

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-71513; File No. SR-CBOE-2013-100)

February 7, 2014

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval of Proposed Rule Change Relating to CBSX Trading Permit Holder Eligibility

I. Introduction

On October 23, 2013, Chicago Board Options Exchange, Incorporated (the “Exchange” or “CBOE”) filed with the Securities and Exchange Commission (the “Commission”), 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> a proposed rule change to add Rule 50.4A to the rules of the CBOE Stock Exchange, LLC (“CBSX”).<sup>3</sup> The proposed rule change was published for comment in the Federal Register on November 12, 2013.<sup>4</sup> The Commission received four comment letters on the proposal.<sup>5</sup> CBOE responded to the comments on December 20, 2013.<sup>6</sup> On December 20, 2013, the Commission

---

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

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

<sup>3</sup> CBSX is a stock execution facility of CBOE.

<sup>4</sup> See Securities Exchange Act Release No. 70806 (November 5, 2013), 78 FR 67424 (“Notice”).

<sup>5</sup> See letter from Chris Concannon, Executive Vice President, Virtu Financial BD, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated November 11, 2013 (“Virtu Letter”); letter from Martin H. Kaplan, Gusrae Kaplan Nusbaum PLLC, to Kevin M. O’Neill, Deputy Secretary, Commission, dated November 18, 2013 (“Gusrae Kaplan Nusbaum Letter”); letter from James Ongena, General Counsel, Chicago Stock Exchange, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated December 3, 2013 (“CHX Letter”); and letter from Mary Ann Burns, Chief Operating Officer, Futures Industry Association, to Elizabeth M. Murphy, Secretary, Commission, dated December 3, 2013 (“FIA Letter”).

<sup>6</sup> See letter from Corinne Klott, Attorney, CBOE, to Elizabeth M. Murphy, Secretary, Commission, dated December 20, 2013 (“CBOE Letter”).

extended the time period for Commission action to February 10, 2014.<sup>7</sup> This order approves the proposed rule change.

## II. Description of the Proposal

The Exchange proposes to adopt Rule 50.4A regarding eligibility for CBSX Trading Permit Holders. Proposed Rule 50.4A provides that a CBSX Trading Permit Holder (“TPH”) may become or remain a CBSX TPH only if it is a member of a national securities association.<sup>8</sup> All CBSX TPHs would have six months from the approval of the rule filing to become a member of a national securities association. The proposed rule also provides that CBSX will terminate, upon written notice, the TPH status of any CBSX TPH that fails to meet this requirement.

CBOE states that it conducts surveillance of trading on CBSX and examines the securities-related operations of TPHs for compliance with CBSX Rules and the federal securities laws, rules and regulations. CBSX TPHs may submit orders to other trading venues as customers through executing broker-dealers, which are ultimately executed on those other trading venues (“away trading activity”). Because away trading activity does not occur on CBSX’s market, CBOE states that it does not have access to all necessary order and trade information for this trading activity, as it does for trading activity done directly on CBSX, from which it can directly conduct systematic surveillance reviews.

---

<sup>7</sup> See Securities Exchange Act Release No. 71152, 78 FR 79035 (December 27, 2013).

<sup>8</sup> Currently, Financial Industry Regulatory Authority, Inc. (“FINRA”) is the only registered national securities association. CBOE states that this proposal furthers compliance with Undertaking O of the June 11, 2013 Order Instituting Administrative and Cease-and-Desist Proceedings involving CBOE and C2 Options Exchange, Inc., which requires CBOE to enhance its regulation of CBSX-only TPHs. CBOE notes that this proposed rule change is only one component of its efforts to enhance its regulation of all CBSX TPHs, including CBSX-only TPHs. CBOE notes that although there will technically no longer be any CBSX-only TPHs if the proposed rule change is approved, the Exchange still believes that the proposal will enhance the general regulatory oversight of CBSX TPHs, including those former CBSX-only TPHs.

