

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61136; File No. SR-CBOE-2009-022)

December 10, 2009

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade S&P 500 Dividend Index Options

I. Introduction

On March 25, 2009, 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 list and trade cash-settled options that overlie the S&P 500 Dividend Index. The proposed rule change was published for comment in the Federal Register on April 6, 2009.³ On May 4, 2009, the Commission received one comment on the proposal.⁴ On May 19, 2009, the Exchange responded to the comment letter⁵ and filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, and simultaneously is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59667 (March 31, 2009), 74 FR 15528 (“Notice”).

⁴ See email from Julian E. Hammar, Assistant General Counsel, Commodity Futures Trading Commission (“CFTC”), to James Eastman, Chief Counsel and Associate Director, and Elizabeth King, Associate Director, Division of Trading and Markets, Commission, dated May 4, 2009 (“CFTC Comment Letter”).

⁵ See letter from Jenny L. Klebes, Senior Attorney, CBOE, to Elizabeth M. Murphy, Secretary, Commission, dated May 19, 2009.

II. Description of the Proposal

CBOE proposes to list and trade cash-settled, European-style options that overlie the S&P 500 Dividend Index.

Index Design

The S&P 500 Dividend Index represents the accumulated ex-dividend amounts of all S&P 500 Index component securities over a specified accrual period. Each day Standard & Poor's calculates the aggregate daily dividend totals for the S&P 500 Index component securities, which are summed over any given calendar quarter and are the basis of the S&P 500 Dividend Index. On any given day, the index dividend is calculated as the total dividend value for all constituents of the S&P 500 Index divided by the S&P 500 Index divisor. The total dividend value is calculated as the sum of dividends per share multiplied by the shares outstanding for all constituents of the S&P 500 Index that are trading "ex-dividend" on that day.

The Exchange will set the accrual period for S&P 500 Dividend Index options at listing (*e.g.*, quarterly, semi-annually, annually), which will be reset to zero at the end of the specified accrual period.⁶ A One-Year S&P 500 Dividend Index will be expressed in S&P 500 Index points and will reset to zero at the end of each annual accrual period.⁷

The S&P 500 Dividend Index is currently calculated by Standard & Poor's and is disseminated by Standard and Poor's once per day.⁸ The S&P 500 Dividend Index is reported in

⁶ See Amendment No. 1. In its original proposal, CBOE described that the S&P 500 Dividend Index represents the accumulated ex-dividend amounts of all S&P 500 Index (dividend paying) component securities over a specified quarterly accrual period and that the index is reset to zero at the end of each quarterly accrual period.

⁷ Standard & Poor's has not committed to creating a One-Year S&P 500 Dividend Index. In the event that S&P does not calculate the index, the Exchange plans to calculate an annual index from published values of the quarterly S&P 500 Dividend Index.

⁸ The daily values can be accessed on Bloomberg under the symbol: SPXDIV <Index>.

absolute numbers (e.g., 3, 5, 7), and the Exchange proposes to trade option contracts on the S&P 500 Dividend Index level with an applied scaling factor of 10.⁹ Once daily, CBOE will disseminate the underlying S&P 500 Dividend Index value with the applied scaling factor of 10 through the Options Price Reporting Authority (“OPRA”) and/or one or more major market data vendors.

Options Trading

The exercise-settlement value for S&P 500 Dividend Index options will be the S&P 500 Dividend Index that is calculated by Standard & Poor's with an applied scaling factor. The underlying S&P Dividend Index will be quoted in decimals and one point will be equal to \$100.¹⁰ The minimum tick size for options trading at or below 3.00 will be 0.05 point (\$5.00) and for all other series, it will be 0.10 (\$10.00).

The Exchange proposes to list series at 1 point (\$1.00) or greater strike price intervals if the strike price is equal to or less than 200 scaled index points on S&P 500 Dividend Index options. When the strike price exceeds 200 scaled index points, strike price intervals will be no less than 2.5 points.

Initially, the Exchange will list in-, at- and out-of-the-money strike prices and may open for trading up to five series above and five series below the calculated forward value of the S&P 500 Dividend Index, which is the anticipated value of the S&P 500 Dividend Index at the end of the specified accrual period.¹¹ In addition, either in response to customer demand or as

⁹ For example, where the S&P 500 Dividend Index is 3, the underlying will have an index value of 30 (3 x 10).

