

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-53092; File No. SR-CBOE-2005-105)

January 10, 2005

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Proposed Rule Change Relating to the CBOE's Membership Rules for Foreign Member Organizations

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 7, 2005, 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 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 proposes to amend its rule regarding the qualifications of foreign member organizations in relation to foreign organizations seeking to become members of the Exchange in a lessor-only capacity. The text of the proposed rule change appears below. Additions are underlined.

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Rule 3.4. Qualifications of Foreign Member Organizations

(a) An organization that is not organized under the laws of one of the states of the United States must satisfy the following requirements in order to be a member organization:

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

- (i) the organization must be a corporation or partnership organized under the laws of a country other than the United States with respect to which an information sharing agreement, memorandum of understanding, or treaty is in effect that provides the Securities and Exchange Commission with access to information concerning securities trading activity in that country;
- (ii) the organization must disclose to the Exchange all persons associated with the organization and all parents of the organization, through all tiers of ownership, until the ultimate individual beneficial owners of the organization are disclosed;
- (iii) the organization must maintain in English and at a location in the United States (A) the books and records of the organization that relate to its business on the Exchange, including, but not limited to, any trading records relating to trading activity on the Exchange and (B) any other books and records of the organization that an organization registered as a broker or dealer pursuant to Section 15 of the Exchange Act is required to maintain at a location in the United States;
- (iv) the organization must maintain its financial records in accordance with United States accounting standards;
- (v) the organization must agree to permit inspections by the Exchange and the Securities and Exchange Commission of the foreign operations of the organization related to its securities business;
- (vi) the organization must waive any applicable secrecy laws and be exempted from any applicable blocking statutes in the domiciliary jurisdiction of the organization;

(vii) the organization must provide to the Exchange an opinion of legal counsel of the domiciliary jurisdiction of the organization which certifies that (A) there are no applicable secrecy laws or blocking statutes in that jurisdiction or (B) that the organization has effectively waived any applicable secrecy laws or is exempted from any applicable blocking statutes in that jurisdiction;

(viii) any customer of the organization that utilizes the organization to execute orders on the Exchange must have waived any applicable secrecy laws and be exempted from any applicable blocking statutes in the domiciliary jurisdiction of the organization;

(ix) the organization must agree to submit to the jurisdiction of the federal courts of the United States and the courts of Illinois and to irrevocably waive, to the fullest extent permitted by law, any objection which the organization may have based on venue or forum non conveniens with respect to any action initiated in such courts;

(x) the organization must appoint a process agent in Illinois to receive, on the behalf of the organization, process which may be served in any legal action or proceeding;

(xi) the organization must own its Exchange membership(s);

(xii) the organization must be registered as a broker or dealer pursuant to Section 15 of the Exchange Act;

(xiii) the organization must satisfy the foregoing requirements in a manner and form prescribed by the Exchange and must satisfy such additional requirements that the Exchange reasonably deems appropriate; and

(xiv) the organization must meet the other qualification requirements for membership under the Constitution and Rules.

... Interpretations and Policies:

.01 For purposes of eligibility for membership, an entity organized as a limited liability company under the laws of a country other than the United States shall be deemed a corporation, its members shall be deemed principal shareholders, and its members with management responsibility and its managers shall be deemed executive officers.

.02 A foreign member organization that is approved to act solely as a lessor is not required to comply with Rules 3.4(a)(iii)(B) and 3.4(a)(xii).

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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 CBOE 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 CBOE 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

Pursuant to CBOE Rule 3.4, "Qualifications of Foreign Member Organizations," an organization that is not organized under the laws of one of the states of the United States ("foreign member organization") must satisfy, among other things, the requirements set forth in

CBOE Rule 3.4 in order to become a CBOE member. The purpose of this proposed rule change is to amend CBOE Rule 3.4 to exempt a foreign member organization that is approved by the Exchange to act solely as a lessor from the requirements set forth in: (i) CBOE Rule 3.4(a)(xii), which requires a foreign member organization to be registered as a broker or dealer pursuant to Section 15 of the Act; and (ii) CBOE Rule 3.4(a)(iii)(B), which requires a foreign member organization to maintain, in English and at a location in the United States, any books and records of the foreign member organization that an organization registered as a broker or dealer pursuant to Section 15 of the Act is required to maintain at a location in the United States.

CBOE member organizations, whether organized under the laws of one of the states of the United States (“U.S. member organizations”) or otherwise, that are approved to act solely as lessors have no trading functions on the Exchange. In other words, the sole business function that may be performed by a U.S. member organization or a foreign member organization approved to act solely as a lessor is to lease the CBOE membership it owns to another Exchange member, which member would be required to be a registered broker-dealer that has been approved for membership under the CBOE's membership rules.

