

performance as the Commission by rule, regulation or order may specify.”

3. Under rule 205-1 of the Advisers Act, the “investment performance” of an investment company must be computed based on the change in the investment company’s net asset value per share.

4. Applicants request exemptive relief from section 205 and rule 205-1 to permit CGTC to charge the fee in question (i) applying the fee only to the CGTC Account and not to the Portfolio as a whole, and (ii) computing the Performance Component measured by the change in the CGTC Account’s gross asset value, rather than its net asset value. Applicants also request exemptive relief for CGTC and its affiliates to enter into similar fee arrangements with other investment companies, provided certain criteria are met.

5. Applicants state that Congress, in adopting and amending section 205 of the Advisers Act, and the Commission, in adopting rule 205-1, put into place safeguards designed to ensure that investment advisers would not take advantage of advisory clients.

6. Applicants assert that the Commission required that performance fees be calculated based on the net asset value of the investment company’s shares to prevent a situation where an adviser could earn a performance fee even though investment company shareholders did not derive any benefit from the adviser’s performance after the deduction of fees and expenses.

7. Applicants state that, unlike traditional performance fee arrangements, CGTC does not receive the Performance Component of its fee unless its management of the CGTC Account has resulted in performance in excess of the EAFE Index Return plus a “performance hurdle” equal to the 0.40 percent base fee. Applicants assert that adding the 0.40 percent hurdle to the performance of the EAFE Index has an effect similar to deducting CGTC’s fees.<sup>6</sup> Applicants argue that, therefore, the Portfolio’s shareholders have protections similar to those contemplated by the net asset value requirement of rule 205-1.

8. Applicants state that Congress’ concern in enacting the safeguards of section 205 came about because the vast majority of investment advisers exercised a high level of control over the structuring of the advisory relationship. Applicants state that the fee in question, however, was negotiated at arm’s length between the parties. Applicants state

<sup>6</sup> If the Base Fee changes, the performance hurdle also would be changed to match the fee.

that CGTC has little, if any, influence over the overall management of the Trust or the Portfolio beyond stock selection. Management functions of the Trust and the Portfolio reside in the Trust’s Board. The Trust itself is directly and fully responsible for supervising the Trust’s service providers and monitoring expenses of each of the Trust’s portfolios. The Trust’s Board is responsible for allocating the assets of the several portfolios among the portfolio managers. Neither CGTC nor any of its affiliates sponsored or organized the Trust or serves as a distributor or principal underwriter of the Trust. Neither CGTC nor any of its affiliates owns any shares issued by the Trust. No officer, director or employee of CGTC, nor of any CGTC’s affiliates, serves as an executive officer or director of the Trust. Neither CGTC nor any of its affiliates is an affiliated person of Hirtle Callaghan or any other person who provides investment advice with respect to the Trust’s advisory relationships (except to the extent that such affiliation exists solely by reason of CGTC serving as investment adviser to the Trust).

9. Applicants argue that the fulcrum fee arrangement is consistent with the purposes intended by rule 205-1 because the CGTC Agreement was negotiated at arm’s-length with the Trust and that the Trust therefore does not need the protections afforded by calculating a performance fee based on net assets. Applicants argue that the proposed fee arrangement is therefore consistent with the underlying policies of section 205 and rule 205-1. Applicants argue that granting the exemption is necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Advisers Act and would therefore be consistent with the exemptive standards in section 206A of the Advisers Act.

#### Applicants’ Conditions

1. If the Base Fee changes, the performance hurdle will be changed to match the Base Fee.

2. To the extent CGTC, or an affiliate of CGTC, relies on the requested order with respect to advisory arrangements with other investment companies that it advises, those arrangements will meet the following requirements: (i) The investment advisory fee will be negotiated between CGTC, or the applicable affiliate of CGTC, and the investment company or its primary investment adviser; (ii) the fee structure will contain a performance hurdle that is, at all times, no lower than the base

fee; (iii) neither CGTC nor any of its affiliates will serve as distributor or sponsor of the investment company; (iv) no member of the board of the investment company will be affiliated with CGTC or its affiliates; (v) neither CGTC nor any of its affiliates will organize the investment company; and (vi) neither CGTC nor any of its affiliates will be an affiliated person of any primary adviser to the investment company or of any other person who provides advice with respect to the investment company’s advisory relationships (except to the extent that CGTC and/or its affiliates may be affiliated with another portfolio manager by virtue of the fact that CGTC serves as a portfolio manager to the investment company or to another investment company).

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 01-20233 Filed 8-10-01; 8:45 am]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44657; File No. SR-BSE-2001-04]

### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment No. 1 by the Boston Stock Exchange, Inc. Relating to Capital Requirements for Specialists and Competing Specialists Trading Portfolio Depository Receipts

August 6, 2001.

