

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 change from interested persons.

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

The Exchange is proposing to amend Article II, Section 2 of the Exchange Constitution to (i) permit Governors to attend Board meetings by means of a conference telephone, and (ii) clarify that individuals who are employed by or associated with a member organization in a senior capacity may be appointed as Exchange Officials. The text of these statements may be examined at the places specified in Item IV below.

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 self-regulatory organization 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 self-regulatory organization 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

In order to facilitate the fullest possible participation in board meetings, it is proposed that Article II, Section 2 of the Exchange Constitution be amended to provide that participation in a meeting of the Board of Governors by means of a conference telephone or similar communications equipment, which allows all persons participating in the meeting to hear each other at the same time, shall constitute presence in person at a meeting. New York law permits this procedure, but only if the appropriate authorization is contained in the corporate by-laws (in the case of the Exchange, its Constitution). It has become common in corporate America to provide for this convenience, and the New York Stock Exchange and most other self-regulatory organizations permit it as well.²

In addition, it is proposed that Article II, Section 2 of the Exchange Constitution be amended to clarify the description of the pool of individuals who are qualified to serve as Exchange Officials. Particularly as upstairs firms have grown and developed more complex organizations, the senior employees who are so well qualified to serve as Exchange Officials may not easily be described as "principal executive officers" or "control persons." Accordingly, we would expand the Constitutional qualification to include individuals who are employed by or associated with a member organization in a senior capacity.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act³ in general and furthers the objectives of Section 6(b)(5)⁴ in particular in that it is designed to promote just and equitable principles of trade and protect the public interest.

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

The proposed rule change will impose no burden on competition.

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

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from August 20, 1997, the date on which it was filed, and the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date, it has become operative pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(e)(6) thereunder.⁵

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.

³ 15 U.S.C. 78f(b).

⁴ 15 U.S.C. 78f(b)(5).

⁵ 17 CFR 240.19b-4(e)(6).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. 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 the filing will also be available for inspection and copying at the principle office of the Amex. All submissions should refer to the file number SR-Amex-97-32 and should be submitted by October 1, 1997.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39010; File No. SR-CBOE-97-39]

Self-Regulatory Organizations; Notice of Filing of and Order Granting Accelerated Approval to Proposed Rule Change by the Chicago Board Options Exchange, Incorporated Relating to Amendments to the Exchange's Telephone Solicitation Rule

September 3, 1997.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on August 25, 1997, 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

² See Article IV, Section 5 of the New York Stock Exchange Constitution.

⁶ 17 CFR 200.30-3(a)(12).

prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to grant accelerated approval to the proposed rule change.

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

The Chicago Board Options Exchange, Inc. ("CBOE" or the "Exchange") proposes to amend Exchange Rules 9.21, Communications to Customers and 9.24, Telephone Solicitation. 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 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 III below. The CBOE 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

Purpose

The purpose of the proposed rule change is to amend Exchange Rules 9.21 relating to communications to customers and Rule 9.24 pertaining to the conduct of CBOE members and persons associated with members ("associated persons") who make unsolicited telephone calls to sell securities or related services ("telemarketing" or "cold-calling"). Rule 9.21(e) is being amended to include telemarketing scripts under the definition of "sales literature."

In December 1995, pursuant to the Telephone Consumer Protection Act ("TCPA"),¹ the CBOE adopted a "telephone solicitation" rule to implement certain rules of the Federal Communications Commission ("FCC Rules")² that require persons who

engage in telephone solicitations to sell products and services ("telemarketers") to establish and maintain a list of persons who have requested that they not be contacted by the caller (a "do-not-call" list).³ Under the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") which became law in August 1994,⁴ the Federal Trade Commission adopted detailed regulations ("FTC Rules") to prohibit deceptive and abusive telemarketing acts and practices that became effective on December 31, 1995.⁵ The FTC Rules, among other things, (i) require the maintenance of "do-not-call" lists and procedures, (ii) prohibit abusive, annoying, or harassing telemarketing calls, (iii) prohibit telemarketing calls before 8 a.m. or after 9 p.m., (iv) require a telemarketer to identify himself, the company for whom he or she works, and the purpose of the call, and (v) require express written authorization or other verifiable authorization from the customer before use of negotiable instruments called "demand drafts."⁶

