

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58823; File No. SR-CBOE-2007-30)

October 21, 2008

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Amendments to Rule 9.21 (Communications to Customers)

On March 19, 2007, the Chicago Board Options Exchange, Incorporated (“CBOE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)<sup>1</sup>, and Rule 19b-4 thereunder.<sup>2</sup> CBOE filed Amendment No. 1 to the proposed rule change on June 9, 2008.<sup>3</sup> Notice of the proposal, as modified by Amendment No. 1, was published for comment in the Federal Register on July 17, 2008.<sup>4</sup> The Commission received one comment letter regarding the proposed rule change<sup>5</sup> and a response to comments from CBOE.<sup>6</sup> This order approves the proposed rule change.

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

<sup>4</sup> See Securities Exchange Act Release No. 58138 (Jul. 10, 2008) 73 FR 40886 (Jul. 17, 2008) (SR-CBOE-2007-30) (notice).

<sup>5</sup> See Letter from Melissa MacGregor, Vice President and Assistant General Counsel, Securities Industry and Financial Markets Association (“SIFMA”), dated July 31, 2008.

<sup>6</sup> See Letter from Lawrence J. Bresnahan, Vice President, CBOE, dated September 30, 2008.

## I. Description of the Proposed Rule Change

On December 23, 2002, the Commission published final rules that exempt standardized options, as defined in Rule 9b-1<sup>7</sup> under 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.<sup>8</sup> Because the Securities Act of 1933 (“Securities Act”)<sup>9</sup> and the rules thereunder (other than the anti-fraud provisions) are no longer applicable to such standardized options, CBOE proposed to remove elements of the Securities Act that are embedded in CBOE Rule 9.21 (“Communications to Customers”). In particular, CBOE proposed to remove all references to a “prospectus” from Rule 9.21. Prospectuses are no longer required for such standardized options, and the Options Clearing Corporation has, in fact, ceased publication of a prospectus.<sup>10</sup> In addition, the proposed amendments 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, exempt certain options communications from the pre-approval requirement by a Registered Options Principal (“ROP”) and update and reorganize Rule 9.21.

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<sup>7</sup> 17 CFR 240.9b-1.

<sup>8</sup> 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).

<sup>9</sup> 15 U.S.C. 77a et seq.

<sup>10</sup> 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).

The proposed amendments are similar to amendments filed with the Commission by the Financial Industry Regulatory Authority, Inc. (“FINRA”).<sup>11</sup>

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 proposed 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,”<sup>12</sup>
- (4) Interpretation and Policy .02A of Rule 9.21, which outlines what is permitted in an “Advertisement,”<sup>13</sup> and
- (5) Interpretation and Policy .03 of Rule 9.21, which concerns educational material.<sup>14</sup>

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<sup>11</sup> See Securities Exchange Act Release No. 57720 (Apr. 25, 2008) 73 FR 24332 (May 2, 2008), Exchange Act Release No. 58738 (approval order) (Oct. 6, 2008) 73 FR 60371 (Oct. 10, 2008) (SR-FINRA-2008-13).

<sup>12</sup> This paragraph essentially incorporates language of Securities Act Rule 134a. While this amendment would eliminate the separate educational material category, as discussed below the Exchange also proposed to revise the definition of Sales Literature to include educational material.

<sup>13</sup> This paragraph essentially incorporates language of Securities Act Rule 134.

<sup>14</sup> See note 12, supra.

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 proposed 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 proposed to delete Rule 9.21(a)(iv).

C. Proposed Amendments to Rule 9.21(b)

CBOE proposed 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 promotes a product or service of the member. All correspondence would be subject to general supervision and review requirements.<sup>15</sup> 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 Act<sup>16</sup>).

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<sup>15</sup> See CBOE Rule 9.8.

<sup>16</sup> 15 U.S.C. 78c(a)(54).

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.<sup>17</sup> 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 proposed 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 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).

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<sup>17</sup> 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."

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 proposed to redesignate paragraph (e) as paragraph (a). CBOE also proposed 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 proposed 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 proposed 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 proposed 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 proposed 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.<sup>18</sup>

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<sup>18</sup> See proposed Rule 9.21(e)(i)(C) and proposed Interpretation and Policies .02 and .03

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,<sup>19</sup> 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 proposed to redesignate Section D of Interpretation and Policy .04 as proposed Interpretation and Policy .04. The Exchange proposed 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).

## II. Comment Letter

The Commission received one comment letter from SIFMA on the proposed rule change.<sup>20</sup> CBOE responded to this comment letter.<sup>21</sup>

SIFMA expressed support for the proposed rule change and incorporated by reference SIFMA’s prior comments on a similar proposal by FINRA regarding options communications with the public.<sup>22</sup> FINRA addressed SIFMA’s prior comments in an amendment to FINRA’s

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<sup>19</sup> See Proposed Rule 9.21(a)(ii).

<sup>20</sup> See note 5, supra.

<sup>21</sup> See note 6, supra.

<sup>22</sup> See Letter from Melissa MacGregor, Vice President and Assistant General Counsel, SIFMA, dated May 22, 2008, regarding Exchange Act Release No. 57720 (Apr. 25, 2008) 73 FR 24332 (May 2, 2008).



proposed rule change.<sup>23</sup> CBOE stated it concurred in general with FINRA's responses to SIFMA's prior comments.<sup>24</sup> Therefore, CBOE did not believe that additional changes to the proposed rule change were required.<sup>25</sup>

### III. Discussion and Findings

After careful review of the proposed rule change, the comment letter and CBOE's response to the comment letter, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder that are applicable to a national securities exchange.<sup>26</sup> In particular, the Commission believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act<sup>27</sup> in general and would further the objectives of Section 6(b)(5)<sup>28</sup> in particular in that it is 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 SROs' options communications rules.

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<sup>23</sup> See Securities Exchange Act Release No. 58738 (Oct. 6, 2008) 73 FR 60371 (Oct. 10, 2008) (SR-FINRA-2008-13).

<sup>24</sup> See note 6, *supra*.

<sup>25</sup> See *id*.

<sup>26</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

<sup>27</sup> 15 U.S.C. 78f(b).

<sup>28</sup> 15 U.S.C. 78f(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>29</sup> that the proposed rule change (SR-CBOE-2007-30), as modified by Amendment No. 1 thereto, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>30</sup>

Florence E. Harmon  
Acting Secretary

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<sup>29</sup> 15 U.S.C. 78s(b)(2).

<sup>30</sup> 17 CFR 200.30-3(a)(12).