

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58178; File No. SR-CBOE-2008-40)

July 17, 2008

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 thereto, to Provide for the Issuance of ITPs

I. Introduction

On April 9, 2008, the Chicago Board Options Exchange, Incorporated (“CBOE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposal to provide for the issuance of up to 50 Interim Trading Permits (“ITPs”). The proposed rule change was published for comment in the Federal Register on April 17, 2008.³ The Exchange filed Amendment No. 1 to the proposed rule change on May 20, 2008, which reflected the vote of CBOE members approving the proposal.⁴ The Commission received two comment letters regarding the proposal,⁵ as well as two letters from CBOE addressing the concerns raised

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 57650 (April 11, 2008), 73 FR 20989 (“Notice”).

⁴ Amendment No. 1 is technical in nature and is therefore not subject to notice and comment. See also General Instruction E to Form 19b-4 (concerning completion of action by a self-regulatory organization on a proposed rule change). In its amendment, CBOE noted that its proposal was approved by an “overwhelming majority” of the CBOE members who voted thereon. CBOE also confirmed that no further action on the part of CBOE is required in connection with this proposed rule change.

⁵ See Letter from Lawrence J. Blum and Michael Mondrus, to Nancy M. Morris, Secretary, Commission, dated April 28, 2008 (“Blum/Mondrus Letter”) and Letter from Mark and Joan Andrew, to Nancy M. Morris, Secretary, Commission, dated May 12, 2008 (“Andrew Letter”).

by the commenters.⁶ This order approves the proposed rule change, as modified by Amendment No. 1.

The proposed rule change would allow the Exchange to issue up to 50 ITPs, which would grant to the holders thereof the same trading privileges on the Exchange as regular transferable Exchange memberships. Individuals and organizations that obtain ITPs would be able to conduct their activities in a manner similar to holders of Exchange memberships and CBOE rules that apply to the holders of memberships would also apply to the holders of ITPs. The Exchange has proposed the authority to issue these permits in order to address the demand for trading access to the Exchange in the event that a shortage exists from time to time in the number of transferable Exchange memberships available for lease.

II. Discussion

After careful review of the proposal, the comment letters thereto, and the Exchange's response to comments, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder.⁷ In particular, the Commission finds that the Exchange's proposal is consistent with the requirements of Section 6(b)(5) of the Act,⁸ which requires that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in

⁶ See Letter from Joanne Moffic-Silver, Executive Vice President, General Counsel, and Corporate Secretary, CBOE, to Nancy M. Morris, Secretary, Commission, dated May 12, 2008 ("CBOE Letter 1") and Letter from Joanne Moffic-Silver, Executive Vice President, General Counsel, and Corporate Secretary, CBOE, to Nancy M. Morris, Secretary, Commission, dated May 15, 2008 ("CBOE Letter 2").

⁷ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁸ 15 U.S.C 78f(b)(5).

regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also finds that the Exchange's proposal is consistent with the requirements of Section 6(b)(3) of the Act,⁹ which requires that the rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer. The Commission also finds that the Exchange's proposal is consistent with Section 6(b)(8) of the Act,¹⁰ which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

A. Issuances of ITPs under Proposed Rule 3.27(b)

The Exchange has proposed various requirements and specified certain processes in connection with the issuance of the ITPs. Specifically, an individual or organization would have to satisfy all requirements and be approved for membership in the Exchange to be eligible to apply for an ITP.¹¹ The Exchange would be able to issue one or more ITPs, subject to a cumulative maximum total of 50, if it determines that: (1) there are insufficient transferable Exchange memberships available for lease at that time at a rate reasonably related to the

⁹ 15 U.S.C 78f(b)(3).

¹⁰ 15 U.S.C 78f(b)(8).

¹¹ See proposed CBOE Rule 3.27(b).

indicative lease rate to meet existing demand for such leases;¹² and (2) it would be in the interest of fair and orderly markets to provide additional trading access under the circumstances (collectively, the “issuance findings”).