Under the Telemarketing Act, the SEC is required either to promulgate or to require the self-regulatory organizations ("SROs") to promulgate rules substantially similar to the FTC rules, unless the SEC determines either that the rules are not necessary or appropriate for the protection of investors or the maintenance of orderly markets, or that existing federal securities laws or SEC rules already provide for such protection.⁷ The

for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, other than with the called person's express invitation or permission, or to a person with whom the caller has an established business relationship, or by a tax-exempt non-profit organization. *Id.*

³ Securities Exchange Act Release No. 36588 (December 13, 1995), 60 FR 65703 (December 20, 1995); order approving File No. SR-CBOE 95-63.

⁴ 15 U.S.C. 6101-08.

⁵ FTC Rules §§ 310.3-4.

⁶ *Id.*

⁷ In response, the National Association of Securities Dealers ("NASD"), the Municipal Securities Rulemaking Board ("MSRB"), the New York Stock Exchange ("NYSE"), the American Stock Exchange ("Amex"), and the Philadelphia Stock Exchange ("Phlx") have adopted rules to curb abusive telemarketing practices. See Securities Exchange Act Release Nos. 38009 (Dec. 2, 1996), 61 FR 65625 (Dec. 13, 1996) (order approving File No. SR-NASD-96-28); 38053 (Dec. 16, 1996), 61 FR 68078 (Dec. 26, 1996) (order approving File No. SR-MSRB-96-06); 38638 (May 14, 1997), 62 FR 27823 (May 21, 1997) (order approving File No. SR-NYSE-97-07); 38724 (June 6, 1997), 62 FR 32390 (June 13, 1997) (order approving File No. SR-Amex-97-07); 38724 (June 6, 1997), 62 FR 32390 (June 13, 1997) (order approving File No. SR-Amex-97-17); and 38875 (July 25, 1997), 62 FR 41983 (August 4, 1997) (order approving file No. SR-Phlx-97-18).

proposed rule change amends CBOE Rule 9.24 and Interpretations thereunder in response to the Commission's request that major SROs promulgate rules substantially similar to applicable provisions of the FTC Rules. The CBOE believes that the proposed rule change addresses all relevant elements of the FTC Rules not already extensively regulated by existing federal securities laws and regulations or inapplicable to securities transactions.

Time Limitations and Disclosure

The proposed rule change amends Exchange Rule 9.24 by adding paragraph (a) to prohibit a member or associated person from making outbound telephone calls to a member of the public's residence for the purpose of soliciting the purchase of securities or related services at any time other than between 8 a.m. and 9 p.m. local time at the called person's location without that person's prior consent; and by adding paragraph (b) to require that the member or associated person promptly disclose to the called person in a clear and conspicuous manner the caller's identity and firm, the telephone number or address at which the caller may be contacted, and that the purpose of the call is to solicit the purchase of securities or related services.

Proposed paragraph (c) to Rule 9.24 creates exemptions from the time-of-day and disclosure requirements of paragraphs (a) and (b) for telephone calls by associated persons responsible for maintaining and servicing accounts of certain "existing customers" assigned to or under control of that associated person. Paragraph (c) defines "existing customer" as a customer for whom the broker or dealer, or a clearing broker or dealer on its behalf, carries an account. Proposed subparagraph (c)(1) exempts calls by the associated person to an existing customer who, within the preceding twelve months, has effected a securities transaction in, or made a deposit of funds or securities into, an

The Commission has determined that the NASD Rule, the MSRB Rule, the NYSE Rule, the Amex Rule and the Phlx Rule, together with the Exchange Act and the Investment Advisers Act of 1940, the rules thereunder, and the other rules of the SROs, satisfy the requirements of the Telemarketing Act, because the applicable provisions of such laws and rules are substantially similar to the FTC Rules except for those FTC Rules that involve areas already extensively regulated by existing securities laws or regulations or activities inapplicable to securities transactions. Securities Exchange Act Release No. 38480 (Apr. 7, 1997), 62 FR 18666 (Apr. 16, 1996). Accordingly, the Commission has determined that no additional rulemaking is required by it under the Telemarketing Act. *Id.* Notwithstanding this determination, the Commission still expects the remaining SROs to file similar proposals.

¹ 47 U.S.C. 227.