The Exchange notes that, although other national securities exchanges require their members to be members of another national securities exchange or a national securities association,<sup>9</sup> the other national securities exchanges may not have direct access to the order and transaction information related to the away trading activity of their members, as is the case with CBOE, and thus may not be in a position to review the away trading activity for potential violations of federal securities laws, rules and regulations.<sup>10</sup> The Exchange states that requiring a CBSX TPH to be a member of a national securities association (i.e. FINRA), but not providing it the option of becoming a member of another national securities exchange, is appropriate to ensure that the CBSX TPH's away trading activity is subject to appropriate regulatory review. According to the Exchange, FINRA rules currently require each FINRA member to submit order data for trading activity on all venues (including away trading activity) to FINRA on a regular basis.<sup>11</sup> The Exchange explains that this order data audit trail provides FINRA the necessary information related to each member's away trading activity to review for and detect possible violations of the federal securities laws, rules and regulations. This, in turn, would allow FINRA to detect possible violations of federal securities laws, rules, and regulations, and take appropriate regulatory and disciplinary action against a CBSX TPH as one of its regulators, or otherwise refer such matter to CBOE for review and consideration of disciplinary action.

---

<sup>9</sup> See, e.g., BATS Exchange, Inc. Rule 2.3, BATS Y-Exchange, Inc. Rule 2.3, EDGA Exchange, Inc. Rule 2.3(a), EDGX Exchange, Inc. Rule 2.3(a), NASDAQ Stock Market LLC Rule 1002(e), and New York Stock Exchange LLC Rule 2.

<sup>10</sup> The Exchange notes that it may obtain an audit trail of this “away activity” from which it will be able to conduct direct systematic surveillance reviews once the National Market System consolidated audit trail is finalized and implemented.

<sup>11</sup> See, e.g., FINRA Rules 7440 and 7450.

Proposed Rule 50.4A requires CBSX TPHs to become a member of FINRA within six months of the date of approval of this rule change.<sup>12</sup> CBOE will announce the date by which CBSX TPHs must comply with this new requirement (the “Compliance Date”) in a Regulatory Circular.<sup>13</sup> The Exchange notes that if it determines that there are extenuating circumstances which result in a CBSX TPH not being able to comply by the Compliance Date, the Exchange may permit the CBSX TPH to retain its TPH status beyond the Compliance Date for such period of time as the Exchange deems reasonably necessary to enable the CBSX TPH to become a member of FINRA.<sup>14</sup>

### III. Discussion of Comment Letters, CBOE’s Response, and Commission Findings

After careful review and for the reasons discussed below, the Commission finds that the proposed rule change is consistent with the requirements of the Act, including Section 6 of the Act,<sup>15</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>16</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>17</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and not

---

<sup>12</sup> As of December 20, 2013, 38 CBSX TPHs would be affected by this eligibility requirement (i.e., are not already members of FINRA).

<sup>13</sup> The Exchange will also issue periodic written reminders to all CBSX TPHs affected by this requirement that the CBSX TPH must become a FINRA member by the Compliance Date.

<sup>14</sup> The Exchange notes that the ability to extend certain time limits where extenuating circumstances exist is consistent with and similar to other Exchange rules. See e.g., CBOE Rule 3.19 and CBOE Rule 3.30.

<sup>15</sup> 15 U.S.C. 78f.

<sup>16</sup> In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In addition, the Commission finds that the proposal is consistent with Section 6(b)(2) of the Act,<sup>18</sup> which requires that the rules of a national securities exchange provide that any registered broker or dealer may become a member of such exchange. The Commission also finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,<sup>19</sup> which requires that the rules of a national securities exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission received four comment letters on the proposed rule change.<sup>20</sup> All four commenters object to the proposed rule change, argue that it is inconsistent with the Act, and recommend that CBOE either enter into a regulatory services agreement or a Rule 17d-2<sup>21</sup> plan with FINRA. In response, CBOE states that none of the comments provide a basis for disapproval of the proposal and reiterates its position that the proposal meets the standards for approval under the Act.<sup>22</sup> The comments, CBOE's response, and the Commission's findings are discussed in detail below.

#### A. Statutory Requirements for Exchange Membership

Two commenters<sup>23</sup> argue that the proposed rule change violates Section 6(b)(2) of the Act<sup>24</sup> because the proposal would impose requirements for exchange membership beyond those contained in the Act. Section 6(b)(2) of the Act provides that “[a]n exchange shall not be

---

<sup>18</sup> 15 U.S.C. 78f(b)(2).

