

Trust Issued Receipts include HOLDRS<sup>SM</sup> and are listed under Amex Rules 1200 *et seq.* Therefore, the Exchange represents that these securities are ineligible to be traded either (1) by OPMs or LTPs; or (2) by RETs or REMMs under Amex Rules 111 and 114.<sup>9</sup> The Exchange believes that permitting regular member ROTs to trade structured products and HOLDRS<sup>SM</sup> under Amex Rule 958 will promote additional market depth and liquidity. According to the Amex, structured products and Trust Issued Receipts do not fall within the definition of "derivative products" as contemplated by the Exchange in authorizing OPMs and LTPs to trade derivative products; therefore, OPMs and LTPs are not permitted to trade those products. The Exchange proposal would clarify Amex Rule 958 to reflect this position.<sup>10</sup>

### III. Discussion of the Proposed Rule Change

The Exchange's proposal would amend Amex Rule 958, Commentary .10 to clarify that structured products and Trust Issued Receipts rules must be traded under Amex Rule 958 and only by registered traders who are regular (*i.e.*, full) members. The proposed rule change would codify current practice, which affects REMMs, RETs, OPMs, and LTPs. Under the current practice, REMMs and RETs, which are regular members of the Exchange, must register under Amex Rule 958 in order to trade structured products or Trust Issued Receipts; LTPs and OPMs, which are not regular members, are not permitted to trade those products.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act<sup>11</sup> 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

<sup>9</sup> However, because RETs and REMMs are regular members of the Exchange, they may, after registering under Amex Rule 958, trade structured products and Trust Issued Receipts under Amex Rule 958. Telephone conversation between Michael Cavalier, Associate General Counsel, Amex, and Florence Harmon, Senior Special Counsel and Steven Johnston, Special Counsel, Division, Commission, on July 22, 2002.

<sup>10</sup> The Exchange also originally proposed a technical change to Amex Rule 958. The Exchange withdrew the proposed technical change in Amendment No. 1. The proposed technical change was unnecessary because it had been previously proposed by the Amex and approved by the Commission. (See Securities Exchange Act Release No. 45320 (January 18, 2002), 67 FR 3921 (January 28, 2002) (File No. SR-Amex-2001-79).

<sup>11</sup> 15 U.S.C. 78f(b).

Act,<sup>12</sup> which requires that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public interest.

When an individual REMM, RET, or other regular member of the exchange registers under Amex Rule 958, he or she becomes a competing market maker with continuous affirmative market making obligations. The individual also receives "good faith" margin, which permits the individual to finance up to 100% of his or her securities positions' market value.<sup>13</sup> Entitlement to good faith margin may serve to attract regular members to trade structured products and Trust Issued Receipts, which, in turn may provide increased depth and liquidity to the markets for those products. Greater depth and liquidity contribute to better executions, a result which is consistent with the protection of investors and the public interest.

The Exchange does not permit either structured products or Trust Issued Receipts to be traded by OPMs or LTPs. OPMs and LTPs have authority to trade "derivative products," as defined in the Amex Constitution and interpreted by the Amex Board of Governors. The Amex observes that when it proposed to allow OPMs and LTPs to trade derivative products, it explicitly stated that its proposal was not intended to expand OPM and LTP trading privileges beyond products that OPMs and LTPs were trading at that time. OPMs and LTPs were not trading structured products and Trust Issued Receipts; those products were not in existence when the Exchange proposed to allow OPMs and LTPs to trade derivative products. Moreover, the Amex represents that the definition of derivative products contemplates only products that are based on open-ended, managed indexes or portfolios registered under the Investment Company Act of 1940.<sup>14</sup> Structured products and Trust Issued Receipts do not satisfy those criteria.<sup>15</sup>

<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> Good faith margin, as defined in Regulation T, issued by the Board of Governors of the Federal Reserve System, as the amount of margin which a creditor, exercising sound judgment, would customarily require for a specified security position and which is established without regard to the customer's other assets or securities positions held in connection with unrelated transactions. See 12 CFR 220.2. In lieu of margin that otherwise would be required, good faith margin permits a trader to finance up to 100% of his or her securities positions' market value.

