

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-57650; File No. SR-CBOE-2008-40)

April 11, 2008

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change to Provide for Issuance of Interim Trading Permits

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act” or “Exchange Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 9, 2008, 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 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

CBOE is filing this proposed rule change to provide for the issuance of up to 50 Interim Trading Permits.<sup>3</sup> The text of the proposed rule change is available on CBOE’s Web site (<http://www.cboe.org/Legal>), at CBOE’s Office of the Secretary, and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Under Sections 2.1(a) and 12.1 of its Constitution, CBOE must obtain, but has not yet obtained, membership approval for the issuance of the Interim Trading Permits and the amendments to its Constitution contemplated in this proposed rule change. Once it has obtained that membership approval, CBOE plans to file a technical amendment to this proposed rule change to reflect that approval.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is filing this proposed rule change to provide for the issuance of up to 50 Interim Trading Permits. These permits will grant the same trading privileges on the Exchange as transferable Exchange memberships. The Exchange is seeking the authority to issue these permits to address the demand for trading access to the Exchange to the extent that a shortage exists from time to time in the number of transferable Exchange memberships available for lease.

Issuances of Interim Trading Permits under Proposed Rule 3.27(b)

Under proposed Rule 3.27(b), the Exchange may issue one or more Interim Trading Permits, subject to the limit on the number of such permits, to address shortages in the number of transferable memberships available for lease. Consistent with this purpose, such permits may be issued only if the Exchange determines in its sole discretion that there are insufficient transferable Exchange memberships available for lease at that time at a rate reasonably related to the indicative lease rate to meet existing demand for such leases,<sup>4</sup> and that it would be in the

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<sup>4</sup> The "indicative lease rate" will be the highest "clearing firm floating monthly rate" of the Clearing Members that assist in facilitating at least 10% of the transferable membership leases. The "clearing firm floating monthly rate" will be the floating rate that a Clearing Member designates, in connection with transferable membership leases that the Clearing

interest of fair and orderly markets to provide additional trading access under the circumstances (collectively, the “issuance findings”).<sup>5</sup>

In the event that circumstances justify the issuance findings and the Exchange consequently determines to issue Interim Trading Permits, the Exchange will announce the number of Interim Trading Permits that the Exchange determines to make available (limited by the number that are available for issuance), that the Exchange is taking applications for such permits, the process the Exchange will follow in issuing such permits (described in the bullets below), and the beginning and ending dates during which period of time individuals and organizations must submit applications for such permits. An individual or organization must be approved and satisfy all requirements for membership in the Exchange to be eligible to apply for an Interim Trading Permit to be issued under proposed Rule 3.27(b). In addition, an individual will be eligible to receive no more than one Interim Trading Permit in connection with a particular issuance of Interim Trading Permits pursuant to proposed Rule 3.27(b), with a maximum of eight such permits for a member organization and individuals and member organizations affiliated with the member organization in connection with that issuance.

Each issuance of Interim Trading Permits pursuant to proposed Rule 3.27(b) will occur in accordance with one of the following objective processes:

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Member assisted in facilitating, for leases that utilize that monthly rate. This is based on the method the Exchange currently is using to determine the access fee for persons who are Temporary Members under Interpretation and Policy .02 of Rule 3.19. See, e.g., Securities Exchange Act Release No. 57411 (March 3, 2008), 73 FR 12478 (March 7, 2008) (notice of filing and immediate effectiveness of File No. SR-CBOE-2008-25).

<sup>5</sup> The reference to this last finding does not imply that the Exchange’s markets might not be fair and orderly if there were insufficient permits to satisfy completely the additional demand for trading access. Instead, this finding ensures that additional permits are not issued – regardless of the extent of such demand – if the issuance of such permits would be contrary to the interests of a fair and orderly market.

