

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58138; File No. SR-CBOE-2007-30)

July 10, 2008

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Amendments to Rule 9.21 (Communications to Customers)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹, and Rule 19b-4 thereunder², notice is hereby given that on March 19, 2007, 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 substantially prepared by CBOE. CBOE filed Amendment No. 1 to the proposed rule change on June 9, 2008.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to remove or otherwise amend elements of CBOE Rule 9.21 (“Communications to Customers”) that incorporate provisions of the Securities Act of 1933 (“Securities Act”)⁴ because options traded on CBOE consist solely of standardized options issued by the Options Clearing Corporation (“OCC”), a registered clearing agency, that are exempt under Rule 238 of the Securities Act from all provisions of the Securities Act except the antifraud provisions of Section 17. Additionally, the proposed amendments expand the types of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaces the original filing in its entirety.

⁴ 15 U.S.C. 77a et seq.

communications governed by Rule 9.21 to include independently prepared reprints and other communications between a member or member organization and a customer. The proposed amendments also exempt certain options communications from the pre-approval requirement by a Registered Options Principal (“ROP”). The text of the proposed rule change is available at the Exchange, the Commission’s Public Reference Room and <http://www.cboe.org/legal>.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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. 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, Proposed Rule Change

1. Purpose

On December 23, 2002, the Commission published final rules that exempt standardized options, as defined in Rule 9b-1⁵ of the Exchange Act, that are issued by a registered clearing agency and traded on a registered national securities exchange or on a registered national securities association, from all provisions of the Securities Act (other than the anti-fraud provisions) and the registration requirements of the Exchange Act.⁶ Because the Securities Act

⁵ 17 CFR 240.9b-1.

⁶ See “Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From the Registration Requirements of the Securities Exchange Act of 1934; Final Rule,” Securities Act Release No. 8171 and Exchange Act Release No. 47082 (Dec. 23, 2002), 68 FR 188 (Jan. 2, 2003).

and the rules thereunder (other than the anti-fraud provisions) are no longer applicable to such standardized options, CBOE proposes to remove elements of the Securities Act that are embedded in CBOE Rule 9.21. In particular, CBOE proposes to remove all references to a “prospectus” from Rule 9.21. Prospectuses are no longer required for such standardized options, and the OCC has, in fact, ceased publication of a prospectus.⁷ In addition, the proposed amendments will update and reorganize Rule 9.21. The proposed amendments are similar to amendments filed with the Commission by the Financial Industry Regulatory Authority, Inc. and the New York Stock Exchange LLC and, if adopted, would provide a more uniform approach to communications to customers regarding standardized options.⁸

a. Deletion of Certain Provisions

As noted above, CBOE Rule 9.21 contains a number of references to a prospectus and other Securities Act requirements. The Exchange proposes to delete the following from Rule 9.21:

- (1) Rule 9.21(a)(iv), which references the Securities Act definition of prospectus,
- (2) Rule 9.21(d), which incorporates Securities Act principles in that it prohibits written material concerning options from being furnished to any person who has not previously or contemporaneously received the ODD,
- (3) Rule 9.21(e)(ii), which defines the term “Educational Material,”⁹

⁷ The options disclosure document (“ODD”) prepared in accordance with Rule 9b-1 under the Exchange Act is not deemed to be a prospectus. 17 CFR 230.135b. See, e.g., Securities Act Release No. 8049 (Dec. 21, 2001), 67 FR 228 (Jan. 2, 2002).

⁸ See Exchange Act Release No. 57720 (Apr. 25, 2008) 73 FR 24332 (May 2, 2008) (SR-FINRA-2008-13) and SR-NYSE-2006-50.

