

15. Before investing in a Fund in excess of the limits in section 12(d)(1)(A), the Investing Fund and the Fund will execute a Participation Agreement stating, without limitation, that their boards of directors or trustees and their investment advisers, and the Trustee and Sponsor, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in Fund Shares in excess of the limit in section 12(d)(1)(A)(i), an Investing Fund will notify the Fund of the investment. At such time, the Investing Fund will also transmit to such Fund a list of names of each Investing Fund Affiliate and Underwriting Affiliate. The Investing Fund will notify the Fund of any changes to the list of names as soon as reasonably practicable after a change occurs. The Fund and the Investing Fund will maintain and preserve a copy of the order, the Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

16. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Investing Management Company, including a majority of the independent directors or trustees, will find that the advisory fees charged under such advisory contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Investing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Investing Management Company.

17. Any sales charges and/or service fees charged with respect to shares of an Investing Fund will not exceed the limits applicable to a fund of funds as set forth in Conduct Rule 2830 of the NASD.

18. No Fund will acquire securities of any investment company or companies relying on sections 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except as permitted pursuant to rule 12d1-1 under the Act.

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

**Florence E. Harmon,**  
Deputy Secretary.

[FR Doc. E9-27130 Filed 11-10-09; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60957; File No. SR-CBOE-2009-070]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving a Proposed Rule Change Relating to Preferred Market Makers

November 6, 2009.

#### I. Introduction

On September 28, 2009, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposal to amend CBOE Rule 8.13, "Preferred Market-Maker Program" to establish a participation entitlement for complex orders designated to Preferred Market Makers and to clarify the operation of the Hybrid System with respect to the existing Preferred Market Maker participation entitlement for individual options orders. The proposed rule change was published for comment in the **Federal Register** on October 7, 2009.<sup>3</sup> The Commission received no comments regarding the proposal. This order approves the proposed rule change.

#### II. Description of the Proposal

The CBOE proposes to amend CBOE Rule 8.13 to: (1) Establish a participation entitlement for complex orders entered into the Complex Order Book ("COB") or the complex order RFQ auction ("COA") that are designated to a Preferred Market Maker; and (2) clarify the operation of the Hybrid System with respect to the Preferred Market Maker participation entitlement for individual options orders.

##### A. Participation Entitlement for Complex Orders

Under the proposal, any Designated Primary Market Maker, Lead Market Maker, or Market Maker with an appointment/allocation in the relevant options class may be designated as a Preferred Market Maker for complex orders.<sup>4</sup> A Preferred Market Maker must comply with the quoting obligations applicable to its Market Maker type

under CBOE's rules and must provide continuous electronic quotes (as defined in CBOE Rule 1.1(ccc)) in at least 90% of the series of each class for which it receives Preferred Market Maker orders.<sup>5</sup> In addition, to receive a participation entitlement for orders entered into the COB, the Preferred Market Maker must be quoting at the best net priced bid/offer when the order is received.<sup>6</sup> For orders in a COA, the Preferred Market Maker must: (1) At the beginning of the auction, be quoting at either (A) the best bid/offer on the CBOE in at least one of the component series of the complex order, or (B) the best net priced bid/offer for the complex order; and (2) be quoting at the best net priced bid/offer at the conclusion of the auction.<sup>7</sup>

CBOE prohibits an order flow provider from notifying a Preferred Market Maker of its intention to submit a preferred complex order so that the Preferred Market Maker could change its quotation to match the national best bid or offer ("NBBO") immediately prior to the submission of the preferred order.<sup>8</sup> CBOE states that CBOE Rule 4.18, "Prevention of the Misuse of Material, Nonpublic Information," prohibits this misuse of material non-public information.<sup>9</sup> CBOE represents that it will conduct surveillance for, and enforce against, such violations.<sup>10</sup>

The participation entitlement for a complex order is based on the contracts remaining after equivalent net priced orders and quotes on the EBook and equivalent net priced public customer complex orders resting in the COB that have priority over Preferred Market Makers have been filled.<sup>11</sup> After these orders have been filled, the participation entitlement for a Preferred Market Maker that satisfies the requirements in CBOE Rule 8.13, Interpretation and Policy .01 is: (1) 40% when there are two or more Market Makers also quoting at the best net priced bid/offer execution price; and (2) 50% when there is one other Market Maker quoting at the best net priced bid/offer execution price.<sup>12</sup> The participation entitlement percentages for complex orders are the same as the

<sup>5</sup> See CBOE Rule 8.13, Interpretation and Policy .01(c).

<sup>6</sup> See CBOE Rule 8.13, Interpretation and Policy .01(a)(ii).