- Random Lottery Process. After the deadline for applications has passed, the Exchange, through a random lottery process, will issue a number of Interim Trading Permits to applicants equal to the number of Interim Trading Permits that the Exchange announced it would make available.
- Order in Time Process. After the deadline for applications has passed, the Exchange will issue an Interim Trading Permit to each applicant who applied for such a permit in the order in time that such applicant applied, until the number of Interim Trading Permits that the Exchange announced it would make available have been issued.
- Other Process. The Exchange will have the authority to modify the processes described above or to establish any other process to issue Interim Trading Permits pursuant to a rule filing submitted to the Commission under Section 19(b) of the Exchange Act.<sup>6</sup>

The Exchange believes that these processes will provide for the issuance of Interim Trading Permits in an objective manner and consequently will provide for fair access to the Exchange. At the same time, the Exchange will have the flexibility to determine which process it will follow in connection with a particular issuance of permits. The Exchange believes that this flexibility is needed to allow it to determine the most efficient way to issue Interim Trading Permits in any given situation.

Overall, the Exchange believes that the ability to issue Interim Trading Permits provides the Exchange with the ability to address, from time to time, situations in which the demand for full trading access to the Exchange exceeds the supply of transferable memberships available for lease. In light of that justification, proposed CBOE Rule 3.27(b) only allows Interim Trading

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<sup>6</sup> 15 U.S.C. 78s(b).

Permits to be issued in circumstances when the Exchange is able to make the issuance findings. Increasing the number of market participants in that situation should promote market liquidity and help promote the fair and orderly character of CBOE's markets.

#### Requirements for Maintaining Interim Trading Permits

Recipients of Interim Trading Permits and all of their associated persons must remain in compliance with paragraph (f) of proposed CBOE Rule 3.27. In particular, subparagraph (f)(ii) of proposed CBOE Rule 3.27 provides that they must remain in good standing and must pay all applicable fees, dues, assessments and other like charges assessed against CBOE members. Further, subparagraph (f)(i) of proposed CBOE Rule 3.27 provides that holders of Interim Trading Permits and all of their associated persons are subject to the regulatory jurisdiction of the Exchange under the Exchange Act and the Constitution and Rules of the Exchange, including the Exchange's disciplinary jurisdiction under Chapter XVII of the Exchange's Rules.<sup>7</sup>

In addition, holders of Interim Trading Permits must pay to the Exchange a monthly access fee. This monthly access fee will be established and adjusted through proposed rule change(s) that will be filed with the Commission under Section 19(b)(3)(A) of the Act.<sup>8</sup> The monthly access fee will be due and payable in accordance with the provisions of the Exchange Fee Schedule and will be the same for all Interim Trading Permit holders.

#### Nature of Rights Under Interim Trading Permits

As provided in subparagraph (e)(i) of proposed CBOE Rule 3.27, the holder of an Interim Trading Permit will enjoy the same trading privileges on the Exchange as the holder of a transferable Exchange membership. Those rights include the right to trade on the CBOE Stock

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<sup>7</sup> In this regard, for instance, Interim Trading Permits may be suspended or revoked as a result of a disciplinary action under the amendments proposed for Rule 17.1.

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

Exchange (“CBSX”) and, as provided in Rule 3.29, the trading rights on the Exchange necessary to become a member of OneChicago, LLC. This subparagraph also provides that an organization that holds an Interim Trading Permit or that has an Interim Trading Permit registered for it shall be treated the same as a “member organization” for purposes of the Rules.<sup>9</sup> As provided in subparagraph (g)(iii) of proposed CBOE Rule 3.27, an Interim Trading Permit will be non-transferable, except that in a form and manner prescribed by the Exchange (1) a member organization may change the designation of the nominee in respect of each Interim Trading Permit it holds, and (2) an individual Interim Trading Permit holder at any time after the issuance of that Interim Trading Permit may transfer that Interim Trading Permit to a member organization with which such individual is then associated.

