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 No. SR–Amex–2004–10 and should be submitted by March 11, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–3543 Filed 2–18–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49214; File No. SR–Amex–2003–101]

Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval of Proposed Rule Change Relating to Amex Membership's Duty To Report Fraudulent or Manipulative Conduct

February 9, 2004.

On November 21, 2003, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] to amend Rule 3 of the Amex's *General and Floor Rules* to require Amex members or member organizations to report to the Exchange fraudulent or manipulative conduct in connection with the trading of securities on the Floor.[3]

The proposed rule change was published for comment in the **Federal Register** on January 6, 2004.[4] The Commission received no comments on the proposal. This order approves the proposed rule change.

After careful review, 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[5] and, in particular, the requirements of section 6 of the Act[6] and the rules and regulations thereunder. Specifically, the Commission believes that the proposal is consistent with section 6(b)(5) of the Act[7] which requires, among other things, that the Exchange's rules 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. In addition, the Commission believes that the proposal is consistent with section 6(b)(1) of the Act,[8] which requires that the Exchange have the capacity to enforce its members' compliance with the Act, the rules and regulations thereunder, and the rules of the Exchange. The Commission believes that by requiring Amex members or member organizations to immediately report fraudulent or manipulative conduct in connection with the trading of securities on the Exchange floor to the Exchange, the proposal should enhance the Exchange's ability to prevent and sanction fraud and manipulation and to enforce its members' compliance with the Federal securities laws and with the Exchange's rules.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[9] that the proposed rule change (SR–Amex–2003–101) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–3579 Filed 2–18–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49213; File No. SR–CBOE–2003–35]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change, and Amendment Nos. 1, 2, and 3 Thereto, by the Chicago Board Options Exchange, Inc. Relating to Its Position and Exercise Limits

February 9, 2004.

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 26, 2003, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange'') submitted to 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. On September 29, 2003, the CBOE submitted Amendment No. 1 to the proposed rule change. On January 29, 2004, the CBOE submitted Amendment No. 2 to the proposed rule change. On February 9, 2004, the CBOE submitted Amendment No. 3 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange proposes to issue a regulatory circular that contains additional guidance for member firms seeking non-aggregation treatment for the accounts of certain trading units of the member for purposes of the Exchange's position and exercise limit rules.

The text of the proposed regulatory circular is below. Proposed additions are in *italics*.

Chicago Board Options Exchange, Incorporated Rules

* * * * *

Regulatory Circular RG04–XX[3]
Date: 2004
To: Members and Member Firms
From: Regulatory Services Division
Re: Aggregation of Accounts for Position and Exercise Limit Purposes

Aggregation of Accounts

The purpose of this memorandum is to summarize the provisions of Exchange rules with respect to the aggregation of accounts for position and exercise limit purposes. Exchange Rules 4.11 and 4.12 require that positions maintained in accounts directly or indirectly controlled by the same individual or entity be aggregated for position and exercise limit purposes. Pursuant to Rule 4.11, control exists when an individual or entity makes investment decisions for an account or accounts, or materially influences directly or indirectly the actions of any person who makes investment decisions. Control is also presumed in the following circumstances: (a) among all participants of a joint account who have authority to act on behalf of the

[8] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] The proposed rule change also changes the title of Rule 3 from ''Excessive Dealings'' to ''General Prohibitions and Duty to Report.''

[4] *See* Securities Exchange Act Release No. 48998 (December 29, 2003), 69 FR 708.

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

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f(b)(1).

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] *This regulatory circular was filed with the SEC in connection with SR–CBOE–2003–35.*

account; (b) among all general partners to a partnership account; (c) when an individual or entity holds an ownership interest of 10% or more in an entity, or shares in 10% or more of profits and/or losses of an account; (d) when accounts have common directors or management; and (e) where an individual or entity has authority to execute transactions in an account.

Non-aggregation of Accounts

Demonstrating that control does not exist can rebut the presumption of control. The rebuttal proof must be submitted to the Exchange by affidavit and other documentation as may be appropriate. The decision to grant non-aggregation is not retroactive and is handled on a case-by-case basis. The Exchange has granted non-aggregation between the following accounts: between a market-maker's individual account and his joint account in which the market-maker's participation in the joint account is limited to providing financial backing to the other member of the account; and between affiliated broker-dealers.

