SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47553; File No. SR–CBOE–2003–05]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to Clearing Firm Prohibitions From Accepting Certain Third Party Deposits

March 21, 2003.

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 February 10, 2003, the Chicago Board Options Exchange, Inc. (''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 CBOE filed Amendment No. 1 to the proposal on March 5, 2003. 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 CBOE proposes to add a rule to Chapter 4 of its rules (''Business Conduct'') that would prohibit market-maker clearing firms from accepting certain deposits by third parties. The text of the proposed rule change follows:

Additions are *italicized;* deletions are in [brackets].

Chicago Board Options Exchange, Incorporated

Rules

Chapter IV

Business Conduct

Rule 4.1 through 4.20.—no change.

Third Party Deposits Prohibited

Rule 4.21. Member organizations engaged in the business of clearing and carrying the accounts of options market-makers (''Clearing Firms'') registered to conduct business on the Exchange are subject to the following prohibitions:

(1) The acceptance of a check or funds transfer for deposit into any broker-dealer account cleared or carried by a Clearing Firm is prohibited if the name on the account from which the check or transfer is drawn is not the same as that on the account cleared or carried by the Clearing Firm.

(2) The acceptance of securities, either directly or via transfer, for deposit into any broker-dealer account cleared or carried by a Clearing Firm is prohibited if the name on the securities, or the name on the account from which the securities are drawn, is not the same as that on the account cleared or carried by the Clearing Firm.

** * * Interpretations and Policies:*

.01 The foregoing prohibitions do not apply to checks, funds or securities for deposit to a market-maker's account that are drawn on a joint account of which the market-maker is one of the joint owners, and the title of the market-maker's account with the Clearing Firm coincides with the market-maker's designation on the joint account.

.02 The foregoing prohibitions do not apply to checks, funds or securities for deposit into the account of a U.S. broker-dealer business entity if the depositor (i) has an ownership interest disclosed on Schedule A of the broker-dealer's Uniform Application for Broker-Dealer Registration (''Form BD''), or (ii) is a U.S. broker-dealer and has an ownership interest disclosed on Schedule B of Form BD.

.03 If immediate action is required in order for an account of a broker-dealer cleared and carried by a Clearing Firm to (i) establish a positive net liquidating equity or supplement equity when required based upon internal risk control procedures of the Clearing Firm, or (ii) achieve compliance with SEC Rule 15c3–1 (the Net Capital Rule), an officer or partner of a Clearing Firm may grant an exception, which must be in writing, with respect to any transaction prohibited by this Rule 4.21.

.04 Transfers of funds or securities between two accounts cleared and carried by the same Clearing Firm are permitted provided that, if both accounts are not owned by the same person(s) or entity, the transfer must be authorized in writing by the owner of the account from which funds and/or securities would be withdrawn.

.05 Documentation evidencing any exceptions granted pursuant to Interpretation and Policy .03 above, as well as documents authorizing transfers of funds or securities between two accounts pursuant to Interpretation and Policy .04 above, shall be retained by the Clearing Firm for at least three years, the first two years in an easily accessible place for examination by the Exchange. In lieu of having the documents easily accessible, a Clearing Firm may make and keep current a separate central log, index or other file through which the documents can be identified and retrieved.

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

The CBOE proposes to adopt a rule that prohibits a member organization that is engaged in the business of clearing and carrying the accounts of options market-makers (a ''Clearing Firm'')[3] from accepting for deposit into an account cleared or carried by the Clearing Firm a check or funds transfer drawn on the account of a third party. Under the proposed rule, Clearing Firms would be prohibited (with certain exceptions) from accepting a check or funds transfer if the name on the account from which the funds are drawn is different (*i.e.*, a ''third party'') from the name on the account cleared or carried by the Clearing Firm. In addition to checks or funds transfers from third parties, the proposed rule would also prohibit (with certain exceptions) Clearing Firms from accepting deposits or transfers of securities in the name of third parties. This rule filing has been undertaken as a result of a recommendation by the CBOE's Financial Regulatory Committee.[4]

The proposed rule would not prohibit a Clearing Firm from transferring funds and/or securities between different name accounts that it carries, although the proposed rule would reaffirm that

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The proposed rule is intended to apply only to Clearing Firms as defined above. Broker-dealers that conduct a public customer business have policies and procedures that either prohibit acceptance of third party checks or require extensive due diligence.

