

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-54169; File No. SR-CBOE-2006-45)

July 18, 2006

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval of Proposed Rule Change Regarding the Review Authority of the Board of Directors

I. Introduction

On May 5, 2006, the Chicago Board Options Exchange, Incorporated (“CBOE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend its rules to clarify the authority of CBOE’s Board of Directors (“Board”) with respect to actions or inactions of CBOE committees and CBOE officers, representatives, or designees. The proposed rule change was published for comment in the Federal Register on June 2, 2006.³ The Commission received one comment letter regarding the proposal⁴ and a response to the comment letter from the Exchange.⁵ This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to add new CBOE Rule 2.2, Power of the Board to Review Exchange Decisions, which would provide that, in connection with any

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 53872 (May 25, 2006), 71 FR 32156.

⁴ See letter to Nancy M. Morris, Secretary, Commission, from Lawrence J. Blum, Member, CBOE, dated June 5, 2006 (“Blum Letter”).

⁵ See letter to Nancy Sanow, Assistant Director, Division of Market Regulation (“Division”), Commission, from Jennifer M. Lamie, Managing Senior Attorney, Legal Division, CBOE, dated July 7, 2006 (“CBOE Response Letter”).

delegation to a committee or committees pursuant to Article EIGHTH of CBOE's Certificate of Incorporation ("Certificate"), the Board would retain the power and authority to review, affirm, modify, suspend, or overrule any and all actions or inactions of CBOE committees, and of all officers, representatives, or designees of CBOE. Proposed CBOE Rule 2.2 would not apply to actions taken (or inactions) pursuant to Chapters XVII (Discipline), XVIII (Arbitration), and XIX (Hearings and Review) of the Exchange's Rules, unless specifically provided for in those Rules, or to actions taken by (or inactions of) the Nominating Committee or Executive Committee pursuant to Article IV of the Exchange's Constitution, which sets forth the Exchange's nominations process. In addition, the proposed rule change would amend CBOE Rule 2.1, Committees of the Exchange, to clarify that CBOE committees would have, in addition to the powers and duties that are specifically granted in the Exchange's Constitution or Rules, only such other powers and duties as may be delegated to them by the Board.

III. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change, the comment letter received, and the CBOE Response Letter, and finds that the proposed rule change is consistent with the requirements of the Act,⁶ and, in particular, the requirements of Section 6 of the Act.⁷ Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,⁸ which requires that an exchange be so organized and have the capacity to be able to carry out the purposes of the Act and to

⁶ In approving this proposed rule change the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁷ 15 U.S.C. 78f.

⁸ 15 U.S.C. 78f(b)(1).

comply, and (subject to any rule or order of the Commission pursuant to Section 17(d)⁹ or 19(g)(2)¹⁰ 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.

The commenter asserted that the proposed rule change is unnecessary and generally in conflict with the CBOE Constitution.¹¹ The commenter also expressed concern that the aim of the proposed rule change is to reduce the influence of member/owners.¹² In response, the Exchange noted that CBOE is a membership corporation formed under Delaware’s General Corporation Law, which provides that “the business and affairs of every corporation shall be managed by or under the direction of a board of directors, except as may be otherwise . . . provided in its certificate of incorporation”¹³ CBOE stated that its Certificate provides that the Board is CBOE’s governing body and is vested with all powers necessary for the management of the Exchange’s business and affairs, except to the extent that the authority, powers, and duties of such management are delegated to a committee or committees established pursuant to CBOE’s Constitution or Rules. According to CBOE, its Certificate and Constitution provide that the Board may establish one or more committees, each of which has the authority, powers, and duties as may be prescribed in the Constitution, Exchange

⁹ 15 U.S.C. 78q(d).

¹⁰ 15 U.S.C. 78s(g)(2).

¹¹ See Blum Letter at 1, supra note 4.

¹² Id. at 2.

¹³ See CBOE Response Letter, supra note 5, at 1.

Rules, or by resolution of the Board.¹⁴ CBOE advised that, under these provisions, it has established various committees and has delegated to those committees specific authority, powers, and duties.

CBOE further noted that its Rules provide that each committee “is subject to the control and supervision of the Board.”¹⁵ CBOE stated, however, that such supervisory power alone does not make explicit the power of the Board to directly modify or overrule the action (or inaction) of a committee when the decision-making authority with respect to the action has been delegated to the committee. CBOE pointed out that the specific delegations contained in its Constitution, Rules, and resolutions vary in scope: some involve a complete delegation and others involve a limited delegation where the Board has explicitly or implicitly reserved certain authorities. CBOE noted that, although the specific delegations contained in its Constitution, Rules, and Board resolutions vary in describing the scope of the authority delegated, its Board retains the power to revoke, limit, or change a committee delegation, either by rule change or by resolution as appropriate.

The purpose of the proposed rule change, CBOE asserted, is to apply an explicit, uniform standard of review by the Board to the general organizational and administrative structure of CBOE’s committees and to resolve any ambiguity that may exist. Thus, CBOE contended that the proposed rule change would clarify that the Board retains the power and authority to review, affirm, modify, suspend or overrule any and all actions or inactions of CBOE committees and officers, representatives, or designees, except as

¹⁴ Id.

¹⁵ CBOE Rule 2.1(d).

otherwise specified. In CBOE's view, the proposal is consistent with its Certificate and Constitution.

CBOE also advised that the proposed rule change is consistent with the provisions of its Constitution pertaining to the Executive Committee. CBOE stated that the Executive Committee is a committee of the Board that performs the functions of the Board when the Board is not in session or it is not practicable to arrange a meeting of the Board within the time reasonably available. Thus, to the extent that the Executive Committee would take any action pursuant to Article VII, Section 7.2 of its Constitution, CBOE asserted that the Board retains jurisdiction over those matters and may later determine to review, affirm, modify, suspend or overrule any and all actions of the Executive Committee.

In the Commission's view, the Exchange has provided a sufficient basis on which the Commission can find that, as a federal matter under the Act, the Exchange is complying with its own Certificate and Constitution. Further, in approving this proposal, the Commission is relying on CBOE's representation that the proposed rule change is appropriate under Delaware state law.¹⁶ Thus, the Commission believes that the proposed rule change clarifies the Board's review authority by providing an explicit, uniform standard to be applied to any delegation of Board authority, powers, and duties and is consistent with the Act.

¹⁶ Telephone conference among Jennifer M. Lamie, Managing Senior Attorney, Legal Division, CBOE; Leah Mesfin, Special Counsel, Division, Commission; and Jan Woo, Attorney, Division, Commission, on July 18, 2006.

IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(1) of the Act.¹⁷

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule change (File No. SR-CBOE-2006-45) is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Nancy M. Morris
Secretary

¹⁷ 15 U.S.C. 78f(b)(1).

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).