Under proposed Section 2.6 of the Constitution and subparagraph (g)(i) of proposed CBOE Rule 3.27, Interim Trading Permit holders will have the same voting and petition rights as regular members, except that Interim Trading Permit holders will have no right to vote or petition concerning (1) issues that relate to Exchange ownership matters, including without limitation those matters related to demutualization, mergers, consolidations, dissolution, liquidation, transfer, or conversion of assets of the Exchange, and (2) matters that relate to Article Fifth(b).<sup>10</sup> Similarly, under proposed Section 2.1(c) of the Constitution and subparagraph

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<sup>9</sup> The Exchange notes that this provision is limited to the Rules and is subject to the conditions imposed on Interim Trading Permit holder status in the Constitution and Rules, including proposed Section 1.1(b) of the Constitution and proposed Rule 3.27(e)(i).

<sup>10</sup> Under proposed Section 1.1(b) of the Constitution and proposed Rule 3.27(e)(i), Interim Trading Permit holders in good standing would be treated the same as members, except as provided in proposed Sections 2.1(c) and 2.6 of the Constitution, and except for purposes of paragraph (b) of Article Fifth of the Certificate of Incorporation, Article Tenth of the Certificate of Incorporation, proposed Section 4.1(a) of the Constitution, proposed Section 6.1(a) of the Constitution, and as may be provided in the Rules. Proposed Rule 3.27(e)(i) further provides that Interim Trading Permit holders would be

(g)(ii) of proposed CBOE Rule 3.27, Interim Trading Permit holders will have no interest in the assets or property of the Exchange, and will have no right to share in any distribution by the Exchange.<sup>11</sup>

To address the fair representation requirements in Section 6(b)(3) of the Exchange Act,<sup>12</sup> proposed Section 4.1(a) of the Constitution provides that an Interim Trading Permit holder, or an officer of an Interim Trading Permit holder, will be eligible to serve on the Nominating Committee in one of the six floor member and firm member positions on the Nominating Committee, notwithstanding the fact that the holder of an Interim Trading Permit is not a regular member or an officer of a regular member. In addition, under proposed Section 6.1(a) of the Constitution, an Interim Trading Permit holder or the executive officer of an Interim Trading Permit holder will be eligible to serve in one of the at-large director positions on the Board of Directors of the Exchange.<sup>13</sup> To clarify that an Interim Trading Permit holder will be able to serve only as an at-large director, proposed Rule 3.27(h)(iii) provides that the holding of an Interim Trading Permit does not satisfy the requirement in Section 6.1(a) of the Constitution to own and control a membership for purposes of the definitions of floor director and lessor director

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treated the same as members (except as described in the preceding sentence) notwithstanding any references in the Rules suggesting that Interim Trading Permit holders are members under the Rules.

<sup>11</sup> The Exchange notes that the provisions described in this paragraph and the following paragraph addressing the voting and representation rights of Interim Trading Permit holders are virtually identical to the provisions addressing the voting and representation rights provided to CBSX Permit holders that were approved by the Commission in connection with a previous Exchange rule filing. See Securities Exchange Act Release No. 55326 (February 21, 2007), 72 FR 8816 (February 27, 2007) (order approving File No. SR-CBOE-2006-107). The Exchange also notes that proposed CBOE Rule 3.27 is similar to the CBSX Permit holder rule, CBOE Rule 3.26, which the Commission approved in connection with that filing.

<sup>12</sup> 15 U.S.C. 78f(b)(3).

<sup>13</sup> The Exchange also proposes to amend Section 6.1(a) to remove references to a transitional period that are no longer needed because that period has passed.

in that section. Finally, proposed Rule 3.27(e)(i) provides that, except as provided in the Constitution, an Interim Trading Permit holder will be eligible to serve on any Exchange committee to the same extent that a member can serve on that committee.

