maintain that the proposed substitutions will not result in the type of forced redemptions that Section 26(b) was designed to prevent.

5. The Section 26 Applicants further submit that the proposed substitutions also are unlike the type of substitution that Section 26(b) was designed to prevent in that by purchasing a Contract, Contract owners and participants select much more than a particular underlying fund in which to invest. The Contract owners also select the specific type of insurance coverage offered under the Contract, as well as other rights and privileges set forth in the Contract. The Applicants state that, in choosing to buy a Contract, the Contract owner also may have considered Equitable's size, financial condition, and reputation for service, and that none of those considerations and factors will change as a result of the proposed substitutions.

6. The Section 26 Applicants submit that, for all reasons stated above, the proposed substitutions are consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

7. Section 17(a)(1) of the 1940 Act, in relevant part, prohibits any affiliated person of a registered investment company, or any affiliated person of such a person, acting as principal, from knowingly selling any security or other property to such registered investment company. Section 17(a)(2) of the 1940 Act prohibits such affiliated persons from knowingly purchasing any security or other property from such registered investment company.

8. Section 17(b) of the 1940 Act Authorizes the Commission to issue an order exempting a proposed transaction from Section 17(a) if: (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policy of each registered investment company concerned; and (c) the proposed transaction is consistent with the general purposes of the 1940 Act.

9. The Section 17 Applicants submit that each of the Current Funds may be deemed to be an affiliated person of an affiliated person (Equitable or the Equitable Separate Accounts) of the New Funds, and vice versa. In addition, each of the Current Funds and each of the New Funds may be deemed to be under the common control of Equitable or the Equitable Separate Accounts and, therefore, to be affiliated persons of each other. If viewed as such, the proposed In-Kind Transactions may be deemed to contravene Section 17(a) due to the affiliated status of the participants.

10. The Section 17 Applicants maintain that the terms of the proposed substitutions, including the consideration to be paid and received, are reasonable, fair, and do not involve overreaching because: (1) the transactions will not adversely affect or dilute the interests of Contract owners and participants; (2) with respect to those securities for which market quotations are readily available, the transactions will comply with the conditions set forth in Rule 17a–7, other than the requirement relating to cash consideration; and (3) with respect to those securities for which market quotations are not readily available, the transactions will be effected in accordance with each Fund's normal valuation procedures, as set forth in the HRT and EQAT registration statements. The Applicants assert that the In-Kind Transactions will be effected at the respective net asset values of the Current Funds and the New Funds and that, after the proposed In-Kind Transactions, the value of an Equitable Separate Account's investment in the New Funds will equal the value of its investment in the Current Funds before the In-Kind Transactions. The Applicants further maintain that none of the parties will be in a position to ''dump'' undesirable securities on either the Current or New Funds or to transfer desirable securities to other advisory clients because virtually all of the portfolio securities of each of the Current Funds will be transferred to the corresponding New Fund, and the portfolio securities were selected and retained, or will be selected between the date of the amended and restated application and the Substitution Date, without regard to the proposed In-Kind Transactions.

11. The Section 17 Applicants submit that the proposed redemption of shares of the Current Funds will be consistent with the investment policies of HRT and the Current Funds provided that the shares are redeemed at their net asset value in conformity with Rule 22c–1 under the 1940 Act. The Applicants also submit that the proposed sale of shares of the New Funds for investment securities is consistent with the investment policy of EQAT and will be consistent with the investment policy of each of the New Funds provided that: (1) the shares are sold at their net asset value; and (2) the investment securities are of the type and quality that each of the New Funds could have acquired, respectively, with the proceeds from the sale of its shares had the shares been sold for cash. The Applicants assert that the second of these conditions is met because for the proposed In-Kind Transactions: (1) the New Funds are substantially similar to the Current Funds; (2) the Adviser for the New Funds will be the same as the current investment adviser for the corresponding Current Funds; and (3) the Adviser will have retained or selected each portfolio security for the corresponding Current Fund without regard to the proposed In-Kind Transaction.

12. The Section 17 Applicants assert that the proposed In-Kind Transactions are consistent with the general purposes of the 1940 Act as stated in the Findings and Declaration of Policy in Section 1 of the 1940 Act and do not present any conditions or abuses that the 1940 Act was designed to prevent.

Conclusion

Applicants assert that, for the reasons summarized above, the requested order approving the substitutions and related transactions involving the In-Kind Transactions should be granted.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–22022 Filed 8–24–99; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–23954; 812–11588]

Van Wagoner Funds, Inc., et al.; Notice of Application

August 19, 1999.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of application under sections 6(c) and 17(d) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act permitting certain joint transactions.

SUMMARY OF APPLICATION: The order would permit applicants to co-invest in the same issuers of securities with each other and certain affiliates.