[4] The CBOE's Financial Regulatory Committee is primarily comprised of representatives of market-maker clearing member organizations of the CBOE. The CBOE consults this committee primarily on issues of clearing operations, margin requirements, net capital requirements, and books and records requirements. The committee provides advice, opinions, and recommendations to the CBOE on rules, interpretations, and procedures.

appropriate written authorization is required for such transfers. The discussion herein focuses on the proposal to prohibit third party checks, but applies equally to funds transfers, as well as deposits and transfers of securities.

Currently, there is no prohibition in the CBOE rules or any of the securities regulations on accepting third party checks for deposit into a securities account. A majority of the CBOE's Clearing Firms will accept the check of a third party for deposit to a market-maker account, unless it would be clearly inappropriate. This is done as a convenience to market-maker customers. These checks are made payable either to the market-maker or the Clearing Firm. Before accepting such deposits, the Clearing Firm examines the relationship of the depositor to the market-maker or market-making entity to gain assurance that there is a legitimate reason for the deposit, such as the third party having an ownership interest in the market-maker's business (*e.g.*, a member of the Limited Liability Corporation (''LLC'') in the case of a market-making entity organized as an LLC).

However, by accepting third party checks, the Clearing Firm takes a business risk. While Clearing Firms make a reasonable effort to confirm that funds deposited via a third party's check are the property of the market-maker or market-making entity, and the transaction exhibits no obvious improprieties, repercussions can arise later. Some Clearing Firms have, in fact, been named as defendants in legal actions taken by third parties who allege some type of impropriety with respect to funds deposited at the Clearing Firm via their check, and seek a monetary judgment against the firm.[5] These actions are rare, and the allegations raised against the Clearing Firm are usually without merit and ultimately dismissed. However, the legal expenses of defending an arbitration claim or lawsuit are alone a significant financial risk to Clearing Firms.

The practice of Clearing Firms accepting third party checks most likely grew as a service among Clearing Firms. Clearing Firms believe that accepting third party checks has become uneconomical when the business risks are considered, and thus believe the practice should be ended. They argue that their market-maker customers should maintain a bank checking account for their market-making business. Clearing Firms believe that the best business practice in this regard is for Clearing Firms to accept checks from a market-maker's bank checking account, which would allow the Clearing Firm greater control over risks with only minor inconvenience to a market-maker. Market-makers could simply use their bank checking account for making deposits of third-party checks and issue checks or effect transfers to the Clearing Firm from their bank checking account. In this way, Clearing Firms need not provide banking services to their customers that could expose them to litigation risks because they are broker-dealers. The proposed rule would, in effect, allow a Clearing Firm to accept a check, funds transfer or securities transfer only if it is drawn on an account that is in the same person's or business entity's name as the account of deposit at the Clearing Firm.

Interpretations and Policies (''I&P'') to the proposed rule would allow certain exceptions to the prohibitions set forth in the rule. Under proposed I&P .01, checks, funds or securities drawn on a joint account of which the market-maker is one of the joint owners are generally excepted from the prohibition. Under proposed I&P .02, if a market-maker whose account is cleared or carried by a Clearing Firm is not a sole proprietor (individual), but is structured as a partnership or corporation, the check of a third party listed as an owner on Schedule A or Schedule B of the market-making entity's Form BD may be accepted by the Clearing Firm for deposit. In order to qualify for this exception, an owner listed on Schedule B of Form BD must be a U.S. broker-dealer. Under proposed I&P .03, if a market-maker is subject to the Commission's Net Capital Rule, an officer or partner of the Clearing Firm may make a written exception to the prohibition if the market-maker's net capital falls below the applicable minimum. In addition, an officer or partner of a Clearing Firm may make a written exception if the equity in the market-maker's account is not sufficient based on the Clearing Firm's internal risk control analysis, or if net liquidating equity becomes negative.

Under proposed I&P .04, transfers of funds and/or securities between different name accounts that are cleared and carried by the same Clearing Firm are permitted if the Clearing Firm obtains written authorization for the transfer from the owner of the account from which the funds and/or securities would be withdrawn. Lastly, proposed I&P .05 sets forth retention requirements for the Clearing Firm documentation evidencing exceptions and authorizations to transfer funds and securities between accounts.