#### Duration of Interim Trading Permits and Transfer of Interim Trading Permit Holders to Open Leases

As provided in paragraph (c) of proposed CBOE Rule 3.27, an Interim Trading Permit will remain in effect until the earlier of one of the following events: (i) a transaction is consummated pursuant to which either CBOE is converted into a stock corporation or memberships in CBOE are converted into stock (collectively, a “Demutualization Transaction”), (ii) the holder of the Interim Trading Permit notifies the Exchange in a form and manner prescribed by the Exchange that the holder is terminating that Interim Trading Permit, (iii) the Interim Trading Permit is terminated as a result of a regulatory action by the Exchange,<sup>14</sup> or (iv) the Exchange terminates all Interim Trading Permits through a rule filing approved by the Commission pursuant to Section 19(b) of the Act.<sup>15</sup> Subparagraph (e)(ii) of proposed Rule 3.27 provides that, in the event of a Demutualization Transaction, holders of Interim Trading Permits will be guaranteed to receive trading permits on the same terms as holders of transferable Exchange memberships who are eligible to receive trading permits in connection with that transaction. This guarantee ensures that there is no disruption in trading access in the event of such a Demutualization Transaction and thereby helps promote the fair and orderly character of the Exchange's markets and helps ensure that holders of Interim Trading Permits are treated fairly in such a transaction and are not unfairly deprived of trading access to the Exchange.

Because Interim Trading Permits can be issued to provide trading access under specified

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<sup>14</sup> For example, an Interim Trading Permit may be revoked as a result of a disciplinary action under the amendments proposed for Rule 17.1.

<sup>15</sup> 15 U.S.C. 78s(b).

conditions, those permits should continue to be available for those purposes if they no longer are being used by their original recipients. Accordingly, paragraph (c) of proposed Rule 3.27 provides that the Exchange may reissue an Interim Trading Permit that has been terminated. This paragraph also incentivizes holders to terminate their permits early in the month so that the Exchange is in a position to reissue those permits at the end of the month. In particular, this paragraph requires a holder of an Interim Trading Permit, if the holder fails to notify the Exchange that the holder is terminating that Interim Trading Permit by the fifteenth day of the month, to pay to the Exchange an amount equal to the following month's monthly access fee for an Interim Trading Permit.

Under paragraph (d) of proposed Rule 3.27, the Exchange will endeavor to facilitate the transfer of holders of Interim Trading Permits to transferable memberships that are available for lease. In connection with determining to issue Interim Trading Permits, the Exchange sought and received oral feedback from the Exchange's Lessors Committee. Certain participants on that committee expressed the concern that the issuance of Interim Trading Permits potentially could have a negative affect on the lease market by reducing the demand for leases. This transfer provision is designed to address that concern.

In particular, paragraph (d) of proposed Rule 3.27 will be triggered if the Exchange is notified by one or more lessors that they have transferable Exchange memberships available for lease ("open leases") at a rate reasonably related to the indicative lease rate, as determined by the Exchange in its sole discretion. It could distort the lease market for Interim Trading Permits to be outstanding while open leases are available at such a rate, so it is appropriate for the Exchange to endeavor to facilitate the transfer of holders of Interim Trading Permits to those open leases.

Accordingly, paragraph (d) of proposed Rule 3.27 provides that, in the event the

Exchange receives notifications from lessors that they have open leases, the Exchange will notify each Interim Trading Permit holder of the number of open leases and the names of the lessors with those open leases. As part of that notification by the Exchange, the Exchange will advise each Interim Trading Permit holder that the holder may contact those lessors if the holder is interested in transferring to an open lease.<sup>16</sup> The Exchange notes that a transfer to an open lease is entirely voluntary for Interim Trading Permit holders.<sup>17</sup>

If, after a reasonable period of time following this process, a lessor notifies the Exchange that the lessor continues to have an open lease, the Exchange shall compensate that lessor through a monthly payment equal to the indicative lease rate, provided that lessor is offering for lease the transferable membership subject to the open lease at a rate reasonably related to the indicative lease rate, as determined by the Exchange in its sole discretion.<sup>18</sup> If the indicative lease rate changes, the Exchange may modify that monthly payment from time to time so that the payment is equal to that rate. The Exchange has included this compensation provision to address the potential impact that Interim Trading Permits may have on the lease market. As mentioned above, certain participants on the Lessors Committee vocalized concern that Interim Trading Permits potentially could negatively affect the lease market by reducing demand for leases. The Exchange believes that this provision is designed to address that concern.