<sup>7</sup> See CBOE Rule 8.13, Interpretation and Policy .01(a)(iii).

<sup>8</sup> See Notice, *supra* note 3, at note 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See CBOE Rule 8.13, Interpretation and Policy .01(b)(ii).

<sup>12</sup> See CBOE Rule 8.13, Interpretation and Policy .01(b).

<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. 60746 (September 30, 2009), 74 FR 51626 ("Notice").

<sup>4</sup> See CBOE Rule 8.13, Interpretation and Policy .01(a).

participation entitlement percentages for individual options orders currently provided under CBOE Rule 8.13(c). If a Preferred Market Maker receives a participation entitlement for a complex order in the COB or a COA, no other participation entitlement provided in the CBOE's rules for complex orders will apply to the complex order.<sup>13</sup>

#### *B. Clarification of the Participation Entitlement for Individual Orders*

CBOE is amending CBOE Rule 8.13(b) to more clearly reflect the operation of the Hybrid System with respect to Preferred Market Makers. Specifically, CBOE is revising CBOE Rule 8.13(b) to indicate that the Hybrid System is programmed so that the recipient of a Preferred Market Maker order will receive a participation entitlement if: (1) The Preferred Market Maker has an appointment/allocation in the relevant options class; and (2) the Preferred Market Maker is quoting at the CBOE's best bid or offer. CBOE is adding paragraph (d) to CBOE Rule 8.13, which will incorporate the quoting obligations applicable to Preferred Market Makers that are currently set forth in CBOE Rule 8.13(b)(iii), including the requirement that a Preferred Market Maker provide continuous electronic quotes, as defined in CBOE Rule 1.1(ccc), in at least 90% of the series of each class for which it receives Preferred Market Maker orders. CBOE notes that this quoting obligation, like other Market Maker quoting obligations, is subject to CBOE market performance, surveillance, and disciplinary programs to assess and enforce compliance.

### **III. Discussion and Commission Findings**

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.<sup>14</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>15</sup> which requires, in part, that the rules of a national securities exchange be designed to prevent fraudulent and

manipulative acts and practices, to promote just and equitable principles of trade, 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. The proposal establishes a Preferred Market Maker participation entitlement for complex orders submitted to the COB and the COA. Under the proposal, the Preferred Market Maker participation entitlement percentages for complex orders are the same as the Preferred Market Maker participation entitlement percentages provided currently in CBOE Rule 8.13(c) for individual options orders.<sup>16</sup> Because the proposal does not provide a participation entitlement for complex orders that is greater than the currently acceptable participation entitlement threshold for individual options orders, the Commission does not believe that the proposal will negatively impact quote competition for complex orders on CBOE. Under the proposal, the remaining portion of each complex order will still be allocated based on the competitive bidding of market participants.

A Preferred Market Maker must satisfy certain requirements to be eligible for a participation entitlement in complex orders. Specifically, a Preferred Market Maker must comply with the quoting obligations applicable to its Market Maker type under the CBOE's rules and must provide continuous electronic quotes (as defined in CBOE Rule 1.1(ccc)) in at least 90% of the series for each class for which it receives Preferred Market Maker orders.<sup>17</sup> In addition, to receive a participation entitlement for orders entered into the COB, the Preferred Market Maker must be quoting at the best net priced bid/offer when the order

is received.<sup>18</sup> For orders in a COA, the Preferred Market Maker must: (1) At the beginning of the auction, be quoting at either (A) the best bid/offer on the CBOE in at least one of the component series of the complex order, or (B) the best net priced bid/offer for the complex order; and (2) be quoting at the best net priced bid/offer at the conclusion of the auction.<sup>19</sup> These quoting requirements are analogous to the current requirement in CBOE Rule 8.13(b)(ii) that a Preferred Market Maker be quoting at the CBOE's best bid/offer to be eligible for a participation entitlement for an individual options order.

The Commission believes that it is critical that, to be eligible for a participation entitlement for a complex order, a Preferred Market Maker may not step up and match the CBOE's best bid/offer after it receives an order, but must be publicly quoting at the CBOE's best net priced bid/offer when the order is received (for orders in the COB), or, for orders in a COA, quoting at either the CBOE's best bid/offer for a least one component of a complex order or at the CBOE's best net priced bid/offer for the complex order at the start of the auction.<sup>20</sup> As noted above, CBOE states that it would be a misuse of material non-public information in violation of CBOE Rule 4.18 for an order flow provider to notify a Preferred Market Maker of its intention to submit a preferred complex order immediately prior to sending the order to allow the Preferred Market Maker to modify its quotation.<sup>21</sup> CBOE represents that it will conduct surveillance for, and enforce against, such violations of its rules.<sup>22</sup>

The Commission emphasizes that approval of this proposal does not affect a broker-dealer's duty of best execution. The Commission has discussed the duty of best execution in previous orders approving proposals to implement participation entitlements,<sup>23</sup> and hereby incorporates those discussions by reference into this order.