If the Exchange determines to issue ITPs, the Exchange would announce the number of ITPs that it would make available (limited by the number that are available for issuance, up to a cumulative maximum of 50), that the Exchange is taking applications for such permits, the objective process the Exchange would follow in issuing such permits,¹³ and the beginning and end dates during which individuals and organizations must submit applications for such permits.¹⁴ To be eligible to apply for an ITP, an individual or organization must meet all of CBOE’s requirements for membership in the Exchange and obtain CBOE’s approval for having met such requirements.¹⁵ CBOE is not proposing to change any of these requirements. An individual would be eligible to receive no more than one ITP in connection with a particular ITP issuance, with a maximum of eight such permits for a member organization and individuals and

¹² The “indicative lease rate” would 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” would be the floating rate that a Clearing Member designates, in connection with transferable membership leases that the Clearing Member assisted in facilitating, for leases that utilize that monthly rate.

¹³ The Exchange would issue the ITPs in accordance with one of the following objective processes: (1) random lottery, (2) order in time, or (3) another objective process adopted pursuant to a rule filing submitted to the Commission under Section 19(b) of the Act, 15 U.S.C. 78s(b).

¹⁴ The Commission notes that although the number of permits to be issued is limited to a maximum of 50 permits, the Exchange could allocate ITPs in multiple issuances, each time in accordance with one of the objective processes. For example, the Exchange could decide to issue 10 permits by either an order-in-time process or a random lottery process.

¹⁵ See proposed CBOE Rule 3.27(b). See also, e.g., CBOE Rules 3.2 and 3.3 (setting forth qualification requirements for individuals and member organizations, including, among other things, that the person be registered as a broker or dealer pursuant to Section 15 of the Act).

member organizations affiliated with the member organization in connection with that issuance.¹⁶

Recipients of ITPs and all of their associated persons must remain in good standing and must pay all applicable fees, dues, assessments, and other charges assessed against CBOE members.¹⁷ An ITP would be non-transferable, except that: (1) a member organization may change the designation of the nominee in respect of each ITP it holds, and (2) an individual ITP holder may transfer that ITP to a member organization with which such individual is then associated.¹⁸

An ITP would remain in effect until the earlier of one of the following events: (1) CBOE is converted into a stock corporation or memberships in CBOE are converted into stock (collectively, a “Demutualization Transaction”), (2) the holder of the ITP notifies the Exchange in a form and manner prescribed by the Exchange that the holder is terminating that ITP,¹⁹ (3) the ITP is terminated as a result of a regulatory action by the Exchange, or (4) the Exchange terminates all ITPs through a rule filing approved by the Commission pursuant to Section 19(b) of the Act.²⁰ In the event of a Demutualization Transaction, holders of ITPs would 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.²¹

¹⁶ See proposed CBOE Rule 3.27(b).

¹⁷ See proposed CBOE Rule 3.27(f)(ii).

¹⁸ See proposed CBOE Rule 3.27(g)(iii).

¹⁹ If the holder of an ITP fails to notify the Exchange that he or she is terminating that ITP by the fifteenth day of the month, the holder would be required to pay to the Exchange an amount equal to the following month’s monthly access fee for an ITP. See Notice, *supra* note 3, 73 FR at 20991. The Exchange could reissue an ITP that had been terminated.

²⁰ See proposed CBOE Rule 3.27(c).

²¹ See proposed CBOE Rule 3.27(e)(ii).

The Commission notes that this provision is designed to ensure that there is no disruption in trading access in the event of such a Demutualization Transaction, and thus should help to promote the fair and orderly character of the Exchange's markets.

The Commission finds that the proposed framework and methodology that the Exchange would follow when issuing ITPs represents an objective methodology for the allocation of trading permits in a fair and reasonable manner and is consistent with the Act. The proposal 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. The Commission believes that increasing the number of members in that situation is consistent with the Act because it would promote market liquidity and help to promote the fair and orderly character of CBOE's markets. The Commission also believes that the limit on the number of permits that may be obtained in any one issuance is consistent with the Act, including Section 6(c)(4) of the Act, which permits an exchange to limit the number of members of the exchange.²² The Commission believes that the limit should help minimize the chance for any broker or dealer to dominate any particular issuance and should provide a broad opportunity for access to the Exchange. Finally, the Commission notes that the additional number of permits that CBOE would have authority to issue represents a small percentage of its 930 outstanding memberships and is consistent with the Act, including Section 6(b)(5) thereunder, in that it should permit the Exchange to offer additional access where demand so warrants, and should facilitate transactions in securities by potentially deepening the pool of liquidity available on the Exchange. Therefore, the Commission finds that the provisions of the proposal governing the issuance and duration of ITPs are consistent with the requirements of the

²² 15 U.S.C. 78f(c)(4).