¹⁰ The contract multiplier will be \$100.

¹¹ See Amendment No. 1. In its original proposal, CBOE proposed to use the related S&P 500 Dividend Index futures price as the level for setting strikes. Because no related futures contract is currently trading, CBOE now proposes to use the calculated forward value of the S&P 500 Dividend Index. The Exchange states that the calculated forward

calculated forward value of the S&P 500 Dividend Index moves from the initial exercise prices of options and LEAPs series that have been opened for trading, the Exchange may open for trading up to an additional twenty series. The Exchange will not be permitted to open for trading series with 1 point (\$1.00) intervals within 0.50 of an existing 2.5 point (\$2.50) strike price with the same expiration month. The Exchange will not be permitted to list LEAPS on S&P 500 Dividend Index options at intervals less than 1 point.

The Exchange also proposes to add new Interpretation and Policy .13 to Rule 5.5, Series of Option Contracts Open for Trading, which will be an internal cross reference stating that the intervals between strike prices for S&P 500 Dividend Index option series will be determined in accordance with proposed new Interpretation and Policy .01(h) to Rule 24.9.

Exercise and Settlement

The proposed options will expire on the Saturday following the third Friday of the expiring month. Trading in the expiring contract month will normally cease at 3:15 p.m. Chicago time on the last day of trading (ordinarily the Thursday before expiration Saturday, unless there is an intervening holiday). When the last trading day is moved because of an Exchange holiday (such as when CBOE is closed on the Friday before expiration), the last trading day for expiring options will be Wednesday.

Exercise will result in delivery of cash on the business day following expiration. S&P 500 Dividend Index options will be A.M.-settled. The exercise-settlement amount will be equal to the difference between the exercise-settlement value and the exercise price of the option, multiplied by the contract multiplier (\$100).

value of the S&P 500 Dividend Index is a market derived estimate based on things such as: (1) the historical dividend policy of the components stocks on the S&P 500 Index, (2) the anticipated date of dividend payment, and (3) the expected start or increase of a dividend payment or the expected elimination or decrease of a dividend payment.

If the exercise settlement value is not available or the normal settlement procedure cannot be utilized due to a trading disruption or other unusual circumstance, the settlement value will be determined in accordance with the rules and bylaws of the OCC.

Surveillance

The Exchange states that it will use the same surveillance procedures currently utilized for each of the Exchange's other index options to monitor trading in S&P 500 Dividend Index options. The Exchange further represents that these surveillance procedures shall be adequate to monitor trading in options on these option products. For surveillance purposes, the Exchange will have complete access to information regarding trading activity in the securities the accumulated ex-dividend amounts of which are represented by the S&P 500 Dividend Index (i.e., S&P 500 Index component securities).

Position Limits

The Exchange is not proposing to establish any position limits for S&P 500 Dividend Index options. Because the S&P 500 Dividend Index represents the accumulated "ex-dividend" amounts of all S&P 500 Index component securities, the Exchange believes that the position and exercise limits for these new products should be the same as those for broad-based index options, e.g., SPX, for which there are no position limits. S&P 500 Dividend Index options will be subject to the same reporting and other requirements triggered for other options dealt in on the Exchange.¹²

Exchange Rules Applicable

Except as modified in this proposed rule change, the rules in Chapters I through XIX, XXIV, XXIVA, and XXIVB will equally apply to S&P 500 Dividend Index options.

¹² See Rule 4.13, Reports Related to Position Limits.

S&P 500 Dividend Index options will be margined as "broad-based index" options, and under CBOE rules, especially, Rule 12.3(c)(5)(A), the margin requirement for a short put or call shall be 100% of the current market value of the contract plus up to 15% of the aggregate contract value. Additional margin may be required pursuant to Exchange Rule 12.10.

The Exchange proposed to designate S&P 500 Dividend Index options as eligible for trading as Flexible Exchange Options as provided for in Chapters XXIVA (Flexible Exchange Options) and XXIVB (FLEX Hybrid Trading System).