² Pursuant to the TCPA, the FCC adopted rules in December 1992 regulating and limiting telemarketing activities. 57 FR 48333 (codified at 47 CFR 64.1200). With certain limited exceptions, the FCC Rules apply to all residential telephone solicitations, including those relating to securities transactions. *Id.* The term "telephone solicitation" refers to the initiation of a telephone call or message

account under the control of or assigned to that associated person at the time of the transaction or deposit. Proposed subparagraph (c)(2) exempts calls by an associated person to an existing customer who, at any time, has effected a securities transaction in, or made a deposit of funds or securities into an account under the control of or assigned to the associated person at the time of the transaction or deposit, as long as the customer's account has earned interest or dividend income during the preceding twelve months. Each of these exemptions also permits calls by other associated persons acting at the direction of an associated person who is assigned to or controlling the account. Proposed paragraph (c)(3) exempts telephone calls to a broker or dealer. The proposed rule change also expressly clarifies that the scope of this rule is limited to the telemarketing calls described herein; the terms of the Rule do not otherwise expressly or by implication impose on members any additional requirements with respect to the relationship between a member and a customer or between an associated person and a customer.

Demand Draft Authorization and Recordkeeping

The proposed rule change adds paragraph (e) to Exchange Rule 9.24 to prohibit a member or associated person from obtaining from a customer or submitting for payment a check, draft, or other form of negotiable instrument drawn on a customer's checking, savings, share, or similar account ("demand draft") without that person's express written authorization (which may include the customer's signature on the instrument), a record of which must be retained for at least three years. The proposal also states, however, that this provision does not require maintenance of copies of negotiable instruments signed by customers.

Telemarketing Scripts

The proposed rule change also amends Exchange Rule 9.21(e) to include telemarketing scripts under the definition of "sales literature." Therefore, telemarketing scripts will be required to be retained for a period of three years.⁸

Statutory Basis

The CBOE believes that the proposed rule change is consistent with the provision of Section 6(b)(5) of the Act,⁹ which requires that the Exchange adopt and amend its rules to promote just and

equitable principles of trade and generally provide for the protection of customers and the public interest, in that the proposed rule change, by imposing time restriction and disclosure requirements, with certain exceptions, on members' telemarketing calls, and by requiring verifiable authorization from a customer for demand drafts, prevents members from engaging in certain deceptive and abusive telemarketing acts and practices while allowing for legitimate telemarketing practices. The CBOE also believes that the proposed rule change fulfills the mandate that SRO rules promulgated under the Telemarketing Act provide protection from deceptive and abusive telemarketing practices and are necessary and appropriate in the public interest and for the protection of investors.

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.

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. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. 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 Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submission should refer to File No. SR-CBOE-97-39 and should be submitted by October 1, 1997.

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

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, and, in particular, with Section 6(b)(5) of the Act¹⁰ which requires, among other things, that the rules of the exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.¹¹ The proposed rule change is consistent with these objectives in that it imposes time restriction and disclosure requirements, with certain exceptions, on members' telemarketing calls, requires verifiable authorization from a customer for demand drafts, and prevents members from engaging in certain deceptive and abusive telemarketing acts and practices while allowing for legitimate telemarketing activities.

The Commission believes that the addition of paragraph (a) to Exchange Rule 9.24, prohibiting a member or associated person from making outbound telephone calls to the residence of any person for the purpose of soliciting the purchase of securities or related services at any time other than between 8 a.m. and 9 p.m. local time at the called person's location, without the prior consent of the person, is appropriate. The Commission notes that, by restricting the times during which a member or associated person may call a residence, the proposal furthers the interest of the public and provides for the protection of investors by preventing members and associated persons from engaging in unacceptable practices, such as persistently calling members of the public at unreasonable hours of the day and night.

The Commission also believes that the addition of paragraph (b) to Rule 9.24, requiring a member or associated person to promptly disclose to the called person in a clear and conspicuous manner the caller's identity and firm, telephone number or address at which the caller may be contacted, and that the purpose of the call is to solicit the purchase of securities or related services, is appropriate. By requiring the caller to identify himself or herself and the purpose of the call, paragraph (b)

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ In approving this rule, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁸ See, CBOE Rule 9.21(b).