Act.

B. Fair Representation of ITP Holders

The Commission finds that the proposed rule change is consistent with Section 6(b)(3) of the Act,²³ which requires that the rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer. ITP holders would be members of CBOE and would have all rights attendant thereto, except as expressly provided otherwise.²⁴

In particular, an ITP holder, or an officer of an ITP holder, would be eligible to serve as an at-large director on the Board of Directors of the Exchange (“CBOE Board”)²⁵ and on any Exchange committee to the same extent that a regular member could serve on that committee, except as provided otherwise.²⁶ Further, an ITP holder, or an officer of an ITP holder, would be eligible to serve on CBOE’s Nominating Committee in one of the six floor member and firm

²³ 15 U.S.C. 78f(b)(3).

²⁴ The Commission notes that the voting and representation rights of ITP holders are substantively identical to the provisions addressing the voting and representation rights provided to CBOE Stock Exchange (“CBSX”) permit holders that the Commission previously approved. See Securities Exchange Act Release No. 55326 (February 21, 2007), 72 FR 8816 (February 27, 2007) (order approving File No. SR-CBOE-2006-107).

²⁵ See proposed Section 6.1(a) of the CBOE Constitution. The Exchange also proposes to amend Section 6.1(a) to remove a reference to the commencement of the classification of the Board that was implemented in 2002, because the transition period has now passed.

²⁶ See proposed CBOE Rule 3.27(e)(i). The Commission notes that an ITP holder would be eligible to serve on Exchange committees that develop and/or review trading rules and would also be eligible for appointment to the Exchange’s Business Conduct Committee, whose members are periodically appointed to conduct hearings for specific disciplinary matters. See E-mail from Patrick Sexton, Associate General Counsel, CBOE, to Johnna B. Dumler, Special Counsel, Division of Trading and Markets, Commission, dated May 20, 2008.

member positions on that committee, notwithstanding the fact that the holder of an ITP would not be a regular member or an officer of a regular member.²⁷

ITP holders would have the same voting and petition rights as holders of transferable memberships, except that they would 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)²⁸ of CBOE's Certificate of Incorporation.²⁹ This limitation reflects the fact that ITP holders would have no interest in the assets or property of the Exchange, and would have no right to share in any distribution by the Exchange.³⁰

²⁷ See proposed Section 4.1(a) of the CBOE Constitution.

²⁸ Article Fifth(b) of CBOE's Certificate of Incorporation provides certain rights to members of the Board of Trade of the City of Chicago, Inc. ("CBOT") to become members of the CBOE without purchasing a separate CBOE membership (the "Exercise Right"). Pursuant to an interpretation of the Exchange that was recently approved by the Commission, CBOE believes that the acquisition of the CBOT by Chicago Mercantile Exchange Holdings, Inc. resulted in no persons any longer qualifying for the Exercise Right. See Securities Exchange Act Release No. 57159 (January 15, 2008), 73 FR 3769 (January 22, 2008) (order approving SR-CBOE-2006-106).

²⁹ See Section 2.6 of the CBOE Constitution and proposed CBOE Rule 3.27(g)(i). Under proposed Section 1.1(b) of the CBOE Constitution and proposed CBOE Rule 3.27(e)(i), ITP 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 CBOE Constitution, and except for purposes of Article Fifth(b) of the Certificate of Incorporation, Article Tenth of the Certificate of Incorporation, proposed Section 4.1(a) of the CBOE Constitution, proposed Section 6.1(a) of the CBOE Constitution, and as may be provided in the rules. Under Section 2.1(c) of the CBOE Constitution, an ITP holder would have no interest in the assets or property of the Exchange and no right to share in any distribution by the Exchange. Further, Section 2.6 of the CBOE Constitution would grant ITP holders the same voting and petition rights as regular members except that an ITP holder, like a CBSX member, would not have the right to vote or petition concerning the matters discussed above.