In situations involving requests for non-aggregation treatment between (i) affiliated broker-dealers and (ii) separate and distinct trading units within the same broker-dealer, the Exchange requires, at a minimum, the broker-dealer(s) to satisfy the following conditions:

(i) *Establish that the trading unit(s) requesting non-aggregation operates independently of other trading units of the broker-dealer, which must include the disclosure of the trading unit's trading objective;*

(ii) *Create internal firewalls and information barriers to segregate the trading unit(s) receiving non-aggregation treatment from other trading units controlled by the broker-dealer that also have trading accounts;*[4]

(iii) *Maintain all trading activity of the trading unit(s) requesting non-aggregation in a segregated account, which shall be reported to the Exchange as such; and*

(iv) *Maintain regulatory compliance oversight and internal controls and procedures.*

If the Exchange determines that the broker-dealer that requests non-aggregation treatment has successfully rebutted the presumption of control and grants non-aggregation status, the broker-dealer must, at a minimum, comply with the following requirements:

(i) *Retain written records of information concerning the non-aggregated account, including, but not limited to, trading personnel, names of personnel making trading decisions, unusual trading activities, disciplinary action resulting from a breach of the broker-dealer's systems firewalls and information-sharing policies, and the transfer of securities between the broker-dealer's non-aggregated accounts, which information shall be promptly made available to the Exchange upon its request;*

(ii) *Promptly provide to the Exchange a written report at such time there is any material change with respect to the non-aggregated account, at which point the Exchange will reexamine the bases for its determination of non-aggregation;*[5] *and*

(iii) *Provide an acknowledgement to the effect that the Exchange reserves the right to impose additional restrictions and conditions with respect to the granting and removal of non-aggregation as the circumstances warrant.*

This memorandum is not intended to be a comprehensive description of all of the rules and requirements relating to the aggregation of accounts for position and exercise limit purposes. For a more detailed description of these rules and requirements members are advised to refer to Exchange Rule 4.11 and the Interpretations and Policies thereunder. Questions pertaining to this memorandum may be directed to Pat Cerny at (312) 786–7722 or Mike Felty at (312) 786–7504.

* * * * *

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 had 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

The Exchange proposes to issue a regulatory circular that provides additional guidance with respect to the proof required to rebut the presumption of control for purposes of the Exchange's option contract position limit and option contract exercise limit rules (CBOE Rules 4.11 and 4.12, respectively). The regulatory circular would set forth conditions and requirements, in addition to those that are set forth in Interpretation .03(c) to CBOE Rule 4.11, that must be satisfied by a member who seeks non-aggregation of the accounts of certain of its trading units, for purposes of CBOE Rules 4.11 and 4.12.

The Exchange recently has received requests from member firms asking for non-aggregation treatment for separate trading accounts of those member firms with respect to the Exchange's position and exercise limits. Specifically, these member firms have requested that one or more of their internal trading units be treated as a separate aggregation unit distinct from other units of the member firm holding proprietary option positions for purposes of determining aggregate position and exercise limits in an option contract. These firms have indicated that common control does not exist with respect to certain trading units of the member firm, which would permit the trading units to be treated as separate aggregation units for purposes of CBOE Rules 4.11 and 4.12.

CBOE Rule 4.11 prohibits a member, for any account in which it has an interest or for the account of any customer, from effecting an opening transaction in an option contract if the member or its customer controls an aggregate position in that option class that exceeds a certain level.[6] CBOE Rule 4.12 prohibits a member, for any account in which it has an interest or for the account of any customer, from exercising a long position in an option contract if the member or its customer exercises within any five consecutive business days aggregate long positions in that option class that exceed a certain

[4] *The Exchange will review this category on a case-by-case basis. With respect to physical separation, the presumption of control becomes easier to rebut as the physical separation between the trading units increases. At the minimum, the Exchange will require trading units located on the same floor to be physically isolated from each other to the extent that the Exchange is assured that no communication will take place between individuals staffed in the applicable trading units. In addition, the Exchange will require system firewalls to be in place in order to prevent the flow of information (e.g., trades, positions, trading strategies) between the trading unit(s) that receives non-aggregation treatment and other trading units controlled by the broker-dealer.*

[5] *The Exchange reserves the right to freeze any position above the standard aggregation limit if the Exchange determines that aggregation is then appropriate due to changed circumstances.*

[6] *See* Interpretation .02 to CBOE Rule 4.11, which delineates position limits for option contracts.

level.[7] Pursuant to Interpretation .03(a) to CBOE Rule 4.11, control exists for purposes of CBOE Rules 4.11 and 4.12 when it is determined that an individual or entity (1) makes investment decisions for an account or accounts, or (2) materially influences directly or indirectly the actions of any person who makes investment decisions. Interpretation .03(b) to CBOE Rule 4.11 provides certain circumstances in which control will be presumed to exist.[8] Interpretation .03(c) to CBOE Rule 4.11 explains how a member firm may rebut the presumption of control.[9]