Capacity

CBOE represents that it believes the Exchange and OPRA have the necessary systems capacity to handle the additional traffic associated with the listing of new series that will result from the introduction of S&P 500 Dividend Index options.

III. Summary of Comments

The CFTC Comment Letter raised several concerns the CFTC staff has regarding the proposed rule change. First, the CFTC staff questioned whether the S&P 500 Dividend Index is an index composed of securities. Specifically, the CFTC staff asserted that a securities index is traditionally based on a weighted average of constituent stock prices, while the S&P 500 Dividend Index represents accrued dividend amounts. As such, the CFTC staff suggested that the S&P 500 Dividend Index may be more akin to an event contract than to a securities index.

The Exchange disagrees with the CFTC staff's comment. The CBOE notes that the S&P 500 Dividend Index measures stock price changes of S&P 500 Index component securities on their respective ex-dividend dates. In addition, as described by the Exchange, the S&P 500 Dividend Index is calculated using the ex-dividend amount of the same set of component securities, same shares outstanding, same capitalization weighting methodology and the same

index divisor that is used to calculate the S&P 500 Index. Based on these factors, the Exchange concluded that its proposed product is an option based on a security “including any interest therein or based on the value thereof” as defined under §2(a)(1) of the Securities Act of 1933 and §3(a)(10) of the Act.

Second, the CFTC staff noted that while CBOE’s proposal provides that the Exchange will list strike prices based on the related S&P 500 Dividend Index futures contract, no such futures contract currently exists. In Amendment No. 1, the Exchange modified its methodology for setting strike prices. As discussed above, rather than basing strike prices on the S&P 500 Dividend Index futures contract, which does not exist, the Exchange proposes to use the calculated forward value of the S&P 500 Dividend Index at the end of the specified accrual period as the measure for setting strikes.

Finally, the CFTC Comment Letter expressed a concern regarding the Exchange’s surveillance of the proposed product for manipulation. In particular, the CFTC staff questioned the Exchange’s assertion that it will have access to information regarding trading in the underlying securities, stating that the S&P 500 Dividend Index represents accrued dividends, which are determined by the boards of directors of the constituent securities. In response, the Exchange represented that it has adequate tools in place, such as large options positions reports to surveil for market manipulation and will continue to use the same surveillance procedures currently utilized for each of the Exchange’s other index options to monitor trading in S&P 500 Dividend Index options. In addition, the CBOE noted that it shares its specific surveillance procedures with the Commission and that as a member of the Intermarket Surveillance Group (“ISG”), the Exchange is able to obtain information from the exchanges listing the issuers in the S&P 500 Dividend Index pertaining to specific issuers. The Exchange may also obtain from the

exchanges and FINRA, the necessary information pertaining to trading in the stock comprising the index.

IV. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹³ Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,¹⁴ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission believes that CBOE's proposal gives options investors the ability to make an additional investment choice in a manner consistent with the requirements of Section 6(b)(5) of the Act.¹⁵

As a threshold matter, the Commission finds that the S&P 500 Dividend Index Options proposed by CBOE are securities. Section 3(a)(10) of the Act¹⁶ defines security to include, in part, "any put, call, straddle, option or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof)."¹⁷ As the

¹³ 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).

¹⁴ 15 U.S.C. 78f(b)(5).

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ 15 U.S.C. 78c(a)(10).

¹⁷ In determining whether a derivative is a security, the Commission and the courts have looked to the economic reality of the product. See Caiola v. Citibank, N.A., New York, 295 F.3d 312, 325 (2d Cir. 2002), quoting United Housing Foundation v. Foreman, 421 U.S. 837, 848 (1975) ("In searching for the meaning and scope of the word 'security' . . . the emphasis should be on economic reality"). Construing the definition of a security in this manner permits the Commission and the courts "sufficient flexibility to ensure that

Commission has previously noted, “[t]he concept of an ‘interest in’ a security plainly includes rights generating a pecuniary interest in a security, such as the right to a dividend payout or bond (coupon) payment.”¹⁸ Accordingly, options on the value of dividends declared by the issuers of component securities of a group or index of securities are options on an interest in, or based on the value of an interest in, that group or index of securities.