In the event the Exchange compensates a lessor in this situation, the Exchange will not enter into, nor be deemed to have entered into, a lease or other agreement with that lessor.

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<sup>16</sup> The Exchange also will provide such a notification to each person who is a Temporary Member under Interpretation and Policy .02 of Rule 3.19.

<sup>17</sup> The Exchange also notes that a transfer to an open lease is entirely voluntary for Temporary Members.

<sup>18</sup> The “indicative lease rate” will be determined in accordance with proposed Rule 3.27(b). See supra note 4.

Accordingly, the Exchange will have no rights with respect to that lessor's membership, including without limitation the right to trade on the Exchange or the right to vote. The lessor may at any time thereafter lease that membership to any qualified individual or organization and will be required to notify the Exchange in the event of such a lease. The Exchange will cease compensating the lessor if it receives such a notification or otherwise learns the lessor has leased that membership, and may recoup from the lessor any compensation paid pursuant to proposed Rule 3.27(d) to the lessor for any period of time during which the lessor has leased that membership. The Exchange has added this provision to clarify that it will have no rights with respect to that membership, and that a lessor may enter into a lease agreement at any time.

The Exchange also may cease compensating that lessor if the Exchange learns an offer to lease that membership at a rate reasonably related to the indicative lease rate, as determined by the Exchange in its sole discretion, has been declined by that lessor. This provision has been added to provide that lessor with an incentive to lease that membership if the opportunity arises. Consistent with the purpose of this transfer provision to assist in filling open leases, the Exchange does not want to be in a position of perpetually compensating certain lessors in the event they have opportunities to lease their memberships.

Finally, in the event that the number of lessors receiving compensation pursuant to this provision becomes greater than the number of outstanding Interim Trading Permits, the Exchange will compensate each such lessor, on a monthly basis, in an amount equal to the current indicative lease rate, as determined by the Exchange in its sole discretion, times the number of holders of such permits divided by the number of such lessors.<sup>19</sup> The Exchange believes this provision is necessary to address the scenario in which the number of open leases

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<sup>19</sup> As a corollary to this provision, the Exchange will cease compensating such lessors during any period when there are no Interim Trading Permits currently outstanding.

exceeds the number of Interim Trading Permits. Under this scenario, the number of open leases over-and-above the number of outstanding permits would indicate a lack of demand for trading access to the Exchange beyond what is being satisfied by Interim Trading Permits. Any compensation the Exchange may pay pursuant to proposed Rule 3.27(d) is not intended to be a substitute for that lack of demand for trading access, and therefore the Exchange has determined in this scenario to compensate lessors on a pro-rata basis from fees paid by Interim Trading Permit holders.

### Conforming Changes

The Exchange has made certain conforming changes in its Rules to ensure that individuals and organizations that receive Interim Trading Permits under proposed Rule 3.27 can conduct their activities in a manner similar to holders of Exchange memberships. In particular, subparagraph (h)(ii) of proposed Rule 3.27 provides that an individual Interim Trading Permit holder will have the same ability to register that Interim Trading Permit for a member organization as the holder of an Exchange membership has to register that membership for a member organization under Rule 3.8(c). In addition, that same subparagraph provides that all Rules that apply to an individual member registering a membership for a member organization, or that apply to a member organization that has a membership registered for it, shall also be deemed to apply to an individual Interim Trading Permit holder who has registered that Interim Trading Permit for a member organization, and to a member organization that has an Interim Trading Permit registered for it. Rule 3.8 also has been amended to allow member organizations holding Interim Trading Permits to designate individual nominees and inactive nominees with respect to those permits.