<sup>19</sup> 15 U.S.C. 78f(b)(8).

<sup>20</sup> See supra, note 5.

<sup>21</sup> 17 CFR 240.17d-2.

<sup>22</sup> See CBOE Letter.

<sup>23</sup> See Virtu Letter and FIA Letter.

<sup>24</sup> 15 U.S.C. 78f(b)(2).

registered as a national securities exchange unless the Commission determines that... subject to the provisions of subsection (c) of this section, the rules of the exchange provide that any registered broker or dealer... may become a member of such exchange...”<sup>25</sup> The two commenters state that the proposal violates Section 6(b)(2) because it effectively denies or excludes certain registered broker-dealers from membership (TPH status) with CBSX.<sup>26</sup> One of the commenters asserts that CBOE incorrectly interprets Section 6(b)(2) as permitting it to exclude certain registered broker-dealers based on their affiliation with certain other self-regulatory organizations (“SROs”).<sup>27</sup> The other commenter points to Section 6(c) of the Act,<sup>28</sup> which provides specific reasons for which a registered broker-dealer may be prohibited from becoming a member of an exchange, as further evidence that the proposal is in violation of Section 6(b)(2) of the Act.<sup>29</sup> The commenter notes that none of the bases in Section 6(c) permit an exchange to deny membership to a broker-dealer solely on the basis of not being a member of a national securities association.<sup>30</sup>

In response, CBOE states that it is incorrect to infer from these statutory provisions that any registered broker-dealer meeting the general requirements of Section 6(b)(2) and that does not fall within the categories enumerated in Section 6(c) is always entitled to membership.<sup>31</sup>

---

<sup>25</sup> Section 6(c) of the Act provides bases for denial of membership in a national securities exchange, including failure to register as a broker-dealer, statutory disqualification, or failure to meet the standards of financial responsibility or operational capacity, or a showing that the party has or that there is a reasonable likelihood that they may engage in acts or practices inconsistent with just and equitable principles of trade.

<sup>26</sup> See Virtu Letter, at 2; FIA Letter, at 3-4.

<sup>27</sup> See Virtu Letter, at 2.

<sup>28</sup> 15 U.S.C. 78f(c).

<sup>29</sup> See FIA Letter, at 3-4.

<sup>30</sup> Id.

<sup>31</sup> See CBOE Letter, at 3.

CBOE notes that the rules of national securities exchanges virtually always provide bases for denial of membership in addition to those enumerated in Section 6(c) of the Act.<sup>32</sup> CBOE also notes that other national securities exchanges have membership with another national securities exchange or national securities association as a condition for membership.<sup>33</sup>

The Commission believes that the proposed rule change is consistent with Section 6(b)(2) and Section 6(c) of the Act. While Section 6(c) specifies certain bases upon which a national securities exchange can deny membership to, among other entities, a broker or a dealer, Section 6(c) is not intended to provide an exclusive list of reasons a national securities exchange can deny membership to a party. National securities exchanges may have requirements for exchange membership beyond those contained in the Act so long as they are consistent with the Act.<sup>34</sup> For example, the Commission has approved the rules of several national securities exchanges that require membership with another SRO as a condition of membership.<sup>35</sup> The Commission believes that CBOE's proposal requiring CBSX TPHs to be members of FINRA, another SRO, is consistent with Section 6(b)(2) and Section 6(c) of the Act.

#### B. Discrimination Among CBOE Members

Two commenters assert that the proposal violates Section 6(b)(5)<sup>36</sup> by discriminating against CBSX TPHs.<sup>37</sup> Section 6(b)(5) provides, among other things, that the rules of an

---

<sup>32</sup> Id.

<sup>33</sup> See CBOE Letter, at 3-4. CBOE also noted that former NYSE Rule 2(b) required membership in FINRA as a condition precedent to becoming or remaining a member organization. Id., at 4.

<sup>34</sup> See e.g. CHX Article 3; Rules of BATS Exchange, Chapter II; Nasdaq Stock Market Rule 1000 series.

