

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59086; File No. SR-CBOE-2008-124]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Increase the Class Quoting Limit in One Option Class

December 11, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 9, 2008, the Chicago Board Options Exchange, Incorporated ("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 Exchange has designated this proposal as one constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule under Section 19(b)(3)(A)(i) of the Act,<sup>3</sup> and Rule 19b-4(f)(1) thereunder, which renders the proposal effective upon filing with the Commission. 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 Exchange proposes to increase the class quoting limit in one option class. The text of the proposed rule change is available on CBOE's Web site (<http://www.cboe.org/legal>), at the CBOE's Office of the Secretary, and at the Commission's public reference room.

#### 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 parts of such statements.

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

##### 1. Purpose

CBOE Rule 8.3A, *Maximum Number of Market Participants Quoting Electronically per Product*, establishes class quoting limits ("CQLs") for each class traded on the Hybrid Trading System.<sup>4</sup> A CQL is the maximum number of quoters that may quote electronically in a given product and Rule 8.3A, Interpretation .01(a) provides that the current levels are generally established at 50.

In addition, Rule 8.3A, Interpretation .01(b) provides a procedure by which the President of the Exchange may increase the CQL for an existing or new product. In this regard, the President of the Exchange may increase the CQL in a particular product when he deems it appropriate. The effect of an increase in the CQL is procompetitive in that it increases the number of market participants that may quote electronically in a product. The purpose of this filing is to increase the CQL in the American-style option class on the Standard & Poor's 100 Index (OEX) from its current limit of 50 to 100.

Given the impending transition of OEX to the Hybrid Trading System Platform ("Hybrid"), which is currently planned for December 9, 2008, CBOE's President has determined that it would be appropriate to increase the CQL in OEX. With a current limit of 50, we anticipate that there will be a wait-list when OEX moves to Hybrid. Increasing the CQL to 100 will accommodate Market-Makers interested in trading OEX when it moves to Hybrid and will enable the Exchange to enhance the liquidity offered, thereby offering deeper and more liquid markets. Lastly, CBOE represents that it has the systems capacity to support this increase in the CQL.

##### 2. Statutory Basis

CBOE believes the proposed rule change is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of section 6(b) of the Act.<sup>5</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>6</sup> requirements that the rules of an 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. As indicated above, the Exchange believes that increasing the CQL in this option class will enable the Exchange to enhance the liquidity offered, thereby offering deeper and more liquid markets.

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

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

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

The Exchange neither received nor solicited written comments on the proposal.

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

The foregoing proposed rule change will take effect upon filing with the Commission pursuant to Section 19(b)(3)(A)(i) of the Act<sup>7</sup> and Rule 19b-4(f)(1) thereunder,<sup>8</sup> because it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule.

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.

#### 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. Comments may be submitted by any of the following methods:

##### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2008-124 on the subject line.

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

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

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

<sup>4</sup> See Rule 8.3A.01.

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

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

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A)(i).

<sup>8</sup> 17 CFR 240.19b-4(f)(1).

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-CBOE-2008-124. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2008-124 and should be submitted on or before January 8, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59096; File No. SR-FINRA-2008-044]

### Self-Regulatory Organizations: Financial Industry Regulatory Authority, Inc.; Order Granting Approval of Proposed Rule Change Relating to the Supervision of Market Letters

December 12, 2008.

#### I. Introduction

On September 4, 2008, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("Commission" or "SEC"), 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> a proposed rule change relating to the supervision of market letters. The proposed rule change was published for comment in the **Federal Register** on October 1, 2008.<sup>3</sup> The Commission received four comment letters on the proposal.<sup>4</sup> This order approves the proposed rule change.

#### II. Description of the Proposal

FINRA proposed to amend NASD Rules 2210 (Communications with the Public) and 2211 (Institutional Sales Material and Correspondence) and Incorporated New York Stock Exchange ("NYSE") Rule 472 (Communications with the Public) to address the supervision of market letters.<sup>5</sup> Among other things, the proposed rule change would amend the definition of "sales literature" in NASD Rule 2210 to exclude market letters that qualify as "correspondence" and would define "correspondence" in NASD Rule 2211 to include market letters distributed by a member to one or more of its existing retail customers and fewer than 25

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

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

<sup>3</sup> See Securities Exchange Act Release No. 58648 (September 25, 2008); 73 FR 57177, 57179 (October 1, 2008).

<sup>4</sup> William A. Jacobson, The Cornell Securities Law Clinic (October 20, 2008) (the "Cornell Letter"); Neal E. Nakagiri, NPB Financial Group LLC (October 20, 2008); Dale E. Brown, Financial Services Institute (October 22, 2008); Michael Mungenast, president, ProEquities (Nov. 7, 2008).

<sup>5</sup> The FINRA rulebook currently includes (1) NASD Rules and (2) rules incorporated from NYSE ("Incorporated NYSE Rules"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to members of both FINRA and the NYSE, referred to as Dual Members.

prospective retail customers within any 30 calendar-day period.

NASD Rule 2210 (Communications with the Public) requires a registered principal of a member to approve prior to use any item of sales literature. The term "sales literature" does not include any item distributed or made available only to institutional investors.<sup>6</sup> "Sales literature" includes "market letters." Incorporated NYSE Rule 472 similarly requires a qualified person to approve in advance of distribution any market letter, but contains no exception for market letters sent only to institutional investors. FINRA is concerned that the pre-approval requirements may, in some circumstances, inhibit the flow of information to traders and other investors who base their investment decisions on timely market analysis.

To address this concern, FINRA proposed to amend the definition of "sales literature" in NASD Rule 2210 to exclude market letters that qualify as a "correspondence" and further to amend "correspondence" in NASD Rule 2211 to include market letters (as well as any written letter or electronic mail message) distributed by a member to one or more of its existing retail customers and fewer than 25 prospective retail customers within any 30 calendar-day period. Pursuant to NASD Rule 2211(b)(1)(A), correspondence does not require approval by a registered principal prior to use, unless such correspondence is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes a financial or investment recommendation or otherwise promotes a product or service of the member. The proposed rule change also would amend Incorporated NYSE Rule 472 to eliminate the requirement that a qualified person approve market letters in advance of distribution.

Thus, under the proposed rule change, all FINRA members would be permitted under FINRA rules to distribute market letters to institutional investors (as defined in NASD Rule 2211(a)(3)) without requiring prior approval by a registered principal or qualified person. In addition, under the proposed rules, a member also could distribute without prior approval by a registered principal a market letter that

<sup>6</sup> Pursuant to NASD Rule 2211(a)(2), communications of any kind sent only to institutional investors (as defined in NASD Rule 2211(a)(3)) are considered to be "institutional sales material." NASD Rule 2210 does not require approval of institutional sales material by a registered principal prior to use. However, institutional sales material remains subject to the supervision and review requirements of NASD Rule 2211(b)(1)(B).

<sup>9</sup> 17 CFR 200.30-3(a)(12).