<sup>14</sup> 15 U.S.C. 80a-1 *et seq.*

<sup>15</sup> Telephone conversation between Michael Cavalier, Associate General Counsel, Amex, and

The Commission finds that it is within the Exchange's discretion to assign or limit trading rights based on type of product and class of membership, as long as the procedures adopted are not inconsistent with the purposes of the Act.<sup>16</sup> In this regard, the Exchange has articulated a legitimate business purpose of attracting registered traders to trade structured products and Trust Issued Receipts. The Commission therefore finds the Exchange's proposed rule change clarifying current practice to be consistent with the Act.<sup>17</sup>

### IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act<sup>18</sup> that the proposed rule change (SR-Amex-2002-50) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>19</sup>

Margaret H. McFarland,

Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46580; File No. SR-BSE-2002-14]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Boston Stock Exchange Relating to an Interpretation of its Execution Guarantee Rule

October 1, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934,<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 5, 2002, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization.

The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

Steven Johnston, Special Counsel, Division, Commission, on September 4, 2002.

<sup>1</sup> 15 U.S.C. 78f(b). See Securities Exchange Act Release No. 28612 (November 14, 1990), 55 FR 48308 (November 20, 1990) (File No. SR-Amex-90-17).

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

<sup>3</sup> 15 U.S.C. 78s(b)(2).

<sup>4</sup> 17 CFR 200.30-3(a)(12).

<sup>5</sup> 15 U.S.C. 78s(b)(1).

<sup>6</sup> 17 CFR 240.19b-4.

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

The Exchange proposes to implement an interpretation of its Execution Guarantee Rule in response to Commission action regarding *de minimis* trades through of certain Exchange Traded Funds ("ETFs") in ITS. The text of the proposed rule change is available at the Office of the Secretary, 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 Exchange 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 Exchange 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

The purpose of the proposed rule change is to add Paragraph .07 to the Interpretations and Policies section of Chapter II, *Dealings on the Exchange*, Section 33, *Execution Guarantee*, of the BSE Rules. This proposed rule change is in response to a Commission Order issued August 28, 2002, granting a *de minimis* exemption for transactions in certain ETFs from the Trade-Through Provisions of the Intermarket Trading System ("ITS") Plan ("Order").<sup>3</sup>

As of the implementation date of the Order, September 4, 2002, certain executions that take place according to the rules of the Exchange may be deemed violative of the provisions thereof. Accordingly, the Exchange is seeking to implement this proposed rule change to run commensurate with the pilot period outlined in the Order, or until such longer time as the Commission may deem appropriate in

<sup>3</sup> See Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 4, 2002). Participants of the ITS Plan are exempt from Section 8(d) of the Plan for the period of September 4, 2002 until June 4, 2003 with respect to transactions in QQQs, DIAMONDS, and SPDRs, that are executed at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS.

conjunction with any further related action concerning this issue.

In Chapter II, *Dealings on the Exchange*, Section 33, *Execution Guarantee* of the BSE Rules, paragraph (c)(2) states that "All agency limit orders will be filled if one of the following conditions occur \* \* \* (2) there has been price penetration of the limit in the primary market \* \* \*." Moreover, in various sections of Chapter XV, *Dealer Specialists*, there are similar provisions.<sup>4</sup> These provisions, in particular those set forth in Chapter II, guarantee that a limit order in a BSE specialist's book will be filled if the primary market trades through the limit price. The BSE specialist provides this protection to its customer limit orders in part due to the fact that the specialist can seek relief through ITS in the event of a trade-through.

As a result of the Commission's Order, certain primary market trades-through in ETFs will constitute exempt trades-through, but will still, under BSE Rules, trigger an obligation on the part of a BSE specialist to provide trade-through protection. However, the specialist will no longer be able to seek recourse to seek satisfaction through ITS from the primary market. Accordingly, the BSE specialist will be competitively disadvantaged if this section of its rules is strictly enforced, while the *de minimis* exemption exists for other ITS participants. Therefore, the BSE is seeking to implement an Interpretation of Chapter II, Section 33(c)(2) of its rules permitting the Exchange to not enforce the provision following a *de minimis* trade through of certain ETFs outlined in the Order.

#### 2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act<sup>5</sup> and furthers the objectives of section 6(b)(5),<sup>6</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to facilitate transactions in securities, to remove impediments to and perfect the mechanism of a free and

<sup>4</sup> See, e.g., Commentary to Section 1, *Specialists*, which sets forth a specialist's obligations in relation to buying and selling on a principal basis while holding unexecuted orders in his book; Section 2, *Responsibilities*, which sets forth, in part, a specialist's primary duties as agent; Section 4, *Precedence to Orders in the Book*, which sets forth the precedence parameters a specialist must adhere to; and Section 18, *Procedures for Competing Specialists*, which sets forth, in various paragraphs, obligations which may conflict with the *de minimis* exemption in the Order.