³⁰ See proposed Section 2.1(c) of the CBOE Constitution and proposed CBOE Rule 3.27(g)(ii).

C. Trading Rights of ITP Holders and Jurisdiction of the Exchange over ITP Holders

A holder of an ITP would have the same trading privileges on the Exchange as the holder of a transferable Exchange membership.³¹ Those rights would include the right to trade on the CBSX and the trading rights on the Exchange necessary to become a member of OneChicago, LLC. An organization that holds an ITP or that has an ITP registered for it in general would be treated the same as a “member organization” for purposes of the rules.³²

Holders of ITPs would be “members” of the Exchange under Section 3(a)(3) of the Act.³³ As members, ITP holders and their associated persons would be subject to the regulatory jurisdiction of the Exchange under the Act, and the Constitution and rules of the Exchange.³⁴ In this regard, for instance, ITPs may be suspended or revoked as a result of a disciplinary action under the amendments proposed for Rule 17.1. In particular, the Exchange would have the authority under proposed Rule 2.23 to revoke an ITP 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 would have the authority under proposed Rules 16.3(c) and 16.4 to suspend or revoke the ITP of a holder that experiences financial difficulty. The Exchange also would have the authority under proposed Rule 17.1 to suspend or revoke an ITP if the holder has been disciplined by the Exchange.

³¹ See proposed CBOE Rule 3.27(e)(i).

³² See *id.* The Exchange notes that this provision is limited to the rules and is subject to the conditions imposed on ITP holder status in the CBOE Constitution and rules, including proposed Section 1.1(b) of the Constitution and proposed Rule 3.27(e)(i).

³³ 15 U.S.C. 78c(a)(3)(A).

³⁴ See proposed CBOE Rule 3.27(f)(i). See also 15 U.S.C. 78f(b)(6) and 15 U.S.C. 78f(c)(3). All Exchange members are required to be registered broker dealers. See CBOE Rules 3.2(a)(ii) and 3.3(a)(ii). The Commission has jurisdiction over all broker dealers.

Accordingly, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,³⁵ which requires an exchange to have the capacity to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,³⁶ which requires, among other things, that the rules of the exchange promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In particular, ITP holders would have the same trading privileges on the Exchange and would be subject to the same regulatory jurisdiction of the Exchange as are applicable to holders of transferable Exchange memberships.

D. Transfer of ITP Holders to Open Leases

In connection with determining to issue ITPs, the Exchange sought and received feedback from the Exchange's Lessors Committee. According to the Exchange, some participants on that committee expressed the concern that the issuance of ITPs potentially could have a negative effect on the lease market for CBOE seats by reducing the demand for leases.³⁷ Further, the commenters to the proposal, while acknowledging CBOE's need to provide additional access to the Exchange, also expressed concern that the proposal would negatively impact the value of existing memberships and dilute the income stream to lessors of current memberships.³⁸

³⁵ 15 U.S.C. 78f(b)(1).

³⁶ 15 U.S.C. 78f(b)(5).

³⁷ See Notice, supra note 3, 73 FR at 20992.

³⁸ See Blum/Mondrus Letter, supra note 5. See also Andrew Letter, supra note 5, at 1-2.

Specifically, in the Blum/Mondrus Letter, commenters acknowledged CBOE's need to provide more trading access to the Exchange, but criticized the proposed expansion of access as effecting a reduction in the value of existing memberships and diluting the income stream to lessors of memberships.³⁹ In addition, the Blum/Mondrus Letter argued that the Exchange's proposal to issue 50 access permits to itself would put the Exchange in competition with seat owners, many of whom lease their seats to others.⁴⁰ Further, the Blum/Mondrus Letter noted that a petition was being circulated among CBOE members to request that the CBOE Board consider an alternate access proposal, and asked the Commission to hold hearings on the proposal.⁴¹ In the Andrew Letter, commenters similarly criticized the mechanics of the proposed ITP program.⁴² In particular, they argued that CBOE would be usurping the historical practice of seat owners pricing floor access and receiving revenue therefrom.⁴³