APPLICANTS: Van Wagoner Funds, Inc. (the ''Company'') and Van Wagoner Capital Management, Inc. (the ''Adviser'').

FILING DATES: The application was filed on April 20, 1999, and amended on July 7, 1999. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

HEARING OR NOTIFICATION OF HEARING: An order granting the

requested relief will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on September 13, 1999, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549–0609. Applicants: 345 California Street, San Francisco, California 94104.

FOR FURTHER INFORMATION CONTACT: J. Amanda Machen, Senior Counsel, (202) 942–7120, or Nadya B. Roytblat, Assistant Director (202) 942–0564 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch, 450 5th Street, NW., Washington, DC 20549–0102 (tel. 202–942–8090).

Applicants' Representations

1. The Company, organized as a Maryland corporation, is registered under the Act as an open-end management investment company. The Company currently offers seven series (together with any new series of the Company to be offered in the future, the ''Funds'').[1] Each Fund's investment objective is capital appreciation, and each Fund may invest up to 15% of its net assets in illiquid securities. Applicants state that substantially all of the illiquid securities held by the Funds are venture capital investments. The Adviser serves as investment adviser to each Fund and is registered under the Investment Advisers Act of 1940. A majority of the board of directors of the Company (''Board'') are not ''interested persons,'' as defined in section 2(a)(19) of the Act (''Independent Directors'').

2. The Adviser or its affiliates (''Adviser Affiliates'') also may serve as investment adviser to other private accounts on a discretionary basis and as general partner and/or investment adviser to other investment vehicles that are exempt from the Act under section 3(c)(1) or 3(c)(7) of the Act. These private accounts and vehicles, along with any similar entity created, advised, sponsored or otherwise organized by the Adviser or Adviser Affiliates, are referred to as ''Company Affiliates.'' When acting as the general partner of a Company Affiliate, the Adviser or Adviser Affiliates may make a capital contribution in connection with the organization of the Company Affiliate and maintain an interest in the gains, losses, income, and expenses of the Company Affiliate. The Adviser or Adviser Affiliate also may be required to make a commitment to co-invest on a principal basis with a Company Affiliate in an amount up to 1% of the Company Affiliate's investment.

3. Applicants state that it may be beneficial for the Funds to be able to co-invest in certain venture capital investments with Company affiliates. Applicants assert that co-investment in portfolio companies by the Funds and Company Affiliates would increase favorable investment opportunities for the Funds, consistent with the Funds' investment objectives, policies, and restrictions. Applicants state that these investment opportunities will not include investments in registered investment companies or entities relying on section 3(c)(1) or 3(c)(7) of the Act. Applicants also state that the co-investments will be treated as illiquid securities for purposes of the 15% limit on the Funds' investment in illiquid securities.[2]

Applicants' Legal Analysis

1. Section 17(d) of the Act and rule 17d–1 under the Act generally prohibit any affiliated person of a registered investment company, or affiliated person of an affiliated person, when acting as principal, from effecting any joint transaction in which the company participates unless the transaction is approved by the SEC. Rule 17d–1 under the Act povides that in passing upon applications under section 17(d), the SEC will consider whether the participation of a registered investment company in a joint enterprise on the basis proposed is consistent with the provisions, policies, and purposes of the Act and the extent to which the company's participation is on a basis different from or les dvantageous than that of other participants.

2. Section 6(c) of the Act provides that an exemptive order may be granted where an exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request an order under sections 6(c) and 17(d) of the Act and rule 17d–1 to permit the Funds to co-invest with other Funds, Company Affiliates, and the Adviser or Adviser Affiliates. Applicants state that the Adviser and Adviser Affiliates will co-invest with the Funds only if and to the extent required to do so by a Company Affiliate. Applicants state that the conditions to the requested order that will govern the co-investments will assure that the investments will be in the best interests of the participating Funds and consistent with the Funds' investment policies, and that the Funds will be participating in the co-investment on a basis that is no less advantageous than that of the other participants.

Applicants' Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. (a) To the extent that a Fund is considering new investments, the Adviser will review investment opportunities on behalf of the other Funds and investments being considered on behalf of any Company Affiliate, and, when required by a Company Affiliate, the Adviser or Adviser Affiliate. The Adviser will determine whether an investment being considered on behalf of a Company Affiliate (''Company Affiliate Investment'') meets a Fund's investment objectives, policies, and restrictions and is otherwise eligible for investment by any of the Funds.