The S&P 500 Dividend Index Option is a cash-settled option based on the value of the dividends of the S&P 500 securities.

If a dividend is declared by the issuer of a component security of the S&P 500 Index, the value of the S&P 500 Dividend Index increases. Upon expiration of an option, a buyer of a call option on the S&P 500 Dividend Index will receive (and the seller of the call option will pay) cash equal to the difference between the value of the index and the strike price of the option, if the index value exceeds the strike price of the option. If the value of the index exceeds the strike price of the option, the option seller makes a payment and the option buyer receives a payment. In other words, the S&P 500 Dividend Index Option payout is based on the dividends paid by issuers of the component securities of the S&P 500 Index.

The value of the dividends of the securities composing the S&P 500 Index is calculated based on price changes of such securities resulting solely from the distribution of ordinary cash dividends, multiplied by the number of float adjusted shares outstanding and divided by the S&P 500 Index divisor.

those who market investments are not able to escape the coverage of the Securities Acts by creating new instruments that would not be covered by a more determinate definition.” Reves v. Ernst & Young, 494 U.S. 56, 63 n.2 (1990).

¹⁸ Exchange Act Release No. 55781 (June 6, 2007), 72 FR 32372, 32376 (June 12, 2007) (emphasis added).

The Commission understands that, prior to its “ex-dividend” date, the component security’s price reflects the right to receive the dividend amount declared by the issuing company. As of the ex-dividend date, the component security trades without the right to receive that dividend payment. The component security’s listing exchange makes internal price adjustments and notifies data vendors and other parties of the per share amount of the dividend for informational purposes, in order to ensure that the reported “net change” from the previous closing price excludes the drop in share value that results from the dividend payment.

The Commission understands that, as it pertains to the S&P 500 Dividend Index, such price adjustments will be equal to the amount of the component securities’ ordinary cash dividends. Therefore, the S&P 500 Dividend Index Options are, in effect, options on the accumulated ex-dividend adjustments to the prices of the weighted index component securities.

For these reasons, the Commission finds that S&P 500 Dividend Index Options are options on interests in, or based on the value of interests in, a group or index of securities and, therefore, are securities under Section 3(a)(10) of the Act.¹⁹

Further, the Commission believes that the listing rules proposed by CBOE for S&P 500 Dividend Index options are reasonable and consistent with the Act. The S&P 500 Dividend Index Options will provide a mechanism for purchasers to hedge their exposure to changes in the dividend payment policies of issuers of securities that compose the S&P 500 Dividend Index.

The Commission believes that permitting \$1.00 strike price intervals for S&P 500 Dividend Index options if the strike price is equal to or less than 200 scaled index points will provide investors with added flexibility in the trading of these options and further the public interest by allowing investors to establish positions that are better tailored to meet their

¹⁹ 15 U.S.C. 78c(a)(10).

investment objectives. As explained by CBOE, the S&P 500 Dividend Index will fluctuate around a limited index value range, and therefore the implementation of \$1 strike price intervals is designed to better serve investors by providing greater flexibility. Because of this unique characteristic, the Commission believes that the implementation of \$1 strike price intervals for S&P 500 Dividend Index options, within the parameters of the rule, is appropriate. The Commission also notes that CBOE's proposed use of the calculated forward value of the S&P 500 Dividend Index for purposes of adding strike price intervals is a methodology reasonably designed to reflect the unique properties of the index (in particular, that the current index level is reset to zero at the end of each accrual period).

The Commission also finds that the Exchange's proposal to set the accrual period for S&P 500 Dividend Index options at the time of listing is reasonable and consistent with the Act. The Commission believes that this will provide the Exchange flexibility in designing the product to meet the needs of market participants to hedge their exposure to changes in dividend payments of S&P 500 Index stocks.

The Commission notes that the S&P 500 Dividend Index is currently calculated and disseminated by Standard and Poor's once per day. Further, CBOE will disseminate the underlying S&P 500 Dividend Index value with the applied scaling factor of 10 through OPRA and/or one or more major market data vendors once daily.