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> notice is hereby given that on June 29, 2001, the Boston Stock Exchange, Inc. (“BSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the BSE.<sup>3</sup> The

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

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

<sup>3</sup> On August 1, 2001, the BSE filed Amendment No. 1 to the proposal. See letter from John A. Boese, Assistant Vice President, Rule Development and Market Structure, BSE, to Katherine England, Assistant Director, Division of Market Regulation (“Division”), Commission, dated July 31, 2001 (“Amendment No. 1”). In Amendment No. 1, the BSE states that it has carefully evaluated volume and price measures for the portfolio depository receipts (“PDRs”) that BSE specialists trade actively and concluded that the proposed equity requirement will continue to ensure that BSE

Commission is publishing this notice to solicit comments on the proposed rule change and Amendment No. 1 from interested persons and to approve the proposal, as amended, on an accelerated basis.

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

The BSE proposes to amend Chapter XXIV, "Portfolio Depositary Receipts," Section 6, "Limitation on Exchange Liability," Interpretation and Policy .01 ("Interpretation and Policy .01") of the BSE's rules to reduce the minimum equity requirement for the trading of PDRs by specialists and competing specialists from \$1,000,000 to \$200,000. Because Interpretation and Policy .01, as amended, would make Interpretation and Policy .03 to Chapter XXIV, Section 6 ("Interpretation and Policy .03") of the BSE's rules unnecessary, the BSE proposes to delete Interpretation and Policy .03.<sup>4</sup>

The text of the proposed rule change is available at the BSE and at the Commission.

### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the BSE 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 III below. The BSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

specialists have sufficient resources to perform their market making obligations effectively. In addition, the BSE states that neither the volume nor the price of PDRs necessitates an additional equity requirement (*i.e.*, an equity requirement in excess of \$200,000), and that the BSE requests elimination of the additional equity requirement so that the capital requirement for PDRs will be more commensurate with the exposure to risk. In a telephone conversation on August 6, 2001, the BSE confirmed that the additional equity requirement discussed in Amendment No. 1 refers to an equity requirement in excess of \$200,000. Telephone conversation between Yvonne Fraticelli, Special Counsel, Office of Market Supervision, Division, Commission, and John Boese, Assistant Vice President, Rule Development and Market Structure, BSE, on August 6, 2001 ("August 6 Conversation").

<sup>4</sup> See Securities Exchange Act Release No. 44269 (May 7, 2001), 66 FR 24417 (May 14, 2001) (order approving File No. SR-BSE-00-22) (adopting Interpretation and Policy .03). Under Interpretation and Policy .03, the minimum equity requirement for derivative based trading products is reduced from \$1,000,000 to \$200,000 when a BSE member firm arranges to clear its trades through a non-Boston Stock Exchange Clearing Corporation member clearing center.

#### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

##### (1) Purpose

The BSE seeks to amend its rule establishing a separate minimum equity requirement for specialists and competing specialists who trade PDRs. Currently, Interpretation and Policy .01 provides that the minimum equity requirement for the trading of PDRs by specialists and competing specialists is \$1,000,000. The BSE's regular minimum equity requirement is \$200,000.<sup>5</sup> The BSE seeks to eliminate the separate higher minimum equity requirement for PDRs.

According to the BSE, the Exchange imposed the \$1,000,000 equity requirement for PDRs during the initial period of trading exchange traded funds ("ETFs") on the BSE.<sup>6</sup> Because ETFs were a relatively new and untested financial instrument, the BSE established the higher equity requirement due to the possible volatility of the new products and the unknown risks they might have posed to the BSE. According to the BSE, the BSE has since determined that ETFs do not pose undue financial exposure risk to the Exchange. The BSE states that ETFs are similar in most respects to "standard" equity securities.

In addition, the BSE states that it conducted an internal analysis to evaluate the overnight positions held by specialists who trade ETFs, both separately and in relation to other equity securities. As a result of this analysis, the BSE determined that the risks to the Exchange posed by specialists trading ETFs were commensurate with the risks posed by the trading of listed equity securities. Moreover, the BSE notes that short positions held by specialists overnight in ETFs were not measurably different from the positions held in other listed equities and, in either case, did not pose a financial risk to the BSE or its members beyond that for which the minimum equity requirement of \$200,000 was deemed to be sufficient.

In addition, the BSE states that it has carefully evaluated the volume and price measures for the PDRs and BSE specialists actively trade and that the

<sup>5</sup> See Chapter XXII, "Financial Reports and Requirements—Aggregate Indebtedness—Net Capital," Section 2, "Capital and Equity Requirements," of the BSE's rules.

<sup>6</sup> The Commission approved the BSE's proposal to adopt listing standards and trading rules for PDRs in 1998. See Securities Exchange Act Release No. 39660 (February 12, 1998), 63 FR 9026 (February 23, 1998) (order approving File No. SR-BSE-97-08).

proposed capital requirement will continue to ensure that BSE specialists have sufficient resources to perform their market making obligations.<sup>7</sup> The BSE believes that neither the volume nor the price of PDRs necessitates an equity requirement for PDRs in excess of \$200,000 and that the proposal will make the capital requirement for PDRs more commensurate with the exposure to risk.<sup>8</sup>

Accordingly, the BSE seeks to amend Interpretation and Policy .01 to reduce the minimum equity requirement for the trading of PDRs from \$1,000,000 to \$200,000 to bring the equity requirement for PDRs into parity with the BSE's minimum equity requirement and to eliminate the possibility of an unfair burden on firms that trade these products. In addition, the BSE seeks to eliminate Interpretation and Policy .03 from its rules because Interpretation and Policy .01, as amended, will make Interpretation and Policy .03 unnecessary.