<sup>35</sup> See supra, note 9.

<sup>36</sup> 15 U.S.C. 78f(b)(5).

<sup>37</sup> See Virtu Letter; CHX Letter.

exchange must not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. One commenter states that the proposal results in certain CBOE members that are not FINRA members being denied access to CBSX (CBOE’s exchange facility for equities), while other CBOE members that are not FINRA members will continue to have access to the CBOE options facility, thus effectively discriminating against members that trade equities.<sup>38</sup> The other commenter shares the same concern and states that this disparate treatment is impermissible under the Act.<sup>39</sup>

CBOE responds to these concerns by stating that Section 6(b)(5) requires only that exchange rules be designed not to permit unfair discrimination and that CBOE may impose “requirements on a subgroup of members who elect to avail themselves of specified exchange services or who conduct specified types of business,” while not imposing such requirements “on other members who choose not to use such services or conduct such types of business, or otherwise where such additional requirements would serve a valid regulatory purpose.”<sup>40</sup> The Exchange argues that the proposed rule is justified by the need for greater regulatory oversight of the away trading activity of CBSX TPHs. Because away trading activity does not occur on the CBSX market, CBOE states that it does not have access to all the necessary order and trade information for this trading activity with which to directly conduct systematic surveillance reviews relating to this trading activity.<sup>41</sup> CBOE believes that because FINRA’s rules require each FINRA member to submit order data for its trading activity on all trading venues on a regular basis, FINRA has greater access to off-exchange trading activity conducted by its

---

<sup>38</sup> See Virtu Letter, at 2.

<sup>39</sup> See CHX Letter, at 3.

<sup>40</sup> See CBOE Letter, at 6.

<sup>41</sup> Id.



members than do national securities exchanges.<sup>42</sup> Therefore, CBOE believes that its proposal to require FINRA membership of CBSX TPHs is reasonably designed to enhance regulatory oversight of CBSX TPHs so it does not unfairly discriminate among CBOE TPHs, but rather imposes a reasonable additional obligation on those CBOE TPHs who choose to be CBSX TPHs as well.<sup>43</sup>

The Commission believes that the proposal is consistent with Section 6(b)(5) of the Act. The Commission believes that the proposal does not unfairly discriminate against CBSX TPHs. As CBOE stated, Section 6(b)(5) does not prevent an exchange from imposing additional requirements on a subgroup of members who elect to avail themselves of specified exchange services or who conduct certain types of business. Here, CBOE's proposal to require CBSX TPHs to be members of FINRA while not requiring CBOE TPHs to be members of FINRA is not unfairly discriminatory because it will apply equally to all CBSX TPHs and enhance the regulatory oversight of CBSX TPHs' trading activity.

### C. Cost

Three commenters argue that the proposed rule change imposes a substantial cost on CBSX TPHs by requiring dual membership with FINRA.<sup>44</sup> One commenter believes that the proposal will make it prohibitively expensive for some CBSX TPHs to continue to hold CBSX trading permits or become members of other exchanges, thereby imposing a burden on

---

<sup>42</sup> Id., at 6-7. CBOE also explains that, as a member of the Intermarket Surveillance Group, CBOE receives an equity audit trail of all equity market orders and trade information for away trading activity, but that the audit trail does not provide the necessary granular level of detail to denote when a CBSX TPH is executing a trade as a customer through another broker-dealer on an away market. CBOE states that without such granular information, the Exchange is limited in the reviews it can conduct of this activity. Id., at 6, note 22.

<sup>43</sup> Id., at 7.