The Exchange has proposed to establish no position or exercise limits for S&P 500 Dividend Index options and to require the same margin as for broad-based index options.²⁰ The

²⁰ The Exchange's decision to apply its broad-based index option position and exercise limits and margin requirements to these new products is unrelated to whether the S&P 500 Dividend Index is a narrow-based security index under Section 3(a)(55) of the Exchange Act.

Commission believes that CBOE's proposed rules relating to position limits, exercise limits, and margin requirements are appropriate.

The Commission also believes that the Exchange's proposal to allow S&P 500 Dividend Index options to be eligible for trading as FLEX options is consistent with the Act. The Commission previously approved rules relating to the listing and trading of FLEX Options on CBOE, which gives investors and other market participants the ability to individually tailor, within specified limits, certain terms of those options.²¹ The current proposal incorporates S&P 500 Dividend Index options that trade as FLEX Options into these existing rules and regulatory framework.

The Commission notes that CBOE represented that it had an adequate surveillance program to monitor trading of S&P 500 Dividend Index options and intends to apply its existing surveillance program to support the trading of these options. As with other securities, there is a potential risk that a corporate insider may exploit his or her advance knowledge of changes to an issuer's dividend policy through the purchase or sale of an S&P 500 Dividend Index Option. In recent years, the Commission has taken a number of enforcement actions in cases where insiders executed securities transactions to exploit their knowledge of changes in issuers' dividend policies.²² Accordingly, adequate surveillance is an important responsibility of the CBOE. The

²¹ See Securities Exchange Act Release No. 31910 (February 23, 1993), 58 FR 12056 (March 2, 1993).

²² See, e.g., SEC v. David L. Johnson, Civil Action No. 05-CV-4789 (USDC E.D. Pa.) (Sept. 7, 2005) (consent to permanent injunction, disgorgement and civil penalty for a person who allegedly sold shares of an issuer based on inside information of a dividend cut, and tipped his son to do likewise); SEC v. Barry Hertz, Civil Action No. 05-2848 (USDC E.D.N.Y.) (Mar. 16, 2007) (consent to final judgment, including an injunction and two-year bar from serving as an officer or director of a public corporation, for a person alleged to have traded on inside information, including purchasing shares of an issuer while in possession of positive news of a first time dividend issuance).

CFTC Comment Letter took issue with this representation, questioning CBOE's ability to adequately surveil for manipulation in S&P 500 Dividend Index options. In its response, the Exchange stated that its access to information provided by the ISG, coupled with its tools such as large options positions reports prove more than sufficient for surveillance of market manipulation, particularly given that the very broad composition of the S&P 500 Dividend Index would render manipulation of options on the index to be extremely difficult. The Commission agrees with CBOE that it should have the ability and resources to adequately surveil for manipulation in S&P 500 Dividend Index options.

In approving the proposed rule change, the Commission has also relied upon the Exchange's representation that it has the necessary systems capacity to support new options series that will result from this proposal.

The Commission finds good cause for approving this proposed rule change, as modified by Amendment No.1, prior to the thirtieth day after publishing notice of Amendment No. 1 in the Federal Register. In Amendment No. 1, the Exchange: (i) revised the methodology for setting strike prices so that strike prices will no longer be based on a futures product value but rather on the calculated forward value of the S&P 500 Dividend Index, and (ii) determined that the accrual period for the S&P 500 Dividend Index options will be set at listing and could be quarterly, semi-annually, annually, etc. to provide investors and other market participants with a more flexible product to hedge their exposure to changes in dividend payments (either up or down) of S&P 500 Index stocks. Thus, the Commission believes that it is appropriate to allow CBOE to immediately list and trade options on the S&P 500 Dividend Index, providing investors with additional means to manage their risk exposure and carry out their investment objectives.

Accordingly, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,²³ to approve the proposal, as modified by Amendment No. 1, on an accelerated basis.

V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 1, including whether Amendment No. 1 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-2009-022 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-2009-022. 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, on official

²³ 15 U.S.C. 78s(b)(2).

business days between the hours of 10:00 am and 3:00 pm. Copies of the 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 Number SR-CBOE-2009-022 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁴ that the proposed rule change (SR-CBOE-2009-022), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

By the Commission.

Elizabeth M. Murphy
Secretary

²⁴ 15 U.S.C. 78s(b)(2).