Finally, the Commission finds that the changes to CBOE Rule 8.13(b) are

<sup>13</sup> See CBOE Rule 8.13, Interpretation and Policy .01(b)(iii). However, if a complex order executes, in part, against a Preferred Market Maker's interest in the COB or the COA and, in part, against the Preferred Market Maker's interest in the individual series legs in the EBook, a Preferred Market Maker entitlement may apply on both the individual series legs and on the COB or COA execution. See Notice, *supra* note 3, at note 5.

<sup>14</sup> In approving this 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>15</sup> 15 U.S.C. 78f(b)(5).

<sup>16</sup> The Commission also has approved similar participation entitlement percentages for individual options orders on other options exchanges. See, e.g., Securities Exchange Act Release Nos. 56269 (August 15, 2007), 72 FR 47086 (August 22, 2007) (File No. SR-Amex-2007-75) (order approving an American Stock Exchange directed order program that provides a 40% participation entitlement on directed orders) ("Amex Order"); 51759 (May 27, 2005), 70 FR 32860 (June 6, 2005) (File No. SR-Phlx-2004-91) (order approving a directed order program on the Philadelphia Stock Exchange that allows the directed order recipient to receive a 40% participation entitlement on designated orders) ("Phlx Order"); and 51818 (June 10, 2005), 70 FR 35146 (June 16, 2005) (File No. ISE-2005-18) (order approving a preferencing program on the International Securities Exchange that allows a preferred market maker to receive a 40% participation entitlement on designated orders).

<sup>17</sup> See CBOE Rule 8.13, Interpretation and Policy .01(c). This quoting obligation also applies currently to the Preferred Market Maker participation entitlement for individual options orders.

<sup>18</sup> See CBOE Rule 8.13, Interpretation and Policy .01(a)(ii).

<sup>19</sup> See CBOE Rule 8.13, Interpretation and Policy .01(a)(iii).

<sup>20</sup> A Preferred Market Maker will not be allocated a total quantity greater than the quantity it is quoting at the best net priced bid/offer execution price. See CBOE Rule 8.13, Interpretation and Policy .01(b)(i).

<sup>21</sup> See notes 8 and 9, *supra*, and accompanying text.

<sup>22</sup> See note 10, *supra*, and accompanying text.

<sup>23</sup> See, e.g., Amex Order and Phlx Order, *supra* note 16; and Securities Exchange Act Release No. 51779 (June 2, 2005), 70 FR 33564 (June 8, 2005) (File No. SR-CBOE-2004-71) (order approving a modification of the participation entitlement for Preferred Designated Primary Market Makers).

consistent with the Act because they clarify the operation of the Hybrid Market System with respect to Preferred Market Maker participation entitlements.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>24</sup> that the proposed rule change (File No. SR-CBOE-2009-070) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-27258 Filed 11-10-09; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60933; File No. SR-FINRA-2008-067]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, to Adopt Rules Governing Financial Responsibility in the Consolidated FINRA Rulebook

November 4, 2009.

#### I. Introduction

On December 30, 2008, the Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission"), 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 to adopt a new, consolidated set of financial responsibility rules as part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook")<sup>3</sup> without material change. The proposed rule change was

published for comment in the **Federal Register** on January 28, 2009.<sup>4</sup> The Commission received two comment letters in response to the proposed rule change,<sup>5</sup> along with one letter from FINRA addressing certain of the comments.<sup>6</sup> FINRA filed Amendment No. 1 to the proposed rule change on June 17, 2009.<sup>7</sup> FINRA filed Amendment No. 2 to the proposed rule change on June 30, 2009.<sup>8</sup> This Order approves the proposed rule change, as modified by Amendment No. 1 and issues notice of, and solicits comments on, Amendment No. 2, and approves the filing, as modified by Amendment No. 2, on an accelerated basis.