<sup>44</sup> See Gusrae Nusbaum Kaplan Letter, CHX Letter, and FIA Letter.

competition not necessary or appropriate in furtherance of the purposes of the Act in violation of Section 6(b)(8).<sup>45</sup> The commenter argues that CBSX TPHs that are proprietary trading firms that do not carry public customer accounts would be required to bear the same costs of FINRA membership as CBSX TPHs that carry public customer accounts.<sup>46</sup> The commenter further states that the “burdens on competition are not appropriate because [s]ection 17(d) of the Act provides the mechanism through which an SRO could share certain regulatory responsibilities with other SROs...”<sup>47</sup> Another commenter criticizes the proposal stating that dual FINRA membership places a large burden on members including, but not limited to, an additional layer of regulatory costs and being subject to compliance with FINRA rules, which have no relevance to proprietary traders who do not have public customers.<sup>48</sup>

A third commenter points out that “undertaking FINRA membership is a significant, time-consuming and expensive exercise.”<sup>49</sup> The commenter explains that FINRA membership would require firms (1) to review and analyze the applicability of a vast array of rules and interpretations from FINRA, the majority of which are designed for firms that transact customer business; (2) to amend filings with other exchanges, incurring additional unnecessary filing costs; (3) to maintain blanket fidelity bond coverage, which the commenter states is typically designed to insure a firm against intentional fraudulent and dishonest acts involving customer funds or customer accounts, while the firms affected by the proposed rule change do not transact customer business; (4) to incur the costs of reporting to FINRA’s order audit trail system; and (5)

---

<sup>45</sup> See CHX Letter, at 2-3.

<sup>46</sup> Id., at 3.

<sup>47</sup> Id.

<sup>48</sup> See Gusrae Nusbaum Kaplan Letter, at 2.

<sup>49</sup> See FIA Letter, at 4.

to require their associated persons to pass additional exams, since certain exams (such as the Series 56) are not recognized by FINRA.<sup>50</sup> The commenter states that if this proposed rule goes into effect, CBSX would be the only exchange requiring FINRA membership for member firms that do not transact customer business and therefore would position CBSX as an outlier and subject to possible regulatory arbitrage, which could increase market fragmentation.<sup>51</sup>

In response to these concerns, CBOE states that any CBSX TPH that finds it burdensome to become a FINRA member can resign its CBSX membership and become a member of a national securities exchange that does not require membership with FINRA.<sup>52</sup> CBOE states, “[t]here are any number of national securities exchanges that would provide the alternative, so the Proposal imposes no burden on competition that a CBSX TPH cannot easily eliminate if it chooses.”<sup>53</sup> CBOE also states that if a CBSX TPH cannot comply with the proposal by the Compliance Date due to extenuating circumstances, CBOE may permit the CBSX TPH to retain its status as a TPH for a time CBOE deems reasonably necessary for the CBSX TPH to become a member of FINRA.<sup>54</sup> Regarding dual registration, CBOE notes that other national securities exchanges require membership in another SRO.<sup>55</sup> Further, according to the Exchange, CBSX TPHs that do not conduct a public customer business would be subject only to those FINRA rules that were applicable to their business.<sup>56</sup> CBOE also notes that if associated persons of CBSX TPHs are currently licensed in a registration category that FINRA does not recognize,

---

<sup>50</sup> Id., at 4-5.

<sup>51</sup> Id., at 6.

<sup>52</sup> See CBOE Letter, at 9.

<sup>53</sup> Id.

<sup>54</sup> Id., at 10.

<sup>55</sup> Id., at 9.

<sup>56</sup> Id., at 11.

FINRA's rules permit FINRA to waive its licensing requirements and accept other standards for qualifying for registration.<sup>57</sup>

The Commission believes that the proposal is consistent with Section 6(b)(8) of the Act and does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As CBOE stated, any firm that determines not to become a FINRA member can join another national securities exchange that does not require FINRA membership. The Commission, as noted above, has approved the membership rules of several exchanges that require membership with another SRO as a condition of membership.<sup>58</sup>

D. Section 15(b)(8) of the Act and Rule 15b9-1 Thereunder

One commenter<sup>59</sup> argues that the proposal conflicts with Section 15(b)(8) of the Act<sup>60</sup> and Rule 15b9-1 thereunder.<sup>61</sup> Section 15(b)(8) of the Act prohibits a registered broker or dealer from effecting a transaction in a security unless the broker or dealer is a member of a national securities association or effects transactions in securities solely on a national securities exchange of which it is a member. Rule 15b9-1(a) exempts a broker or dealer from becoming a member of a national securities association if it: (1) is a member of a national securities exchange; (2) carries no customer accounts; and (3) has annual gross income of no more than \$1,000 that is derived from securities transactions otherwise than on an exchange of which it is a member.<sup>62</sup>

The commenter believes that the proposed rule change conflicts with these provisions because it

---

<sup>57</sup> See CBOE Letter, at 11.