(b) If the Adviser deems a Company Affiliate Investment eligible for one or more Funds (a ''co-investment opportunity''), the Adviser will determine what it considers to be an appropriate amount that each eligible Fund should invest. When the aggregate amount recommended for any Fund and that to be bought by other Funds, a Company Affiliate and, when required by a Company Affiliate, the Adviser or Adviser Affiliate, exceeds the amount of the co-investment opportunity, the amount invested by such Fund shall be based on the ratio of the net assets available for investment of that Fund to the aggregate net assets available for investment by any other Fund and the Company Affiliate (including the interest of the Adviser or Adviser

[1] All existing Funds that currently intend to rely on the requested order are named as applicants, and any entity that relies on the order in the future will comply with the terms and conditions of the application.

[2] Applicants note that if a portfolio company subsequently becomes a publicly traded company, its shares held by the Funds may no longer be illiquid securities.

Affiliate, if applicable) seeking to make the investment.

(c) Following the making of the determinations referred to in (a) and (b), the Adviser will distribute written information concerning all co-investment opportunities to the Independent Directors. Such information will include the amount any other Fund, the Company Affiliate and, when required by a Company Affiliate, the Adviser or Adviser Affiliate, proposes to invest.

(d) Information regarding the Adviser's preliminary determinations will be reviewed by the Independent Directors. One or more Funds will co-invest with each other and/or with a Company Affiliate and, when required by a Company Affiliate, with the Adviser or Adviser Affiliate, only if a majority of the Independent Directors who have no direct or indirect financial interest in the transaction (''Required Majority'') concludes prior to the acquisition of the investment that:

(i) the terms of the transaction, including the consideration to be paid, are reasonable and fair to the shareholders of applicable Funds and do not involve overreaching of the Company or such shareholders on the part of any person concerned;

(ii) the transaction is consistent with the interest of the shareholders of the applicable Funds and is consistent with the Fund's investment objectives and policies as recited in its registration statement and reports filed under the Act, and its reports to shareholders;

(iii) the investment by the Company Affiliates and, when required by a Company Affiliate, the Adviser or Adviser Affiliate, would not disadvantage a Fund, and that participation by such Fund or Funds would not be on a basis different from or less advantageous than that of the Company Affiliate and, when required by a Company Affiliate, the Adviser or Adviser Affiliate; and

(iv) the proposed investment by applicable Funds will not benefit the Adviser or any affiliate entity thereof, other than the Company Affiliate making the co-investment, provided, however that the Adviser (1) may continue to receive advisory and other fees from the Funds and the Company Affiliates and (2) may participate in any co-investment wherein the Adviser or Adviser Affiliate is required by a Company Affiliate to commit to co-invest in all direct investments with such equity in the amount of up to 1% of the investment of each such entity.

(e) Each of the Funds has the right to decline to participate in the co-investment opportunity or purchase less than its full allocation.

2. No Fund will make an investment for its portfolio if any Company Affiliate or the Adviser or Adviser Affiliate is an existing investor in such issuer, with the exception of a follow-on investment that complies with condition 5 below.

3. For any purchase of securities by one or more Funds in which a Company Affiliate and, when required by a Company Affiliate, the Adviser or Adviser Affiliate, is a joint participant, the terms, conditions, price, class of securities, settlement date, and registration rights shall be the same for each of the Funds and the Company Affiliate and the Adviser or Adviser Affiliate, if applicable, and the approval of such transactions, including the determination of the terms of the transaction by the Required Majority, will be made in the same time period.

4. If a Company Affiliate and/or the Adviser or Adviser Affiliate elects to sell, exchange, or otherwise dispose of an interest in a security that is also held by one or more Funds, the Adviser will notify the applicable Funds of the proposed disposition at the earliest practical time and the Company will be given an opportunity to participate in such disposition on a proportionate basis, at the same price and on the same terms and conditions as those available to the Company Affiliate and/or the Adviser or Adviser Affiliate. The Adviser will formulate a recommendation as to participation by such Funds as such a disposition, to the extent that the Required Majority determines that it is in the Fund's best interest. Each of the Funds, the Adviser or Adviser Affiliate and the Company Affiliate will bear its own expenses associated with any such disposition of the portfolio security.

5. If a Company Affiliate desires to make a ''follow-on'' investment (*i.e.*, additional investment in the same entity) in a portfolio company whose securities are held by any of the Funds or to exercise warrants or other rights to purchase securities of such an issuer, the Adviser will notify the company of the proposed transaction at the earliest practical time. The Adviser will formulate a recommendation as to the proposed participation by the applicable Fund in a follow-on investment and provide the recommendation to the Required Majority along with notice of the total amount of the follow-on investment. The Required Majority will make its own determination with respect to follow-on investments. To the extent that the amount of a follow-on investment opportunity is not based on the amount of the applicable Fund's, the Company Affiliate's and, if applicable, the Adviser's or Adviser Affiliate's initial investments, the relative amount of investment by the Company Affiliate and, if applicable, the Adviser or Adviser Affiliate and the Company will be based on the ratio of the applicable Fund's remaining funds available for investment to the aggregate of such Fund's and the Company Affiliate's (including the interest of the Adviser or Adviser Affiliate) remaining funds available for investment. The applicable Fund will participate in such investment to the extent that the Required Majority determines that it is in such Fund's best interest. The acquisition of follow-on investments as permitted by this condition will be subject to the other conditions set forth in the application.