#### II. Description of the Proposed Rule Change

The proposed rule change would adopt FINRA Rules 4110 (Capital Compliance), 4120 (Regulatory Notification and Business Curtailment), 4130 (Regulation of Activities of Section 15C Members Experiencing Financial and/or Operational Difficulties), 4140 (Audit) and 4521 (Notifications, Questionnaires and Reports) in the Consolidated FINRA Rulebook and delete NASD Rules 3130 and 3131, NASD IM-3130, Incorporated NYSE Rules 312(h), 313(d), 325, 326, 328, 416.20, 418, 420, 421 and NYSE Rule Interpretations 313(d)/01, 313(d)/02, 325(c)(1), 325(c)(1)/01 and 416/01. FINRA also proposed to revise FINRA Rule 9557 (Procedures for Regulating Activities Under Rules 4110, 4120 and 4130 Regarding a Member Experiencing Financial or Operational Difficulties) and FINRA Rule 9559 (Hearing

Procedures for Expedited Proceedings Under the Rule 9550 Series). Lastly, FINRA proposed to make conforming revisions to Section 4(g) of Schedule A to the FINRA By-Laws.

#### A. Background

Currently, both NASD and NYSE Rules<sup>9</sup> contain provisions governing financial responsibility. These provisions have played an important role in supporting the SEC's minimum net capital and other financial responsibility requirements by establishing criteria promoting the permanency of member's capital, requiring the review and approval of material financial transactions and establishing criteria intended to identify member firms approaching financial difficulty and to monitor their financial and operational condition. For that reason, FINRA has placed high priority on expeditiously developing the unified set of proposed rules for inclusion in the Consolidated FINRA Rulebook. FINRA believes that the proposed rules would incorporate many of the provisions in the existing rules but would streamline and reorganize the provisions. In addition, FINRA has tiered many provisions to apply only to those firms that clear or carry customer accounts.<sup>10</sup>

#### B. Proposed FINRA Rule 4110 (Capital Compliance)

##### 1. Authority to Increase Capital Requirements

Proposed FINRA Rule 4110(a), based primarily on NYSE Rule 325(d), would enable FINRA to prescribe greater net capital requirements for carrying and clearing members, or require any such member to restore or increase its net capital or net worth, when deemed necessary for the protection of investors or in the public interest. The authority to act under the proposed rule would reside with FINRA's Executive Vice President charged with oversight for financial responsibility (or his or her written officer delegate) (referred to as "FINRA's EVP"). To execute such authority, FINRA would be required to issue a notice pursuant to Proposed FINRA Rule 9557 (a "Rule 9557 notice"). FINRA believes that proposed FINRA Rule 9557, much like the current rule, would afford a member adequate safeguards because, among other things,

<sup>9</sup> For convenience, the Incorporated NYSE Rules are referred to as the "NYSE Rules."

<sup>10</sup> All requirements set forth in the proposed rules that would apply to firms that clear or carry customer accounts would also apply to firms that operate pursuant to the exemptive provisions of SEA Rule 15c3-3(k)(2)(i). For further clarification in response to commenter concerns, see Section 2 under Item II C. See also *infra* note 12.

<sup>4</sup> See Securities Exchange Act Release No. 59273 (January 22, 2009), 74 FR 4992 (January 28, 2009) (hereinafter the "Proposing Release").

<sup>5</sup> See letters from Holly H. Smith and Eric A. Arnold of Sutherland, Asbill & Brennan, LLP on behalf of the Committee of Annuity Insurers dated February 18, 2009 (the "CAI Letter") and Julian Rainero of Bracewell & Giuliani, LLP dated April 17, 2009 (the "B&G Letter").

<sup>6</sup> See letter from Adam H. Arkel of FINRA, dated April 14, 2009 (the "FINRA Letter").

<sup>7</sup> Amendment No. 1 is a technical amendment designed to clarify one sentence in the rule text.

<sup>8</sup> Amendment No. 2 adds Supplementary Material to the proposed FINRA Rules 4110, 4120 and 4521 to clarify that, for purposes of each of those rules, all requirements that apply to a member that clear or carry customer accounts also shall apply to any member that, operating pursuant to the exemptive provisions of Rule 15c3-3(k)(2)(i), either clears customer transactions pursuant to such exemptive provisions or holds customer funds in a bank account established thereunder. FINRA explained this aspect of the rule change in its Notice to Members 08-23, and in greater detail in its original filing with the Commission. Further, one of the two commenters commented on this aspect of the proposed rule changes (See the CAI Letter). FINRA believes that incorporating this Supplementary Material will reduce any possible ambiguity with respect to this issue.

<sup>24</sup> 15 U.S.C. 78s(b)(2).

<sup>25</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.

<sup>3</sup> The current FINRA rulebook includes, in addition to FINRA Rules, (1) NASD Rules and (2) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). For more information about the rulebook consolidation process, see *FINRA Information Notice*, March 12, 2008 (Rulebook Consolidation Process).