The Exchange believes that Interpretation .03 to CBOE Rule 4.11 provides the Exchange with the authority to grant non-aggregation requests of the type described above because the limits set forth in CBOE Rules 4.11 and 4.12 are generally based on control, as opposed to ownership, of accounts.[10] Therefore, if two accounts of a broker-dealer are individually managed by separate trading units that have no relationship to the other except that each operates within a single corporate entity, the Exchange believes that the broker-dealer would have a basis to show that the accounts are not under common control. In fact, the Exchange has already permitted non-aggregation of accounts of affiliated entities of a member firm for purposes of CBOE Rules 4.11 and 4.12 and does not believe the existence of a separate corporate entity, affiliated or otherwise, into which a trading unit and its corresponding account are placed should be the determinative factor with respect to rebutting the presumption of control. Instead, the Exchange believes that the existence of separate corporate entities is merely part of the analysis of whether the presumption of control has, in fact, been rebutted. For example, the separate corporate entity may still have to prove to the Exchange that it meets the requirements of Interpretation .03(c) to CBOE Rule 4.11 in order to have a non-aggregated account. Of course, the Exchange may determine based on the circumstances that accounts must be aggregated for purposes of CBOE Rules 4.11 and 4.12, notwithstanding the establishment of separate corporate affiliated entities to manage those accounts.

The Exchange notes that Commission staff has taken a no-action position with respect to a broker-dealer that calculates its net position in a particular security of an individual trading unit (such as a block positioning desk) of the broker-dealer independently from other individual trading units of the broker-dealer for purposes of determining whether the broker-dealer is ''net long,'' as that term is used in Rules 3b–3 and 10a–1 under the Act.[11] The CBOE believes that the Commission staff's recognition that trading units within a broker-dealer can operate independently from each other for purposes of the Exchange Act's ''short sale'' rules [12] further supports the concept that trading units within a broker-dealer may also be treated as separate, independent aggregation units for purposes of CBOE Rules 4.11 and 4.12.

Notwithstanding the Exchange's authority to grant a request for non-aggregation, the threshold for rebutting a presumption of control in the context of such a request would be high. In addition to satisfying all of the enumerated factors set forth in Interpretation .03(c) to CBOE Rule 4.11, the regulatory circular would require the member firm to satisfy additional conditions prior to the Exchange's grant of non-aggregation of the trading unit's account. Specifically, a member firm would have to (i) establish that the trading unit(s) requesting non-aggregation operates independently of other trading units of the member firm, which must include the disclosure of the trading unit's trading objective, (ii) create internal firewalls and information barriers to segregate the trading unit(s) receiving non-aggregation treatment from other trading units controlled by the member firm that also have trading accounts,[13] (iii) maintain all trading activity of the trading unit(s) requesting non-aggregation in a segregated account and report the activity to the Exchange as such, and (iv) maintain regulatory compliance oversight and internal controls and procedures.

As set forth in the proposed regulatory circular, a member firm that is granted non-aggregation would have to comply with the following requirements: (i) retain written records of information concerning the trading unit's non-aggregated account, which must be promptly provided to the Exchange upon request, (ii) promptly provide to the Exchange a written report at such time there is any material change with respect to the non-aggregated account, at which point the Exchange will reexamine the bases for its determination of non-aggregation,[14] and (iii) provide an acknowledgement by the member firm that the Exchange reserves the right to impose additional restrictions and conditions with respect to the granting and removal of non-aggregation of the trading unit's account as the circumstances warrant.

The Exchange will review non-aggregation requests with members of the Intermarket Surveillance Group Options Sub-Group (the ''Sub-Group''), which is comprised of representatives from the CBOE, American Stock Exchange, Boston Options Exchange, International Securities Exchange, Pacific Exchange and Philadelphia Stock Exchange (each, an ''options exchange''). Generally, the options exchange that receives the initial request for non-aggregation (''the receiving exchange'') will distribute the material to the Sub-Group members and

[7] *See* Interpretation .02 to CBOE Rule 4.11, which, as directed by CBOE Rule 4.12, delineates exercise limits for option contracts.

[8] Interpretation .03(b) to CBOE Rule 4.11 states: ''In addition, control will be presumed in the following circumstances: (1) Among all parties to a joint account who have authority to act on behalf of the account; (2) among all general partners to a partnership account; (3) when an individual or entity (i) holds an ownership interest of 10 percent or more in an entity (ownership interest of less than 10 percent will not preclude aggregation), or (ii) shares in 10 percent or more of profits and/or losses of an account; (4) when accounts have common directors or management; (5) where a person or entity has the authority to execute transactions in an account.''