⁹ This paragraph essentially incorporates language of Securities Act Rule 134a. While this amendment would eliminate the separate educational material category, as discussed

(4) Interpretation and Policy .02A of Rule 9.21, which outlines what is permitted in an “Advertisement,”¹⁰ and

(5) Interpretation and Policy .03 of Rule 9.21, which concerns educational material.¹¹

b. Redesignation of Rule 9.21(a) to Proposed Rule 9.21(d) and Related Amendments

Rule 9.21(a) currently contains an outline of the “General Rule” for options communications. CBOE proposes to redesignate paragraph (a) as paragraph (d), and to incorporate limitations on the use of options communications contained in Interpretations and Policies .01 of Rule 9.21 into proposed Rule 9.21(d). In addition, proposed Rule 9.21(d)(iii) would amend Rule 9.21(a)(iii) by clarifying the types of cautionary statements and caveats that are prohibited. Also, as previously noted, CBOE proposes to delete Rule 9.21(a)(iv).

c. Proposed Amendments to Rule 9.21(b)

CBOE proposes to amend Rule 9.21(b) to include the types of communications proposed to be added to the definition of “Options Communications” in proposed Rule 9.21(a). Proposed Rules 9.21(b)(ii) and (b)(iii) would also amend the current requirements to obtain advance approval by a ROP for most options communications by exempting certain options communications, defined as “Correspondence” and “Institutional Sales Material.” Specifically, proposed Rule 9.21(b)(ii) would exempt correspondence from the pre-approval requirement unless the correspondence is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes any financial or investment recommendation or otherwise

below the Exchange also proposes to revise the definition of Sales Literature to include educational material.

¹⁰ This paragraph essentially incorporates language of Securities Act Rule 134.

¹¹ See note 9, supra.

promotes a product or service of the member. All correspondence would be subject to general supervision and review requirements.¹² Proposed Rule 9.21(b)(iii) would exempt institutional sales material from the pre-approval requirement if the material is distributed to “qualified investors” (as defined in Section 3(a)(54) of the Exchange Act¹³).

Pre-approval by a ROP would, however, be required with respect to independently prepared reprints. In addition, Proposed Rule 9.21(b)(iv) would require that firms retain options communications in accordance with the record-keeping requirements of Rule 17a-4 under the Exchange Act.¹⁴ Proposed Rule 9.21(b)(iv) would also require that firms retain other related documents in the form and for the time periods required for options communications by Rule 17a-4.

d. Proposed Amendments to Rule 9.21(c)

Rule 9.21(c) currently requires members to obtain approval for every advertisement and all educational material from the Exchange’s Department of Compliance. This requirement applies regardless of whether the options communications are used before or after the delivery of a current ODD. CBOE proposes to amend this provision to require approval by the Exchange only with respect to options communications used prior to the delivery of a current ODD. The Exchange pre-approval requirement for options communications used subsequent to the delivery

¹² See CBOE Rule 9.8. Telephone call between Larry Bresnehan of CBOE and Haimera Workie, Branch Chief, Office of Chief Counsel, Division of Trading and Markets, Securities and Exchange Commission, on July 2, 2008.

¹³ 15 U.S.C. 78c(a)(54).

¹⁴ 17 CFR 240.17a-4. More specifically, Rule 17a-4(b)(4) requires that a broker-dealer retain “originals of all communications received and copies of all communications sent...including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public.”

of the ODD is being eliminated because the ODD should help alert the customer to the characteristics and risks associated with trading in options and because Rule 9.21(b) requires the Registered Options Principal of a member organization to pre-approve options communications (with certain exceptions for “Correspondence” and “Institutional Sales Material”). Rule 9.21(c) would also be amended to include the types of communications added to the definition of “Options Communications” in proposed Rule 9.21(a).

e. Redesignation of Rule 9.21(e) to Proposed Rule 9.21(a) and Related Amendments

Rule 9.21(e) currently defines terms used in Rule 9.21. CBOE proposes to redesignate paragraph (e) as paragraph (a). CBOE also proposes to amend the definition of “Options Communications” in proposed Rule 9.21(a) to expand the types of communications governed by Rule 9.21 to include independently prepared reprints and other communications between a member or member organization and a customer. The Exchange proposes to amend the definitions of “Advertisement” and “Sales Literature;” and define “Correspondence,” “Institutional Sales Material,” “Public Appearances,” and “Independently Prepared Reprints;” to clarify the rule. In addition, as previously noted, CBOE proposes to delete the definition of “Educational Material.”

f. Proposed Rule 9.21(e)

