securities Exchange Act Release No. 50157 (August 5, 2004), 69 FR 49924 (August 12, 2004) (policy adopted by the National Association of Securities Dealers, Inc. ("NASD") (now FINRA) to conduct fingerprint-based background checks of NASD employees and independent contractors).

Access to the Federal Bureau of Investigation's ("FBI") database of fingerprint based criminal records is permitted only when authorized by law. Numerous federal and state laws authorize employers to conduct fingerprint-based background checks that make use of the FBI's database. Notably, Section 17(f)(2) of the Securities Exchange Act of 1934, as amended ("Act"), and SEC Rule 17f-2 require partners, directors, officers and employees of members of national securities exchanges, brokers, dealers, transfer agents, and clearing agencies to be fingerprinted and authorize SROs to maintain facilities for processing and storing fingerprint cards and criminal record information received from the FBI database with respect to such cards. Section 17(f)(2) explicitly directs the Attorney General of the United States (i.e., the FBI) to provide SROs designated by the Commission with access to criminal history record information. Section 17(f)(2) was amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") to also require partners, directors, officers and employees of registered securities information processors, national securities exchanges and national securities associations to be fingerprinted.<sup>4</sup> The Exchange believes, therefore, that a proposed rule change for a fingerprinting program for directors, officers, employees and contractors is a necessary component of the Exchange's business plan.

CBOE believes that fingerprint-based background checks of Exchange directors, officers, employees and contractors will promote the objectives of investor protection, business continuity and workplace safety and its other responsibilities under the Act by providing CBOE with an effective tool for identifying and excluding persons with felony or misdemeanor conviction records that may pose a threat to the safety of Exchange personnel or the security of facilities and records. The proposed rule would permit CBOE to conduct fingerprint-based background

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<sup>4</sup> See Section 929S of the Dodd-Frank Act.

checks of all Exchange directors, officers, employees and contractors. All Exchange directors, officers, employees and contractors would be subject to fingerprinting at any time. Fingerprint-based background checks of contractors would be performed prior to providing a contractor with access to facilities and records. The Exchange would also conduct fingerprint-based background checks of Exchange director candidates that are not already serving on the Exchange's Board before they are formally nominated and of employee candidates after an offer of employment has been made by the Exchange.

Any employee who refuses to submit to fingerprinting would be subject to progressive discipline up to and including the termination of employment. Any person who is given an offer of employment with the Exchange who refuses to submit to fingerprinting would have the offer withdrawn. A contractor who refuses to submit to fingerprinting would be denied access to facilities and records. The Exchange may choose to not obtain fingerprints from, or to seek fingerprint-based information with respect to, any contractor due to that contractor's limited, supervised, or restricted access to facilities and records, or the nature or location of his or her work or services, or if the contractor's employer conducts fingerprint based criminal records checks of its personnel.

Through access to state-of-the-art information systems administered and maintained by the FBI and its Criminal Justice Information Services Division, CBOE would receive centrally-maintained "criminal history record information," which is arrest-based data and derivative information, and may include personal descriptive data; FBI number; conviction status; sentencing, probation and parole information; and such other information as the FBI may now or hereafter make available to CBOE. This information is supplied to the FBI by various local, state, federal and/or international criminal justice agencies. Thus, the information obtained

through fingerprint-based background checks provides a profile of a candidate's criminal record and facilitates risk assessment with respect to the candidate.

Access to the FBI's nationwide database is particularly crucial with respect to the screening of contractors, who are not employees of the Exchange and who therefore are not subject to the pre-hire review that the Exchange conducts with respect to employees but whose work frequently requires the same or similar access to facilities and records as that provided to employees of the Exchange. In furtherance of its commitment to utilize and improve technology and systems applications to better serve investors, disseminate market information, and ensure reliable order handling and execution for all market participants, CBOE regularly retains outside vendors whose specialized expertise is required for the development, installation and servicing of this technology. Such vendors complement the work of CBOE systems staff in providing the investment community with an efficient and technologically advanced marketplace. Examples of persons from whom fingerprints may be obtained under the proposed rule change include the following (the plan does not include the fingerprinting of SEC staff), all of whom are anticipated to need CBOE-issued photo badges or other identification permitting them access to facilities and records for more than one day: personnel providing temporary services to CBOE but who are employed and provided by a staffing service and non-employee technicians whose work with CBOE software and equipment, although temporary, necessitates broad access to CBOE facilities.

The proposed access to criminal history information is consistent with federal law. Section 17(f)(2) of the Act and Rule 17f-2 thereunder require, subject to certain exemptions, a variety of securities industry personnel to be fingerprinted, including partners, directors, officers and employees of every member of a national securities exchange, brokers, dealers, transfer

agents, and clearing agencies. As noted above, Section 17(f)(2) was amended by the Dodd-Frank Act to also require partners, directors, officers and employees of registered securities information processors, national securities exchanges and national securities associations to be fingerprinted. Although Section 17(f)(2) does not require CBOE or other SROs to fingerprint contractors, the statute specifically permits SROs designated by the SEC to have access to “all criminal history record information.”

The proposed access to criminal history information is consistent with rules of other SROs<sup>5</sup> and is also consistent with New York's General Business Law, which, among other things, requires SROs in New York to fingerprint their employees and those non-employee service providers whose access to facilities or records places the self-regulatory organization at risk.

CBOE will comply with all applicable laws relating to the use and dissemination of criminal history record information obtained from the FBI.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>6</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>7</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect

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<sup>5</sup> Supra Footnote 3.

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes fingerprint-based background checks of Exchange directors, officers, employees and contractors is consistent with the foregoing requirements of Section 6(b)(5) in that they would help CBOE identify and exclude persons with felony or misdemeanor conviction records that may pose a threat to the safety of Exchange personnel or the security of facilities and records, thereby enhancing business continuity, workplace safety and the security of the Exchange's operations and helping to protect investors and the public interest. The proposed rule is substantially similar to fingerprinting rules of other SROs and would conform the Exchange's fingerprinting practices with recent amendments to Section 17(f)(2) of the Act.

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

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would enhance the security of the Exchange's facilities and records without adding any burden on market participants. The proposed rule change would conform the Exchange's fingerprinting rules with Section 17(f)(2) of the Act as amended by the Dodd-Frank Act. As discussed below, the Exchange notes the proposed rule change is based on fingerprinting rules of other SROs.

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

The Exchange neither solicited nor received comments on the proposed rule change.

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

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>8</sup> and Rule 19b-4(f)(6)(iii) thereunder.<sup>9</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>10</sup> normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii)<sup>11</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, because it will conform CBOE's fingerprinting practices with Section 17(f)(2) of the Act, as amended by the Dodd-Frank Act, which requires national securities exchanges, among other entities, to fingerprint their officers, directors, and employees, and to submit such fingerprints to the Attorney General of the United States for

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<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(6)(iii). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

<sup>11</sup> 17 CFR 240.19b-4(f)(6)(iii).

identification and processing. For this reason, the Commission designates the proposed rule change to be operative upon filing.<sup>12</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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. 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 No. SR-CBOE-2013-044 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. SR-CBOE-2013-044. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

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<sup>12</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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 No. SR-CBOE-2013-044 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>13</sup> 17 CFR 200.30-3(a)(12).