The CBOE believes that the uncertainty surrounding third party deposits justifies prohibition by rule. The CBOE further believes that while each Clearing Firm could make a business decision to refuse to accept third party checks, funds transfers and securities, a rule is needed to establish a uniform, safe practice.

2. Statutory Basis

The proposed rule is intended to eliminate an unnecessary practice and promote a greater level of financial safety and soundness across Clearing Firms. As such, the CBOE believes that the proposed rule change is consistent with and furthers the objectives of section 6(b)(5) of the Act,[6] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market, and to protect investors and the public interest.

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

CBOE does not believe that the proposed rule change will result in 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 CBOE 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

[5] In the case of a business relationship between a third party and a market-maker, a claim may arise due to trading losses.

[6] 15 U.S.C. 78(f)(b)(5).

including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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 such filings will also be available for inspection and copying at the principal office of CBOE. All submissions should refer to File No. SR–CBOE–2003–05 and should be submitted by April 18, 2003.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–7399 Filed 3–27–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47564; File No. SR–ISE–2003–13]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by International Securities Exchange, Inc., Relating to Fee Changes

March 24, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and rule 19b–4 thereunder,[2] notice is hereby given that on March 13, 2003, the International Securities Exchange, Inc. (''Exchange'' or ''ISE'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in items I, II, and III below, which items have been prepared by the Exchange. 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 is proposing to add to the list of options on Select Sector SPDR Funds and exchange traded funds (''ETFs'') based on indexes developed by the Frank Russell Company (''Russell'') that will be subject to the $.10 surcharge for non-public customer transactions on the Exchange's Schedule of Fees. The text of the proposed rule change is available from the Office of the Secretary of the ISE or the Commission.

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 Exchange 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 Exchange 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

The Exchange has entered into a license agreement to use various indexes and trademarks of Russell in connection with the listing and trading of options on certain ETFs based on Russell indexes. The Exchange has entered into a license agreement to use various indexes and trademarks of Standard & Poor's, a division of The McGraw-Hill Companies, Inc. (''S&P''), in connection with the listing and trading of options on certain Select Sector SPDR Funds. The purpose of this proposed rule change is to add to the list of options on Select Sector SPDR Funds and ETFs based on indexes developed by Russell that will be subject to the $.10 surcharge fee for non-public customer transactions on the Exchange's Schedule of Fees. The Exchange's Schedule of Fees currently lists seven (7) Select Sector SPDR Funds and ten (10) exchange-traded funds based on indexes developed by Russell that are subject to the surcharge.[3] The Exchange is proposing to add options on two (2) more Select Sector SPDR Funds and two (2) more exchange-traded funds based on indexes developed by Russell that will be subject to the surcharge.[4] These additional options are listed in the Schedule of Fees. The purpose of the fee for trading in these options is to defray the licensing costs.

The Exchange believes that charging the participants that trade in options on these instruments is the most equitable means of recovering the costs of the license. However, because competitive pressures in the industry have resulted in the waiver of all transaction fees for customers, we propose to exclude Public Customer Orders (as defined in Exchange Rule 100) from this additional fee. This additional fee will only be charged with respect to Non-Public Customer Orders.[5]

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under section 6(b)(4) of the Act that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.[6]

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

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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 47075 (December 20, 2002), 67 FR 79673 (December 30, 2002) (SR–ISE–2002–29); 47243 (January 24, 2003), 68 FR 5066 (January 31, 2003) (SR–ISE–2003–01); and 47536 (March 19, 2003) (SR–ISE–2003–12).

[4] Pursuant to this proposed rule change, the proposed fee will apply to options on the Energy Select Sector SPDR Fund, Consumer Staples Select Sector SPDR Fund, Russell 1000 Index Fund iShares and Russell 3000 Index Fund iShares.

[5] Under Exchange Rule 100, a ''Public Customer'' is a person that is not a broker or dealer in securities, and a ''Public Customer Order'' is an order for the account of a Public Customer. Accordingly the execution of orders for the account of a ''non-broker-dealer'' will not be subject to the proposed $.10 surcharge fee. All other orders, *i.e.*, orders for the account of a broker-dealer, will be subject to the proposed $.10 surcharge fee. Telephone call between Joseph Ferraro, Assistant General Counsel, ISE, and Jennifer Colihan, Special Counsel, Division of Market Regulation (''Division''), Commission, March 19, 2003.

[6] 15 U.S.C. 78f(b)(4).