Proposed Rule 9.21(e) would set forth (i) standards for options communications that are not preceded or accompanied by an ODD and (ii) standards for options communications used prior to delivery of an ODD. These requirements generally would clarify and restate the requirements contained in the current Interpretations and Policies .02 of Rule 9.21.

g. Interpretations and Policies

Proposed Rule 9.21(e)(i)(B) would require options communications to contain contact information for obtaining a copy of the ODD. Proposed Interpretation and Policy .01 would include the provisions found in current Section A of Interpretation and Policy .02 regarding how this requirement may be satisfied. In addition, as noted above, the provisions of Interpretation and Policy .01 regarding limitations on the use of options communications are proposed to be incorporated into proposed Rule 9.21(d).

As previously noted, the provisions of Interpretation and Policy .02 that outline what is permitted in an advertisement are proposed to be deleted and the provisions relating to standards for options communications used prior to delivery of the ODD are proposed to be incorporated into proposed Rule 9.21(e)(ii).

Interpretation and Policy .03, which concerns educational material, is proposed to be deleted as noted above.

Interpretation and Policy .04 sets forth the standards applicable to Sales Literature. Section A of Interpretation and Policy .04 sets forth the requirement that Sales Literature shall state that supporting documentation for any claims, comparisons, recommendations, statistics or other technical data, will be supplied upon request. The Exchange proposes to redesignate Section A of Interpretation and Policy .04 as proposed Rule 9.21(d)(vii).

Section B of Interpretation and Policy .04 pertains to standards for Sales Literature that contains projected performance figures. Section C of Interpretation and Policy .04 pertains to standards for Sales Literature that contains historical performance figures. The Exchange proposes to redesignate Section B of Interpretation and Policy .04 as proposed Interpretation and Policy .02 and Section C of Interpretation and Policy .04 as proposed Interpretation and Policy .03.

Rule 9.21 currently requires that a copy of the ODD precede or accompany options related sales literature. The Exchange is proposing to modify the ODD delivery requirement applicable to sales literature to provide that an ODD must precede or accompany any communication that conveys past or projected performance figures involving options or constitutes a recommendation pertaining to options.¹⁵

A notice providing the name and address of a person from whom the ODD may be obtained would be required in sales literature that does not contain a recommendation or past or projected performance figures. Because CBOE is proposing to merge educational material into the sales literature category,¹⁶ this amendment would continue to allow communications that are educational in nature to be disseminated without being preceded or accompanied by a copy of the ODD.

The Exchange proposes to redesignate Section D of Interpretation and Policy .04 as proposed Interpretation and Policy .04. The Exchange proposes to delete Sections E and F of Interpretation and Policy .04. The Exchange believes Section E is unnecessary because worksheets are included in the definition of “Sales Literature.” The Exchange believes Section F is no longer necessary because the Exchange is proposing to clarify the record-keeping requirements applicable to options communications in proposed Rule 9.21(b)(iv).

2. Statutory Basis.

The proposed amendments to Exchange Rule 9.21 would reflect the exemption from the provisions of the Securities Act (other than the anti-fraud provisions) for standardized options that are traded on a registered national securities exchange or on a registered national securities

¹⁵ See proposed Rule 9.21(e)(i)(C) and proposed Interpretation and Policies .02 and .03

¹⁶ See Proposed Rule 9.21(a)(ii).

association and would update and reorganize the rule. The proposed amendments to Exchange Rule 9.21 are consistent with Section 6(b) of the Exchange Act¹⁷ in general and would further the objectives of Section 6(b)(5)¹⁸ in particular in that they are 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 by providing the investing public with options communications rules that are designed to provide appropriate safeguards and greater clarity by promoting harmonization between CBOE's and other SRO's options communications rules.

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 purposes of the Exchange 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 self-regulatory organization 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.

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 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 Exchange 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-2007-30 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, D.C. 20549-1090.

All submissions should refer to File Number SR-CBOE-2007-30. 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, D.C. 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 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-2007-30 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Florence E. Harmon
Acting Secretary

¹⁹ 17 CFR 200.30-3(a)(12).