Similarly, subparagraph (h)(i)(A) of proposed Rule 3.27 provides that an Interim Trading Permit will be counted as one membership for purposes of the Participation Entitlement provisions in Rule 6.45A(a)(i)(C)(1) and Rule 6.45B(a)(ii)(C)(1). In addition, subparagraph (h)(i)(B) of proposed Rule 3.27 provides that an Interim Trading Permit will be counted as one membership for purposes of the appointment costs provisions in Rule 8.3(c)(v), Rule 8.85(e) and Rule 8.92(d). Notwithstanding the similar treatment of an Interim Trading Permit and a membership for these purposes, subparagraph (h)(i)(A) - (B) also provide that an Interim Trading Permit will not satisfy the requirements in Rule 8.85(e) and Rule 8.92(d) that a DPM or an e-DPM own at least one membership.<sup>20</sup> This is consistent with the original purpose of the DPM and e-DPM membership ownership requirement, which was to require that DPMs and e-DPMs own, instead of lease, at least one Exchange membership in order to ensure that they have a long-term commitment to the Exchange. As discussed above, an Interim Trading Permit holder will have no interest in the assets or property of the Exchange, and will have no right to share in any distribution by the Exchange.

In order further to assure that holders of Interim Trading Permits can conduct their trading activities in a manner similar to the holders of Exchange memberships, subparagraph (h)(i)(C) of proposed Rule 3.27 provides that an Interim Trading Permit will be treated as a separate membership for purposes of the pilot programs referenced in Rule 8.3(c)(vii)(1), Rule 8.3(c)(vii)(2), Rule 8.85(a)(v), Rule 8.93(vii), and subparagraph (b)(viii) of the Guidelines for Exemptive Relief Under Rule 8.91(e) for Members Affiliated with DPMs. These pilot programs allow one Market-Maker affiliated with another Market-Maker, an Off-Floor DPM or an e-DPM

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<sup>20</sup> Proposed Interpretation and Policy .04 of Rule 8.85 and proposed Interpretation and Policy .01 of Rule 8.92 specifically provide that an Interim Trading Permit does not satisfy the membership ownership requirements in those Rules.

to trade in open-outcry in any specific option class allocated to that Market-Maker, Off-Floor DPM or e-DPM, provided such Market-Maker trades on a separate membership. Further, subparagraph (h)(i)(D) of proposed Rule 3.27 provides that an individual Interim Trading Permit holder may satisfy the qualification requirements to be a DPM Designee or SBT DPM Designee as set forth in Rule 8.81(b)(ii) and Rule 44.11(b)(2) by registering the Interim Trading Permit for a DPM or SBT DPM or an affiliate of the DPM or SBT DPM. This subparagraph also provides that a DPM may satisfy the requirement in Rule 8.81(d) by having DPM Designees who have registered their Interim Trading Permits for the DPM.

Other conforming changes have been made to the Rules such that certain requirements related to the holders of memberships will apply to the holders of Interim Trading Permits. In particular, under proposed Rule 3.2(c), individual Interim Trading Permit holders will be required to have authorized trading functions. In addition, proposed Rule 3.3(c) provides that the holding of an Interim Trading Permit satisfies the requirement in that Rule that Clearing Members and order service firms possess at least one membership. Further, under proposed Rule 3.19, the membership status of an Interim Trading Permit holder will automatically terminate at such time that person, among other things, does not hold an Interim Trading Permit. Under this rule, the Exchange also will have the authority to permit such a person to retain that membership status under certain circumstances to enable that person to obtain, among other things, another Interim Trading Permit (subject to the requirements in proposed Rule 3.27). Also, individual Interim Trading Permit holders under proposed Rule 3.24 will be eligible for the member death benefit.

Finally, the Rules have been amended to preserve the Exchange's regulatory authority under the Exchange Act and the Constitution and Rules of the Exchange. In particular, the

Exchange will have the authority under proposed Rule 2.23 to revoke an Interim Trading Permit if the holder fails to pay any dues, fees, assessments, charges, fines or other amounts due to the Exchange within six months after such payment is due. In addition, the Exchange will have the authority under proposed Rules 16.3(c) and 16.4 to suspend or revoke the Interim Trading Permit of a holder that experiences financial difficulty. The Exchange also will have the authority under proposed Rule 17.1 to suspend or revoke an Interim Trading Permit if the holder has been disciplined by the Exchange.