[9] Interpretation .03(c) to CBOE Rule 4.11 states in relevant part: ''Control * * * can be rebutted by proving the factor does not exist or by showing other factors which negate the presumption of control. The rebuttal proof must be submitted by affidavit and/or such other documentary evidence as may be appropriate in the circumstances. The Exchange will also consider the following factors in determining if aggregation of accounts is required: (1) Similar patterns of trading activity among separate entities; (2) the sharing of kindred business purposes and interests; (3) whether there is common supervision of the entities which extends beyond assuring adherence to each entity's investment objectives and/or restrictions; and (4) the degree of contact and communication between directors and/or managers of separate accounts.''

[10] *See* Securities and Exchange Act Release No. 34–22695 (December 9, 1985), 50 FR 50976 (December 13, 1985) (approving SR–CBOE–82–17, which established a system of control, rather than ownership, as the determinative factor for the aggregation of accounts).

[11] *See* Wilke Farr & Gallagher, SEC No-Action Letter, (1998 Transfer Binder) Fed. Sec. L. Rep. (CCH) ¶ 77,483 (November 23, 1998) (the ''SEC No-Action Letter'').

[12] 17 CFR 240.3b–3 and 17 CFR 240.10a–1.

[13] The Exchange would review this category on a case-by-case basis. With respect to physical separation, the presumption of control becomes easier to rebut as the physical separation between the trading units increases. At the minimum, the Exchange would require trading units located on the same floor to be physically isolated from each other to the extent that the Exchange is assured that no communication will take place between individuals staffed in the applicable trading units. In addition, the Exchange would require system firewalls to be in place in order to prevent the flow of information (*e.g.*, trades, positions, trading strategies) between the trading unit(s) that receives non-aggregation treatment and other trading units controlled by the broker-dealer.

[14] The Exchange would reserve the right to freeze any position above the standard aggregation limit if the Exchange determines that aggregation is then appropriate due to changed circumstances.

thereafter discuss the request through one or more conference calls. The receiving exchange will collect input and comments from the Sub-Group members and if need be, contact the requesting member for additional information. If necessary, the Sub-Group members may participate in a conference call to pose their questions directly to the requesting member. Once a decision has been reached, the receiving exchange will draft the response letter and circulate it to the Sub-Group for comments.

2. Statutory Basis

The CBOE believes that the proposed rule change will assist Exchange members by providing guidance on how an Exchange member firm can rebut the presumption of control with respect to CBOE Rules 4.11 and 4.12 and is therefore consistent with section 6(b) of the Act [15] in general and furthers the objectives of section 6(b)(5) [16] in particular in that it should 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 protect investors and the public interest.

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

The 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 Act.

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

No written comments were solicited or received with respect to 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 CBOE consents, the Commission will:

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

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

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

[16] 15 U.S.C 78f(b)(5).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. SR–CBOE–2003–35. 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, comments should be sent in hardcopy or by e-mail but not by both methods. 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 filings will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR–CBOE–2003–35 and should be submitted by March 11, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–3578 Filed 2–18–04; 8:45 am]

BILLING CODE 8010–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49221; File No. SR–EMCC–2003–08]

Self-Regulatory Organizations; Emerging Markets Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Clearing Fund Requirements for Special Members

February 11, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 22, 2003, the Emerging Markets Clearing Corporation (''EMCC'') 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 primarily by EMCC. 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 proposed rule change revises Addendum I (Clearing Fund Requirement for Special Member) of EMCC's Rules to establish a capped clearing fund requirement of $50 million for ''special members.''

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

In its filing with the Commission, EMCC 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. EMCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.[2]

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

In rule filing SR–EMCC–2003–02, EMCC created the membership category ''special member.'' [3] A special member is either an inter-dealer broker (''IDB'') or another entity that clears for entities that are IDB's. The function of an IDB is to bring principals together in transactions on a matched and anonymous basis while taking no principal risk themselves, so if every dealer who interacted with an IDB were a member of EMCC, the IDB or its clearing firm would have to deposit only a minimal clearing fund amount. To the extent that one side of an IDB trade is not an EMCC member, the clearing fund requirement for the IDB or its clearing firm are based only on one side of the matched transaction. This one-sided calculation creates a clearing

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

[2] The commission has modified the text of the summaries prepared by EMCC.

[3] Securities Exchange Act Release No. 48366 (Aug. 19, 2003), 68 FR 51311 (Aug. 26, 2003) (EMCC–2003–02).