<sup>58</sup> See supra, note 9.

<sup>59</sup> See CHX Letter, at 2.

<sup>60</sup> 15 U.S.C. 78o(b)(8).

<sup>61</sup> 17 CFR 240.15b9-1.

<sup>62</sup> Rule 15b9-1(b) states that the gross income limitation in (a) does not apply to income derived from transactions (1) for the dealer's own account with or through another registered broker or dealer or (2) through the Intermarket Trading System.

would require all CBSX TPHs – even those that would qualify for the Rule 15b9-1 exemption - to become members of a national securities association.<sup>63</sup> The commenter states this directly contradicts Rule 15b9-1, which recognizes that certain broker-dealers should not be required to become members of a national securities association.<sup>64</sup>

In its response, CBOE states that neither Section 15(b)(8) nor Rule 15b9-1 preclude CBOE from adopting a more restrictive rule concerning when a member must become a member of a national securities association.<sup>65</sup> In fact, CBOE claims that exchanges often impose requirements on their members that are stricter than those specifically enumerated in the Exchange Act and Commission rules.<sup>66</sup> CBOE believes that Rule 15b9-1 “has no application if the requirement to become a member of a national securities association is required not by Section 15(b)(8) of the [Act], but by some other authority, such as an exchange rule.”<sup>67</sup>

The Commission does not believe that the proposed rule change conflicts with Section 15(b)(8) or Rule 15b9-1. As CBOE stated, national securities exchanges may impose requirements on their members that are more stringent than those imposed by the Act or by Commission rules. Therefore, the requirement imposed by proposed Rule 50.4A that CBSX TPHs become members of FINRA, although more restrictive than Section 15(b)(8), is consistent with the Act and not in violation of Section 15(b)(8) or Rule 15b9-1.

---

<sup>63</sup> See CHX Letter, at 2.

<sup>64</sup> Id.

<sup>65</sup> See CBOE Letter, at 5.

<sup>66</sup> Id.

<sup>67</sup> Id.

#### E. Satisfaction of Regulatory Obligations

One commenter<sup>68</sup> believes that the proposed rule change is an admission of CBOE's failure to satisfy its exchange obligations, in violation of Section 6(b)(1) of the Act, which requires an exchange to, among other things, enforce compliance by its members with provisions of the Act and the rules thereunder.<sup>69</sup> The commenter argues it is not appropriate for an exchange to alter its membership requirements in order to satisfy its regulatory burden and that if CBOE fails to satisfy its regulatory responsibilities, then CBOE's status as an exchange and its ability to operate the CBSX must be scrutinized.<sup>70</sup> This commenter and another commenter observe that the issue of CBOE not having access to all necessary order and trade information for away trading activity is not unique to CBOE, yet other exchanges have been able to fulfill their exchange obligations regardless.<sup>71</sup> Specifically, the other commenter argues that other exchanges have not shifted the costs associated with surveillance and monitoring to certain of its member firms by imposing a burdensome new membership requirement at FINRA in order to discharge their regulatory obligations.<sup>72</sup> A third commenter states that the proposal is an inefficient attempt by the CBOE to remedy a fundamental break down in its regulatory structure, that instead of building up its own surveillance and enforcement departments and abilities, the

---

<sup>68</sup> See Virtu Letter, at 1, 3.

<sup>69</sup> 15 U.S.C. 78f(b)(1). Section 6(b)(1) of the Act states that “[a]n exchange shall not be registered as a national securities exchange unless the Commission determines that... [s]uch exchange is so organized and has the capacity to be able to carry out the purposes of this title and to comply, and... to enforce compliance by its members and persons associated with its members, with the provisions of this title, the rules and regulations thereunder, and the rules of the exchange.”

<sup>70</sup> See Virtu Letter, at 3.

<sup>71</sup> Id. and FIA Letter, at 6.

<sup>72</sup> See FIA Letter, at 6.