⁹ 15 U.S.C. 78f(b)(5).

assists in the prevention of fraudulent and manipulative acts and practices by providing investors with information necessary to make an informed decision when purchasing securities. Moreover, by requiring the associated persons to identify the firm for which he or she works and the telephone number or address at which the caller may be contacted, the Rule encourages responsible use of the telephone to market securities.

The Commission further believes that the addition of paragraph (c), which creates exemptions from the time-of-day disclosure requirements for telephone calls by associated persons, or other associated persons acting at the direction of such persons, to certain categories of "existing customer" is appropriate. The Commission believes it is appropriate to create an exemption for calls to customers with whom there are existing relationships in order to accommodate personal and timely contact with a broker who can be presumed to know when it is convenient for a customer to respond to telephone calls. Moreover, such an exemption also may be necessary to accommodate trading with customers in multiple time zones across the United States. The Commission, however, believes that the exemption from the time-of-day and disclosure requirements should be limited to calls to persons with whom the broker has a minimally active relationship. In this regard, the Commission believes that paragraph (c) achieves an appropriate balance between providing protection for the public and the members' interests in competing for customers.

Moreover, the Commission believes that the addition of paragraph (e) to Rule 9.24, requiring that a member or associated person obtain from a customer, and maintain for three years, express written authorization when submitting for payment a check, draft, or other form of negotiable paper drawn on a customer's checking, savings, share or similar account, is appropriate. The Commission notes that requiring a member or associated person to obtain express written authorization from a customer in the above-mentioned circumstances assists in the prevention of fraudulent and manipulative acts in that it reduces the opportunity for a member, or associated person to misappropriate customers' funds. In addition, the Commission believes that by requiring a member or associated person to retain the authorization for three years, subparagraph (e) protects investors and the public interest in that it provides interested parties with the ability to acquire information necessary

to ensure that valid authorization was obtained for the transfer of a customer's funds for the purchase of a security.

The Commission believes that the amendment to paragraph (e) of Rule 9.21, adding telemarketing scripts to the definition of sales literature thereby requiring the retention of telemarketing scripts for a period of three years is appropriate. By requiring the retention of telemarketing scripts for three years, the Rule assists in the prevention of fraudulent and manipulative acts and practices and provides for the protection of the public in that interested parties will have the ability to acquire copies of the scripts used to solicit the purchase of securities to ensure that members and associated persons are not engaged in unacceptable telemarketing practices. Finally, the Commission believes that the proposed rule achieves a reasonable balance between the Commission's interest in preventing members from engaging in deceptive and abusive telemarketing acts and the members' interests in conducting legitimate telemarketing practices.

The Commission finds good cause for approving the proposed rule change, prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The proposal is identical to the NASD and MSRB rules, which were published for comment and, subsequently, approved by the Commission. The approval of the CBOE's rules provides a consistent standard across the industry. In that regard, the Commission believes that granting accelerated approval to the proposed rule change is appropriate and consistent with Section 6 of the Act.¹²

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-CBOE-97-39) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39009; File No. SR-NYSE-96-16]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to Amendments to Percentage Order Rules 13 and 123A.30

September 3, 1997.

I. Introduction

On June 28, 1996, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend its rules relating to percentage orders.

The proposed rule change was published for comment in Securities Exchange Act Release No. 37495 (July 30, 1996), 61 FR 40699 (August 5, 1996). No comments were received on the proposal. This order approves the proposed rule change.

II. Description

NYSE Rule 13 defines a percentage order as "a limited price order to buy (or sell) fifty percent of the volume of a specified stock after its entry." A percentage order is essentially a memorandum entry left with a specialist, specifying the total number of shares to be bought or sold and the limit price, which becomes a "live" order capable of execution in one of two ways: (i) all or part of the order can be "elected" as a limit order on the specialist's book based on trades in the market; or (ii) all or part of the order can be "converted" into a limit order to make a bid or offer or to participate directly in a trade.

A. The Election Process

1. Current Practice

Under the election process, as trades occur at the percentage order's limit price or better, an equal number of shares of the percentage order are "elected" and become a limit order on the specialist's book. This limit order takes its place behind other limit orders on the specialist's book at the same price. The percentage order then is reduced by the number of elected shares until the entire order has been satisfied.

¹² 15 U.S.C. 78f.

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.