#### Clarifying Changes Related to CBOE Stock Exchange Permits

In amending the Constitution and Rules to provide for the issuance of Interim Trading Permits, the Exchange determined to make certain changes to clarify how CBOE Stock Exchange Permits currently are treated under the Certificate of Incorporation, Constitution, and Rules. The Exchange believes that these changes are non-substantive in nature because they make explicit the way CBOE Stock Exchange Permits and the holders of such permits currently are treated and do not modify the rights of the holders of such permits.

In particular, the Exchange has amended Section 1.1 of the Constitution to specifically provide that, rather than being defined as members, CBOE Stock Exchange Permit holders will be treated the same as members, except as provided in Sections 2.1(d) and 2.6 of the Constitution, and except for purposes of paragraph (b) of Article Fifth of the Certificate of Incorporation, Article Tenth of the Certificate of Incorporation, Section 4.1(a) of the Constitution, Section 6.1(a) of the Constitution, and as may be provided in the Rules. The Exchange also is proposing a conforming amendment in Rule 3.26(c) to provide that CBOE Stock Exchange Permit holders are treated the same as members (except as described above), rather than being “deemed” members, for purposes of the Certificate of Incorporation,

Constitution, and Rules. Similarly, the Exchange is proposing to amend this paragraph to provide that CBOE Stock Exchange Permit holders shall be treated the same as members (except as described above) notwithstanding any references in the Rules suggesting that CBOE Stock Exchange Permit holders are members under the Rules. In addition, the Exchange is proposing to amend this paragraph to clarify that an organization that holds a CBSX Permit or that has a CBSX Permit registered for it shall be treated the same as a “member organization” for purposes of the Rules. Further, the Exchange is proposing to amend Rule 3.26(e)(i) to clarify that the holding of a CBSX Permit does not satisfy the requirement in Section 6.1(a) of the Constitution to own and control a membership for purposes of the definitions of floor director and lessor director in that section.

The Exchange also has proposed to amend Rule 2.23 to clarify that the Exchange has the authority to revoke a CBOE Stock Exchange Permit if the holder fails to pay any dues, fees, assessments, charges, fines or other amounts due to the Exchange within six months after such payment is due. Similarly, the Exchange has proposed to amend Rules 16.3(c) and 16.4 to clarify that the Exchange has the authority to suspend or revoke the CBOE Stock Exchange Permit of a holder that experiences financial difficulty. The Exchange also is clarifying that it has the authority under proposed Rule 17.1 to suspend or revoke a CBOE Stock Exchange Permit if the holder has been disciplined by the Exchange.

Further, the Exchange is proposing to amend Rule 3.2 to clarify that individuals holding CBOE Stock Exchange Permits are required to have authorized trading functions in accordance with Rule 50.3. In addition, the Exchange is proposing to amend Rule 3.19 to clarify that the membership status of a CBOE Stock Exchange Permit holder will automatically terminate at such time that person, among other things, does not hold a CBOE Stock Exchange Permit. Rule

3.19 also is being amended to clarify that the Exchange would have the authority to allow such a person to retain that membership status under certain circumstances to enable that person to obtain, among other things, another CBOE Stock Exchange Permit (subject to the requirements in Rule 3.26).

2. Statutory Basis

For the reasons described above, the Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act, in general, and furthers the particular objectives of Section 6(b)(5) of the Exchange Act.<sup>21</sup> In particular, the proposed rule change is designed to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.<sup>22</sup>

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 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:

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<sup>21</sup> 15 U.S.C. 78f(b) and (b)(5).

<sup>22</sup> See 15 U.S.C. 78f(b)(5).

- (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, 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](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2008-40 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 20549-1090.

All submissions should refer to File Number SR-CBOE-2008-40. 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, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. 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-2008-40 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.<sup>23</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>23</sup> 17 CFR 200.30-3(a)(12).