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

<sup>6</sup> 15 U.S.C. 78f(b)(5).

open market and a national market system, and, in general, in that it is designed 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 Exchange 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. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the BSE. All submissions should refer to the File No. SR-BSE-2002-14 and should be

submitted by [insert date 21 days from date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46582; File No. SR-CBOE-2002-53]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Amending Its Rules To Provide Notice of Benefits of Membership and Attendant Obligations

October 1, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on September 9, 2002, 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 Exchange. 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 add a rule provision setting forth that each CBOE member and Option Trading Permit holder (until such permit expires) with trading rights on CBOE (i) is a member of OneChicago, LLC, and (ii) to the extent provided in OneChicago rules, becomes bound by OneChicago rules and subject to jurisdiction of OneChicago by accessing or entering any order into the OneChicago System.

Below is the text of the proposed rule change. Proposed new language is italicized and proposed deletions are in brackets.

\* \* \* \* \*

### Chicago Board Options Exchange, Incorporated

#### Rules

\* \* \* \* \*

*RULE 3.28. Reserved.*

#### *Membership in OneChicago, LLC*

*RULE 3.29. Each member and Option Trading Permit holder (until such permit expires) with trading rights on the Exchange is a member of OneChicago, LLC, and to the extent provided in OneChicago rules, becomes bound by OneChicago rules and subject to jurisdiction of OneChicago by accessing or entering any order into the OneChicago System.*

#### *Extension of Time Limits*

*RULE 3.30 [3.28]. Any time limit imposed on an applicant, member, or other person under this Chapter may be extended by the Membership Committee in the event that the Membership Committee determines that such an such extension is warranted due to extenuating circumstances.*

#### Delegation of Authority

*RULE 3.31 [3.29].(a) All of the authority granted to the Exchange under this Chapter may be exercised by the Membership Committee and/or the Membership Department.*

*(b) The Membership Committee may delegate to the Membership Department any of the authority that is granted to the Membership Committee under the Rules.*

\* \* \* \* \*

#### 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 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 Exchange 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

OneChicago, LLC is a joint venture formed by CBOE, the Chicago Mercantile Exchange, and the Chicago Board of Trade to provide a market for trading security futures products.

OneChicago has been conditionally designated by the Commodity Futures Trading Commission as a contract market under the Commodity Exchange Act and is in the process of registering with the Commission as a national securities exchange under section 6(g) of the Act.<sup>3</sup>

One of CBOE's primary goals in participating in the formation of OneChicago was to provide CBOE's membership with access to a market for trading security futures products. Accordingly, OneChicago Rule 132<sup>4</sup> provides that any person or entity with full member trading rights or option trading permits (until such permits expire) on CBOE is a member of OneChicago. A person or entity with full member trading rights on CBOE is a CBOE member with the right to enter into securities transactions at the CBOE. These persons and entities include CBOE members in a number of CBOE membership capacities including, among others, those CBOE members with an authorized floor function (*i.e.*, are approved to act as a CBOE Market-Maker and/or Floor Broker), lessees of CBOE memberships, Chicago Board of Trade exercisers, CBOE Clearing Members, and CBOE member organizations approved to transact business with the public. A person or entity with option trading permits (until such permits expire) is an Option Trading Permit holder under CBOE Rule 3.27 that is not a lessor of the Option Trading Permit.

Additionally, OneChicago Rule 307(a) provides, in pertinent part, that by accessing, or entering any order into, the OneChicago System, and without any need for any further action, undertaking or agreement, a OneChicago member agrees (i) to be bound by, and comply with, OneChicago rules, the rules of any OneChicago clearing corporation, and applicable law, to the extent applicable to it, and (ii) to become subject to the jurisdiction of OneChicago with respect to any and all matters arising from, related to, or in connection with, the status, actions, or omissions of that OneChicago member.

In this regard, CBOE proposes to add a CBOE rule provision setting forth that each CBOE member and Option Trading Permit holder (until such permit expires) with trading rights on CBOE (i)

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

<sup>4</sup> The CBOE's original filing referred to OneChicago Rule 129. The CBOE represents that the OneChicago rules have since been amended and the correct reference should now be to OneChicago Rule 132. Telephone conversation between Arthur B. Reinstein, Legal Division, CBOE, and Sapna C. Patel, Attorney, Division of Market Regulation, Commission, on September 24, 2002.

<sup>7</sup> 17 CFR 200.30-3(a)(12).

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

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