In its response to the commenters, the Exchange noted that the CBOE Board has explicit legal authority in Section 2.1(a) of CBOE's Constitution to adopt the proposed permit plan.⁴⁴ CBOE also noted that members would have an opportunity to vote on the merits of the plan.⁴⁵ In Amendment No. 1 to the proposed rule change, CBOE confirmed that it obtained both the requisite CBOE Board approval and membership approval, and confirmed that no further action by CBOE in connection with the proposal is necessary.⁴⁶ As approximately 82% of CBOE seats

³⁹ See Blum/Mondrus Letter, supra note 5.

⁴⁰ See id.

⁴¹ See id.

⁴² See Andrew Letter, supra note 5.

⁴³ See id. at 1.

⁴⁴ See CBOE Comment Letter 1, supra note 6, at 1.

⁴⁵ See id.

⁴⁶ See Amendment No. 1, supra note 4.

are currently leased,⁴⁷ the Commission notes that members who lease their seats had an opportunity to be heard on the proposal and have subsequently endorsed CBOE's proposed plan.

CBOE also noted that its members would be the ultimate beneficiaries of the plan and any revenues generated therefrom because they are the owners of the Exchange.⁴⁸ CBOE further noted that it is not unusual for an exchange to retain trading access fees, and noted that it currently does so with respect to CBSX permits.⁴⁹

In addition, CBOE proposed certain features designed to address the concerns of lessors of CBOE memberships. To minimize any potential negative impact on the market for leased CBOE memberships, the proposal provides a process by which CBOE would endeavor to facilitate the transfer of holders of ITPs to leases that become available or, if necessary, compensate a lessor who holds an unleased seat with a monthly payment equal to the indicative lease rate. In particular, 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, as determined by the Exchange in its sole discretion, to the indicative lease rate, then the Exchange would notify each ITP holder of the number of open leases and the names of the lessors with those open leases. The ITP holder could contact those lessors if the holder is

⁴⁷ Telephone call with Arthur Reinstein, Deputy General Counsel, CBOE, Patrick Sexton, Associate General Counsel, CBOE, Stan Leimer, Director CBOE Membership Department, CBOE, and Richard Holley III, Senior Special Counsel, and Johnna B. Dumler, Special Counsel, Division of Trading and Markets, Commission, and J. Daniel Aromi, Office of Economic Analysis, Commission, on June 11, 2008 ("June 11 Telephone Call").

⁴⁸ See CBOE Comment Letter 1, supra note 6, at 2.

⁴⁹ See id.

interested in transferring to an open lease.⁵⁰ Transfer to an open lease would be entirely voluntary for ITP holders.⁵¹

If, after a reasonable period of time following the process set forth in the paragraph above, a lessor notifies the Exchange that the lessor continues to have an open lease, the Exchange would compensate that lessor through a monthly payment equal to the indicative lease rate, provided the 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.⁵² The lessor may, at any time thereafter, lease that membership to any qualified individual or organization and would be required to notify the Exchange in the event of such a lease. The Exchange would cease compensating the lessor if it receives such a notification or otherwise learns the lessor has leased that membership.

The Commission finds that the aspects of the proposal that relate to the Exchange's intention to facilitate the transfer of ITP holders to open leases, as well as the Exchange's proposal to compensate lessors who hold unleased seats that are offered for lease at a market rate when ITPs are outstanding, are consistent with the Act, including Section 6(b)(5) thereunder.⁵³ In particular, transfers of ITP holders to an open lease would be on a voluntary basis at the option of the ITP holder. Further, compensation to holders of CBOE transferable memberships

⁵⁰ The Exchange would provide a similar notification to each person who is a Temporary Member under Interpretation and Policy .02 of Rule 3.19, and transfer to an open lease would be entirely voluntary. See Notice, supra note 3, 73 FR at 20992, n.16.

⁵¹ See Notice, supra note 3, 73 FR at 20992.