CBOE is shifting the burden entirely onto its members and FINRA.<sup>73</sup> Finally, a fourth commenter states that it is concerned with the precedent that will be set if the proposal is approved, specifically that an SRO will be permitted to adopt rules that will unilaterally shift some of its responsibilities to another SRO.<sup>74</sup>

All four commenters suggest that a better resolution would be for CBOE to enter into a Rule 17d-2 plan or a regulatory services agreement with FINRA in lieu of the proposed rule change.<sup>75</sup> One commenter recommends that CBOE either adopt a rule requiring its members to send their trading activity data to FINRA, or that CBOE enter into a regulatory services agreement with FINRA allowing FINRA to collect this data and surveil it.<sup>76</sup> The other commenters were in favor of CBOE entering into Rule 17d-2 plan.<sup>77</sup>

In response, CBOE reiterates that the proposal is designed to enhance the regulation of CBSX.<sup>78</sup> CBOE explains that it does not have access to all of the necessary order and trade information for away trading activity and that the proposal addresses this limitation on its ability to oversee away trading activity.<sup>79</sup> CBOE further explains that entering into a 17d-2 agreement with FINRA is not possible to address the away trading activity of CBSX TPHs because a 17d-2 agreement is available only with respect to broker-dealers that are members of each SRO that is a party to the agreement, and by definition, the proposal addresses the situation in which CBSX

---

<sup>73</sup> See Gusrae Kaplan Nusbaum Letter, at 2.

<sup>74</sup> See CHX Letter, at 1.

<sup>75</sup> See Virtu Letter, at 1-2; Gusrae Kaplan Nusbaum Letter, at 3; CHX Letter, at 3; and FIA Letter, at 6.

<sup>76</sup> See Gusrae Kaplan Nusbaum Letter, at 3.

<sup>77</sup> See Virtu Letter, at 1-2; CHX Letter, at 3; and FIA Letter, at 6.

<sup>78</sup> See CBOE Letter, at 7.

<sup>79</sup> Id.

TPHs are not FINRA members.<sup>80</sup> CBOE acknowledges that there may be other ways to accomplish its regulatory goal, but that it has determined that its proposal is a reasonable method of achieving its regulatory objectives.<sup>81</sup> CBOE also reiterates its position that its proposal is consistent with the Exchange Act and notes that this is further evidenced by the fact that the Commission has previously approved exchange rules requiring members to be members of at least one other SRO.<sup>82</sup>

The Commission does not believe that CBOE's proposal, in and of itself, provides evidence that CBOE has failed to meet its exchange obligations. The Commission also notes that CBOE's proposal in no way (1) reduces CBOE's obligations under the Act to meet its regulatory responsibilities as an SRO, or (2) shifts any of CBOE's responsibilities to FINRA. The Commission agrees with CBOE that a Rule 17d-2 plan is available as an option only with respect to broker-dealers that are members of each SRO that is a party to the agreement. CBOE has proposed to require CBSX members to be members of FINRA in order to enhance regulation of their away trading activity. Whether or not there may be other less costly or burdensome ways to enhance regulation of away trading activity by CBSX members, the issue before the Commission is whether the current proposal is consistent with the Exchange Act and the rules and regulations thereunder applicable to SROs. If so, the Commission must approve the proposed rule change. The Commission believes that the proposal is consistent with the Act. As stated above, exchanges may impose membership requirements that are more stringent than

---

<sup>80</sup> Id., at 7-8.

<sup>81</sup> Id., at 8.

<sup>82</sup> Id. CBOE also stated that because other exchanges also require their members to be members of at least one other SRO, it is evident that its proposal does not reflect that it is in violation of Section 6(b)(1). Id., at note 25.



those contained in the Act. The Commission has previously approved rules of other exchanges requiring membership in another SRO.

IV. Conclusion

For all the reasons discussed above, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to national securities exchanges. IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>83</sup> that the proposed rule change (SR-CBOE-2013-100) be, and it is hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>84</sup>

Kevin M. O'Neill  
Deputy Secretary

---

<sup>83</sup> 15 U.S.C. 78s(b)(2).

<sup>84</sup> 17 CFR 200.30-3(a)(12).