The foreign member organization application requirements set forth in CBOE Rule 3.4 apply equally to all foreign member organizations, whether or not the foreign member organization is applying to act solely as a lessor. In contrast, the application requirements for U.S. member organizations, as set forth in CBOE Rule 3.3, “Qualifications and Membership Statuses of Member Organizations,” distinguish, in certain cases, between organizations applying as lessor-only members and other member organizations. Specifically, CBOE Rule 3.3(a)(ii) requires U.S. member organizations to be registered as a broker or dealer pursuant to Section 15

of the Exchange Act, except that a U.S. member organization that is approved to act solely as a lessor is not required to comply with that requirement. The effect of the disparate treatment between foreign member organizations, as set forth in CBOE Rule 3.4, and U.S. member organizations, as set forth in CBOE Rule 3.3, is that a U.S. member organization that is approved by the Exchange to act solely as a lessor is not required to register as a broker or dealer, while a foreign member organization that is approved to act solely as a lessor is required to register as a broker or dealer pursuant to Section 15 of the Act.

The Exchange believes that a foreign member organization that is approved by the Exchange to act solely as a lessor should not be required to register as a broker or dealer. In this regard, the Exchange has received a no-action letter from the staff of the Commission that supports the notion that persons not engaging in securities activities for which broker or dealer registration is required (i.e., a lessor) would not be required to register as a broker or dealer merely because that person has acquired and leased a membership on the Exchange.³ Because foreign member organizations approved to act solely as lessors conduct no activities on the Exchange that would otherwise require them to register as a broker or dealer, the Exchange believes that it is appropriate not to require them to do so.

U.S. member organizations that are approved to act solely as lessors are generally subject to the same application requirements as other member organizations. The only distinctions that currently exist for these organizations are the exemptions set forth in CBOE Rule 3.3(a)(ii), as

³ See letter from Jeffrey L. Steele, Assistant Chief Counsel, Division of Market Regulation, Commission, to Arne R. Rode, Associate General Counsel, CBOE, dated Jan. 3, 1980.

stated above, and the exemption from the Exchange's orientation and testing requirements.⁴ Thus, for example, the Exchange would conduct an investigation of a foreign organization applying to be approved to act solely as a lessor in accordance with CBOE Rule 3.9, "Application Procedures and Approval or Disapproval." Furthermore, the additional application requirements set forth in CBOE Rule 3.4 for foreign member organizations, other than those that are proposed to be revised in this filing, would ensure that the Exchange would have both access to the information it would need to review the foreign member organization's application for membership and, if necessary, the requisite jurisdiction to litigate matters related to the foreign member organization's business on the Exchange. The Exchange also notes that CBOE Rule 3.6(b) requires each associated person of a member organization that is required to be disclosed on Form BD as a direct owner or executive officer to submit an application to the Exchange for approval to become associated with the member organization in that capacity. CBOE Rule 3.6(b) also provides that if the member organization is not required to be a registered broker-dealer, an application to become associated with the member organization in the applicable capacity is required of each associated person of the organization that would be required to be disclosed on Form BD as a direct owner or executive officer in the event that the organization was a registered broker-dealer. Therefore, the Exchange would have the ability, through the associated person application process, to examine the senior persons in charge of the foreign member organization to ensure that those that are not qualified under the CBOE rules and the Act to be associated with a CBOE member are not associated with the foreign member organization.

⁴ See CBOE Rule 3.9(g). The Exchange's testing and orientation requirements apply to members required to have authorized trading functions. Members approved to act solely as lessors are not permitted to have authorized trading functions.

Because the foreign member organization approved by the Exchange to act solely as a lessor would be conducting activities that would otherwise not require it to be registered as a broker or dealer, the Exchange also believes that the requirement set forth in CBOE Rule 3.4(a)(iii)(B) imposes obligations on the foreign member organization that do not reflect its activities on the Exchange. As noted above, CBOE Rule 3.4(a)(iii)(B) currently requires a foreign member organization approved solely as a lessor to maintain, in English and at a location in the United States, any books and records of the organization that an organization registered as a broker or dealer pursuant to Section 15 of the Act is required to maintain at a location in the United States. The Exchange believes that if the only activities conducted by the foreign member organization on the Exchange relate to its lease activities, the provisions set forth in CBOE Rule 3.4(a)(iii)(A), which require the foreign member organization to maintain, in English and at a location in the United States, the books and records of the organization that relate to its business on the Exchange, should ensure that the Exchange will have the ability to have access to adequate information with respect to the foreign member organization.

2. Statutory Basis

The proposed rule change implements certain application standards for foreign member organizations that are approved to act solely as lessors that currently exist for U.S. member organizations approved to act solely as lessors, while still allowing for the Exchange to obtain the information it needs to determine whether the Exchange's membership qualifications are satisfied. Therefore, the Exchange believes the proposed rule change is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange and, in

particular, the requirements of Section 6(b) of the Act.⁵ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁶ requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

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

The Exchange believes that the proposed rule change does not 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

No written comments were solicited or received with respect to the proposed rule change.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- (A) by order approve such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

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-2005-105 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-CBOE-2005-105. 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. 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-2005-105 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷

Nancy M. Morris
Secretary

⁷ 17 CFR 200.30-3(a)(12).