

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59200; File No. SR-CBOE-2008-125)

January 6, 2009

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Affiliations with Broker-Dealers

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 15, 2008, the Chicago Board Options Exchange, Incorporated (“CBOE” or “Exchange”) 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 by the CBOE. The Exchange has designated this proposal as one constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule under Section 19(b)(3)(A)(i) of the Act,³ and Rule 19b-4(f)(1)⁴ thereunder, which renders the proposal effective upon filing with the Commission. 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 Exchange is seeking effectiveness of an interpretation of a CBOE Constitution provision related to affiliations with broker-dealers. The proposed rule change is available on CBOE’s website (www.cboe.org/legal), at the CBOE’s Office of the Secretary, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(i).

⁴ 17 CFR 240.19b-4(f)(1).

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 parts 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 is in the process of forming a wholly-owned broker-dealer subsidiary. With respect to the contemplated establishment of the broker-dealer, the Exchange is seeking effectiveness of an interpretation of a CBOE Constitution provision related to affiliations with broker-dealers.

In particular, the Exchange notes that Article VIII, Section 8.1(b) of the CBOE Constitution provides in part that “[n]o officer, other than the Vice Chairman of the Board, shall be a member or affiliated with a member or a broker or dealer in securities or commodities.”⁵ The term “affiliated with” is not explicitly defined in the Constitution, but that term, and the related definition of control, has been defined in the Exchange Rules since 1973, the year the

⁵ The Exchange notes that this provision of the Constitution is proposed to be deleted as part of the Exchange’s contemplated demutualization and, upon its deletion, there would no longer be such a restriction. See SR-CBOE-2008-88. The Exchange also notes that other self-regulatory organizations do not have restrictions in their rules preventing their respective officers from acting in an official capacity with a broker-dealer affiliate. For example, certain officers of the National Stock Exchange, Inc. (“NSX”) are also officers and principals of NSX’s subsidiary broker-dealer, NSX Securities LLC.

Exchange was founded.⁶ The term “affiliate” or a person “affiliated with” another person is defined in the Exchange Rule 1.1(j) as, “a person who, directly or indirectly, controls, is controlled by, or is under common control with, such other person.” The term “control” is defined in Exchange Rule 1.1(k) as “the power to exercise a controlling influence over the management or policies of a person, unless such power is solely the result of an official position with such person. Any person who owns beneficially, directly or indirectly, more than 20% of the voting power in the election of directors of a corporation, or more than 25% of the voting power in the election of directors of any other corporation which directly or through one or more affiliates owns beneficially more than 25% of the voting power in the election of directors of such corporation, shall be presumed to control such corporation.”

The purpose of this rule filing is to seek effectiveness of an Exchange interpretation that Section 8.1(b), by its terms, does not apply to instances in which an Exchange officer acts solely in an official position for a broker-dealer, consistent with the longstanding definition and application of the term “affiliated with” in the Exchange Rules.⁷ The essence of this interpretation is that if an Exchange officer is not in a control relationship with a broker-dealer subsidiary of the Exchange, the officer is not an “affiliate” of the subsidiary even if the officer serves in an official position with the subsidiary, and thus the Exchange officer’s serving in an official position of the subsidiary is not prohibited by Section 8.1(b) of the Constitution. For example, the Exchange believes it would be permissible and consistent with Section 8.1(b) for an

⁶ E-mail from Jennifer M. Lamie, Assistant General Counsel, CBOE, to Richard Holley III, Senior Special Counsel, Division of Trading and Markets, Commission, dated January 5, 2009 (adding the preceding sentence to clarify the nature of the proposed interpretation).

⁷ Id.

Exchange officer to be a director, officer, principal, or an employee of a broker-dealer that is a wholly-owned subsidiary of the Exchange.

The Exchange notes that until it demutualizes it only intends to utilize the interpretation to permit Exchange officers to act in an official position with the wholly-owned broker-dealer subsidiary in accordance with Section 8.1(b) and to form the broker-dealer. The Exchange represents that the broker-dealer will not perform any operations without first discussing with the Commission staff whether any of the broker-dealer's operations should be subject to an Exchange rule filing required under the Act.⁸ These Exchange also notes that there are other protections in place that limit the potential conflicts between the Exchange as a self-regulator and broker-dealers, including, among other things, the existence of a Regulatory Oversight Committee as a committee of the CBOE Board of Directors that consists solely of public directors.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act⁹ in general and furthers the objectives of Section 6(b)(5) of the Act¹⁰ in particular in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national

⁸ 15 U.S.C. 78s(b)(1). In particular, the Exchange represents that it will not commence operations for such broker-dealer prior to an effective rule filing with the Commission setting forth the manner in which the broker-dealer would operate. E-mail from Jennifer M. Lamie, Assistant General Counsel, CBOE, to Richard Holley III, Senior Special Counsel, Division of Trading and Markets, Commission, dated January 5, 2009 (adding the preceding clarifying text).

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

market system, and, in general, to protect investors and the public interest. The proposed rule change is also consistent with the requirements of Section 6(b)(1) of the Act,¹¹ which requires that an exchange be so organized so as to have the capacity to be able to carry out the purposes of the Act and to comply, and (subject to any rule or order of the Commission pursuant to Section 17(d)¹² or 19(g)(2)¹³ of the Act) to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder and the rules of the Exchange. This rule change is designed to clarify the meaning and scope of CBOE's Constitution and Rules related to affiliations with broker-dealers.

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.

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

The Exchange neither received nor solicited written comments on the proposal.

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

The foregoing proposed rule change will take effect upon filing with the Commission pursuant to Section 19(b)(3)(A)(i) of the Act¹⁴ and Rule 19b-4(f)(1) thereunder,¹⁵ because it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule.

¹¹ 15 U.S.C. 78f(b)(1).

¹² 15 U.S.C. 78q(d).

¹³ 15 U.S.C. 78s(g)(2).

¹⁴ 15 U.S.C. 78s(b)(3)(A)(i).

¹⁵ 17 CFR 240.19b-4(f)(1).

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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CBOE-2008-125 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 Number SR-CBOE-2008-125. 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 Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. 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-2008-125 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

Florence E. Harmon
Deputy Secretary

¹⁶ 17 CFR 200.30-3(a)(12).