##### (2) Basis

The BSE believes that the proposed rule change is consistent with Section 6(b)(5) of the Act in that it is designated to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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 is not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

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

The BSE does not believe that the proposed rule change will impose any burden on competition.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange has neither solicited nor received comments on the proposed rule change.

### **III. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change and Amendment No. 1 are consistent with the Act. Persons making

<sup>7</sup> See Amendment No. 1, *supra* note 3.

<sup>8</sup> See Amendment No. 1, *supra* note 3.

written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to file number SR-BSE-2001-04 and should be submitted by September 4, 2001.

#### IV. Commission Findings and Order Granting Accelerated Approval of Proposed Rule Change

The BSE has asked the Commission to approve the proposal on an accelerated basis to ease the financial burden on member firms subject to the \$1,000,000 capital requirement for PDRs.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>9</sup> which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and to protect investors and the public interest. As discussed more fully above, the BSE established the current \$1,000,000 capital requirement for PDRs during the initial period of trading ETFs on the BSE, when ETFs were a relatively new and untested financial instrument. The BSE established the \$1,000,000 capital requirement due to the possible volatility of ETFs and the unknown risks that they might have posed to the BSE.

Since the initial period of trading PDRs on the BSE, the BSE states that it has determined that ETFs do not pose undue financial exposure risk to the BSE. In addition, the BSE states that an internal analysis performed by the

Exchange indicated that specialists' trading of ETFs and listed equity products pose commensurate risks to the BSE. The Exchange states that it has carefully evaluated volume and price measures for PDRs that BSE specialists trade actively and that the proposed equity requirement will continue to ensure that BSE specialists have sufficient resources to perform their market making obligations effectively.<sup>10</sup> The BSE believes that neither the volume nor the price of PDRs necessitates an equity requirement in excess of \$200,000 of PDRs and that the proposal will make the capital requirement for PDRs more commensurate with the exposure to risk.<sup>11</sup>

The Commission believes that the proposed \$200,000 capital requirement for PDRs should help to ensure that BSE specialist continue to have adequate capital to conduct their market making activities. Accordingly, the Commission believes that it is not inconsistent with the Act for the BSE to reduce the specialist capital requirement for trading PDRs from \$1,000,000 to \$200,000. However, the Commission expects, and the BSE has agreed, that if there is a significant increase in the trading volume of PDRs, the BSE will reconsider the adequacy of its reduced capital requirement and, if appropriate, submit to the Commission a proposal to increase the capital requirement for specialists trading PDRs.<sup>12</sup>

The Commission believes that it is reasonable for the BSE to eliminate Interpretation and Policy .03 because Interpretation and Policy .01, as amended, will make Interpretation and Policy .03 unnecessary.

The Commission finds good cause for approving the proposed rule change and Amendment No. 1 prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission believes that accelerated approval of the proposal will reduce the financial burden on BSE specialists trading PDRs and facilitate the efficient allocation of market making capital. Amendment No. 1 strengthens the BSE's proposal by representing that BSE specialists trading PDRs will continue to have sufficient resources to fulfill their market making obligations under the reduced capital requirement. Accordingly, the Commission believes that there is good cause, consistent with Sections 6(b)(5) and 19(b)(2) of the Act,<sup>13</sup> to approve the proposal and

Amendment No. 1 to the proposal on an accelerated basis.

*It Is Therefore Ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-BSE-2001-04), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 01-20186 Filed 8-10-01; 8:45 am]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44654; File No. SR-CBOE-2001-42]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to Exchange Fees

August 3, 2001.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 23, 2001, 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.

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

The CBOE proposes to amend its fee schedule to waive all public customer fees related to options on the Standard & Poor's 100 European-style index ("XEO").<sup>3</sup>

The text of the proposed rule change is available at the Office of the Secretary, CBOE and at the Commission.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements

<sup>14</sup> 17 CFR 200.30-3(a)(12).

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

217 CFR 240.19b-4.

<sup>3</sup> The listing of XEO options on the CBOE became effective pursuant to File No. SR-CBOE-2001-39. See Securities Exchange Release No. 44556 (July 16, 2001), 66 FR 38046 (July 20, 2001) (notice of filing and immediate effectiveness of File No. SR-CBOE-2001-39).

<sup>9</sup> 15 U.S.C. 78f(b)(5). In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>10</sup> See Amendment No. 1, *supra* note 3.

<sup>11</sup> See August 6 Conversation, *supra* note 3.

<sup>12</sup> See August 6 Conversation, *supra* note 3.

<sup>13</sup> 15 U.S.C. 78f(b)(5) and 78s(b)(2).