⁵² The "indicative lease rate" would be determined in accordance with proposed Rule 3.27(b). See supra note 12 (further describing the indicative lease rate). In the event that the number of lessors receiving compensation pursuant to this provision becomes greater than the number of outstanding ITPs, the Exchange would compensate each such lessor on a pro-rated basis.

⁵³ 15 U.S.C. 78f(b)(5).

that are unable to lease their seats at market rates when ITPs are outstanding is a business decision of the Exchange that does not raise any issues under the Act.

The Commission does not believe that the necessary result of CBOE's ITP proposal is a reduction in the value of a CBOE membership or a decrease over time in the seat lease income paid to CBOE members. To the contrary, as CBOE provides additional trading access to the Exchange, the result could be an increase in liquidity that in turn increases the value of access to the Exchange. Further, the Commission notes that the Exchange has explicit authority in its Constitution to issue permits, and that CBOE members were informed of the proposal and have voted decidedly in favor of it. The Commission also notes that the Exchange currently receives trading access fees for permits to access CBSX, and the Commission notes CBOE's point that CBOE members, as owners of the Exchange, are the ultimate beneficiaries of the proposed permit plan and any revenues generated in connection therewith.

Similarly, the Commission does not believe that the proposal places the Exchange in competition with its members. When the Exchange determines to issue ITPs, consistent with the issuance findings, there would be insufficient seats available for lease at a rate reasonably related to the indicative lease rate. Thus, at the point in time of an issuance, the Exchange generally would not be in competition with any of its members who have open seats for lease at market rates. Further, the Exchange's use of the indicative lease rate is designed so that the Exchange will not issue ITPs at below-market rates. In particular, the indicative lease rate is an objective metric that is derived from lease rates determined by entities unaffiliated with the Exchange⁵⁴ in which there is a liquid market for leased seats.⁵⁵ Further, the Commission notes that the

⁵⁴ See supra note 12 (further describing the indicative lease rate).

⁵⁵ See Notice, supra note 3, 73 FR at 20990 (discussing the indicative lease rate) and June 11 Telephone Call, supra note 47. The Commission notes that, of the seats that are

Exchange considers the highest of the “clearing firm floating monthly rates” when it establishes the “indicative lease rate,” which the Commission believes alleviates the potential for any downward pressure on the market lease rate.⁵⁶

Accordingly, the Commission does not believe that the ITP proposal imposes any burden on competition, consistent with Section 6(b)(8) of the Act,⁵⁷ that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange would issue ITPs, consistent with the issuance findings, when doing so would be in the interest of fair and orderly markets. In CBOE’s judgment, therefore, the issuance of a limited number of permits through an objective methodology would contribute to the vitality of its market, thereby increasing the attractiveness of CBOE’s market and consequently enhancing its value to CBOE members and other users of CBOE’s facilities. In addition, as discussed above, the Exchange has proposed to provide compensation to holders of CBOE memberships that are unable to lease their seats at market rates when ITPs are outstanding, which the Commission believes would mitigate any potential burden that the proposal might represent to lessors of CBOE memberships.

Finally, the Commission notes the desire of a commenter to have CBOE delay the proposal and have the Commission hold hearings on the proposal.⁵⁸ Section 19(b)(1) of the Act⁵⁹ requires CBOE to file with the Commission any proposed changes to, or interpretations of,

leased, more than 83% are currently facilitated by two clearing firms, such that the “clearing firm floating monthly rate” and the corresponding “indicative lease” rate are based on a significant and representative portion of the overall leased seat market.

⁵⁶ See supra note 12 (further describing the indicative lease rate).

⁵⁷ 15 U.S.C 78f(b)(8).

⁵⁸ See Blum/Mondrus Letter, supra note 5.

⁵⁹ 15 U.S.C. 78s(b)(1).

its rules and the Commission is thereafter obligated to consider CBOE's proposal. In this instance, given the member vote and approval, the Commission is acting on CBOE's proposal.