6. The Required Majority will be provided quarterly for its review all information concerning co-investment transactions, including investments made by the Adviser, Adviser Affiliate and Company Affiliates in which a Fund declined to participate, so that the Required Majority may determine whether all investments made during the preceding quarter, including those investments in which the Fund declined to participate, comply with the conditions of the order. In addition, the Required Majority will consider at least annually the continued appropriateness of the standards established for co-investment by a Fund, including whether the use of the standards continues to be in the best interest of the Funds and its shareholders and does not involve overreaching on the part of any person concerned.

7. Other than as provided in condition 1(d)(iv), neither the Adviser nor any Adviser Affiliate nor any director of the Company will participate in a co-investment with the Company unless a separate exemptive order with respect to such co-investment is obtained.

8. None of the Adviser, Adviser Affiliates, Company Affiliates or the Funds will be involved in the sponsorship of any portfolio company.

9. None of the Adviser, Adviser Affiliates, Company Affiliates or the Funds will be involved in the structuring of any portfolio company or of any security issued by any portfolio company, except that the Adviser may take part in the negotiation of the terms (such as coupon, final maturity, average life, sinking funds, conversion price, registration, put rights and call protection) and appropriate restrictive covenants governing the securities purchased in a co-investment transaction.

10. Each of the Funds will maintain and perserve all records that are required by section 31 of the Act and any other provisions of the Act and the rules and regulations under the Act applicable to the Funds. The Fund also will maintain the records required by section 57(f)(3) of the Act as if each of the Funds were a business development company and the co-investments and any follow-on investments were approved under section 57(f).

11. None of the Adviser, Adviser Affiliates, Company Affiliates or the Funds will ''make available significant managerial assistance,'' within the meaning of section 2(a)(47) of the Act, to any portfolio company whose securities were acquired pursuant to the requested order.

12. None of the Adviser, Adviser Affiliates, or Company Affiliates will receive any transaction fees (including, without limitation, monitoring, ''topping,'' breakup, and termination fees) in connection with any investment made pursuant to the requested order.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–22021 Filed 8–24–99; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41752; File No. SR–CBOE–99–42]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to the Market-Maker Surcharge Fee Schedule

August 17, 1999.

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 August 2, 1999, 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 Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

[2] 17 CFR 240.19b–4.

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

The CBOE is proposing to make changes to its fee schedule pursuant to CBOE Rule 2.40, *Market-Maker Surcharge for Brokerage.*[3]

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

Pursuant to CBOE Rule 2.40, on July 30, 1999, the Equity Floor Procedure Committee (''Committee'') approved the following fees for the option classes listed in the chart below. The Order Book Official Brokerage Rate (per contract) currently is $.00 for these option classes.[4] The market-maker surcharge for brokerage is proposed to be raised as reflected below.

Option class	Market-Maker surcharge (per contract)
Friede Goldman International, Inc. (FGI)	$0.15
Northwest Airlines Corporation (NAQ)	0.14
Open Market, Inc. (OQM)	0.17
Orbital Sciences Corporation (ORB)	0.11
ONSALE, Inc. (QOL)	0.12
Synovous Financial Corporation (SNV)	0.12
Zebra Technologies Corporation (ZBQ)	0.15

These fees will be effective as of August 2, 1999. All of the fees will remain in effect until such time as the Committee or the Board determines to change these fees and files the appropriate rule change with the Commission.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b)(4)[5] of the Act because it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members.

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

The Exchange 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

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange and, therefore, has become effective pursuant to section 19(b)(3)(A)(ii)[6] of the Act and subparagraph (f)(2) of Rule 19b–4 thereunder.[7] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[8]

IV. Solicitation 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. 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

[3] *See* Securities Exchange Act Release No. 41121 (February 26, 1999), 64 FR 11523 (March 9, 1999) (order approving CBOE Rule 2.40).

[4] As the Order Book Official Brokerage Rate (per contract) for these classes is already $.00, additional funds generated by the surcharge will be paid to Stationary Floor Brokers as provided in Exchange Rule 2.40. Telephone conversation between Timothy Thompson, Director, Regulatory Affairs, Legal Department, CBOE, and Kenneth Rosen, Attorney, and Matthew Boesch, Paralegal, Division of Market Regulation, Commission, on August 16, 1999.

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A)(ii).

[7] 17 CFR 240.19b–4(f)(2).

[8] In reviewing this proposal, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).