E. ITP Fees

Holders of ITPs would be required to pay to the Exchange a monthly access fee. The monthly access fee would be established and adjusted through a proposed rule change that would be filed with the Commission under Section 19(b) of the Act.⁶⁰ Such fees would be due and payable in accordance with the provisions of the Exchange fee schedule and would be the same for all ITP holders.⁶¹ Commenters suggested that CBOE provide better justification for its claim to floor access revenue.⁶² In response, CBOE stated that, because its members own the Exchange, they are the ultimate beneficiaries of any revenues that may be generated by the permit plan and that the members will have an opportunity to be heard on that aspect of the proposal when they vote on the proposal.⁶³ CBOE also noted that the commenter incorrectly suggested that it is unusual for an exchange to set the level of and retain trading access fees, and noted that the CBSX permit plan is based on that model.⁶⁴ The Commission is not today approving the level of the monthly access fee for ITPs and notes that such fees would be the subject of a separate proposed rule change. Nevertheless, the Commission agrees with CBOE

⁶⁰ 15 U.S.C. 78s(b).

⁶¹ See proposed CBOE Rule 3.27(f)(ii).

⁶² See Andrew Letter, supra note 5, at 2.

⁶³ See CBOE Letter 2, supra note 6, at 2. On May 19, 2008, the CBOE membership approved the ITP plan. See Amendment No. 1, supra note 4.

⁶⁴ See CBOE Letter 2, supra note 6, at 2. CBOE also sought to clarify a reference in the Andrew Letter to trading access funds that, according to the Andrew Letter, are being held in "escrow." CBOE noted that the fees to be collected under its ITP proposal would not be held in escrow and no escrowed funds would be affected by its proposal. See id.

that it is consistent with Section 6(b)(4) of the Act⁶⁵ for exchanges to charge for access to their facilities.⁶⁶

F. Conforming Rule Changes to Accommodate ITPs and Clarifying Changes Relating to CBSX Permits

The Exchange proposed several conforming changes in its rules to ensure that individuals and organizations that receive ITPs can conduct their activities in a manner similar to holders of Exchange memberships.⁶⁷ These changes relate to, among other things, registration, designation of nominees, and qualifications. Other conforming changes have been made to the rules so that certain requirements related to the holders of memberships would apply to the holders of ITPs. For example, CBOE would amend Rule 3.2(c) to specify that individual ITP holders would be required to have authorized trading functions.⁶⁸

Additionally, though unrelated to the ITP proposal, CBOE also proposed to adopt several changes to clarify how CBSX permits currently are treated under the Certificate of Incorporation, Constitution, and rules. These changes, which adopt certain language that is also being proposed for ITPs, are non-substantive in nature and do not modify the rights of the holders of such permits or materially alter the status quo with respect to the Exchange's operation of CBSX.⁶⁹

⁶⁵ 15 U.S.C. 78f(b)(4).

⁶⁶ See, e.g., Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251, 11268 (March 6, 2006) (SR-NYSE-2005-77) (approving a process to determine an access fee for trading licenses and noting that the exchange would later file a separate proposed rule change to amend its fee schedule to establish the price).

⁶⁷ See Notice, supra note 3, 73 FR at 20992-94 (describing each such proposed rule change).

⁶⁸ See Notice, supra note 3, 73 FR at 20993.

⁶⁹ For example, the Exchange proposes to change the terminology in CBOE Rule 3.26(c) to note that (except as indicated therein) CBSX permit holders are treated the "same as" members, rather than being "deemed to be" members for purposes of the Certificate of Incorporation, Constitution, and rules. In addition, the Exchange is proposing to amend CBOE Rule 3.26(c) to clarify that an organization that holds a CBSX permit or that has a

The Commission finds that the conforming and clarifying changes proposed by the Exchange are consistent with the requirements of Section 6 of the Act. In particular, the clarifying and conforming changes are non-substantive in nature and should provide greater clarity to market participants, including CBOE's members and CBSX permit holders, regarding the application and operation of the Exchange's rules.

III. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁷⁰ that the proposed rule change (SR-CBOE-2008-40), as modified by Amendment No. 1 thereto, be, and hereby is approved.

By the Commission.

Florence E. Harmon
Acting Secretary

CBSX permit registered for it shall be treated the same as a "member organization" for purposes of the CBOE rules. See Notice, supra note 3, 73 FR at 20993.

⁷⁰ 15 U.S.C. 78s(b)(2).