

investment restrictions of the Series and will be consistent with the policies as set forth in the registration statement of the Series.

#### Applicants' Conditions

Applicants agree that the order granting the requested relief shall be subject to the following conditions:

1. Each Series will comply with section 12(d)(1)(F) in all respects except for the sales load limitation of section 12(d)(1)(F)(ii).

2. Any sales charges, distribution-related fees, and service fees relating to Units of a Series, when aggregated with any sales charges, distribution-related fees, and service fees paid by the Series relating to its acquisition, holding, or disposition of securities of the underlying Funds, shall not exceed the limits set forth in rule 2830 of the NASD Conduct Rules.

3. No Series will acquire securities of any Fund which, at the time of acquisition, owns securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

4. No Series will terminate within thirty days of the termination of any other Series that holds shares of one or more common Funds.

5. The prospectus of each Series and any sales literature or advertising that mentions the existence of an in-kind distribution option will disclose that holders of Units who elect to receive Fund shares will incur any applicable rule 12b-1 fees.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 23918; 812-11270]

#### Smith Breeden Trust, et al.; Notice of Application

July 21, 1999.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of an application under section 12(d)(1)(J) of the Investment Company Act of 1940 ("Act") for an exemption from section 12(d)(1)(G)(i)(II) of the Act.

#### SUMMARY OF THE APPLICATION:

Applicants request an order to permit funds of funds relying on section

12(d)(1)(G) of the Act to invest in securities and other instruments.

**APPLICANTS:** Smith Breeden Trust ("Trust"), Smith Breeden Series Fund ("Series Fund"), and Smith Breeden Associates, Inc. ("SBA").

**FILING DATES:** The application was filed on August 25, 1998 and amended on December 22, 1998 and April 16, 1999. Applicants have agreed to file an amendment, the substance of which is included in this notice, during the notice period.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 16, 1999 and should be accompanied by proof of service on applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Applicants 100 Europa Drive, Suite 200 Chapel Hill, NC 27514.

**FOR FURTHER INFORMATION CONTACT:** Rachel H. Graham, Senior Counsel, at (202) 942-0583, or Christine Y. Greenlees, Branch Chief, at (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee from the Commission's Public Reference Branch, 450 Fifth Street, NW, Washington, DC 20549-0102 (telephone (202) 942-8090).

#### Applicants' Representations

1. Each of the Trust and the Series Fund is organized as a Massachusetts business trust and registered under the Act as an open-end management investment company. The Trust currently offers five series, including Smith Breeden U.S. Equity Market Plus Fund ("Equity Fund"), Smith Breeden European Market Fund ("Europe Fund"), and Smith Breeden Asian/Pacific Market Fund ("Asia Pacific Fund") (collectively, the "Index Plus Funds"). The series Fund currently offers two series, one of which is Smith

Breeden Short Duration U.S. Government Fund ("Short Fund"). SBA, as investment adviser registered under the Investment Advisers Act of 1940, serves as investment adviser for each series of the Trust and of the Series Fund (each a "Fund"). Applicants request that the relief also apply, to any existing or future open-end management investment company or series thereof advised by SBA (together with the Index Plus Funds, the "Upper Tier Funds") that wishes to invest in a registered open-end management investment company or series thereof that is advised by SBA and is part of the same "group of investment companies" (as defined in section 12(d)(1)(G)(ii) of the Act) (together with the series of the trust and of the Series Fund, excluding the Index Plus Funds, the "Underlying Funds") as the investing Upper Tier Fund.<sup>1</sup>

2. The Equity Fund seeks to provide a total return greater than that of the Standard & Poor's 500 Composite Stock Price Index. To achieve this objective, the Equity Fund proposes to invest in shares of the Short Fund while also investing in futures and options, equity swap contracts, and other investments (collectively, "Index Securities"). Similarly, the Europe Fund and the Asia Pacific Fund each propose to invest in both shares of the Short Fund and Index Securities in order to obtain a total return greater than that of indices reflecting, respectively, the major equity markets of Europe and of the Asia/Pacific region. The Short Fund seeks to provide a high level of current income by investing primarily in mortgage-backed securities issued by the U.S. Government, its agencies, and instrumentalities. Applicants state that, by purchasing shares of the short Fund, each Index Plus Fund will avoid the need to duplicate the strategies and positions of the Short Fund and will lower the transaction cost incurred by the Index Plus Funds. The Index Plus Funds and other Upper Tier Funds also want the flexibility to invest in other securities and financial instruments, including financial futures and options, swaps, and reverse repurchase agreements ("Other Securities").

3. Applicants state that it is SBA's practice to reduce its advisory fees and bear certain expenses to the extent that a Fund's total annual operating expenses (excluding extraordinary expenses) exceed a specified percentage of net assets. Applicants represent that

<sup>1</sup> All existing entities that currently intend to rely on the order are named as applicants. Any Upper Tier Fund that may rely on this order in the future will do so only in accordance with the terms and conditions of the application.

SBA will waive the duplicative portion of an Index Plus Fund's advisory fee to the extent that an Index Plus invests in shares of the Short Fund. Applicants further represent that the Index Plus Funds will not pay any sales charges or distribution fees in connection with their investment in shares of the Short Fund.

### Applicants' Legal Analysis

1. Section 12(d)(1)(A) of the Act provides that no registered investment company may acquire securities of another investment company if such securities represent more than 3% of the acquired company's outstanding voting stock or more than 5% of the acquiring company's total assets, or if such securities, together with the securities of other investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or cause more than 10% of the acquired company's voting stock to be owned by investment companies.

2. Section 12(d)(1)(G) of the Act provides that section 12(d)(1) will not apply to securities of an acquired company purchased by an acquiring company if: (i) The acquiring company and the acquired company are part of the same group of investment companies; (ii) the acquiring company holds only securities of acquired companies that are part of the same group of investment companies, government securities, and short-term paper; (iii) the aggregate sales loads and distribution-related fees of the acquiring company and the acquired company are not excessive under rules adopted pursuant to section 22(b) or section 22(c) of the Act by a securities association registered under section 15A of the Securities Exchange Act of 1934 or by the Commission; and (iv) the acquired company has a policy that prohibits it from acquiring securities of registered open-end management investment companies or registered unit investment trusts in reliance on section 12(d)(1) (F) or (G). Applicants state that the proposed arrangement would comply with the provisions of section 12(d)(1)(G), but for the fact that each Index Plus Fund's policies contemplate that it will invest in Index Securities and Other Securities while also investing in shares of the Short Fund.

3. Section 12(d)(1)(J) of the Act provides that the Commission may

exempt persons or transactions from any provision of section 12(d)(1) if, and to the extent that, the exemption is consistent with the public interest and the protection of investors. Applicants assert that permitting the Index Plus Funds and other Upper Tier Funds to invest in securities as described in the application would not raise any of the concerns that the requirements of section 12(d)(1)(G) were designed to address.

### Applicants' Condition

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. Before approving any advisory contract under section 15 of the Act, the board of trustees of an Index Plus or other Upper Tier Fund, including a majority of the trustees who are not "interested persons" as defined in section 2(a)(19) of the Act, will find that advisory fees, if any, charged under the contract are based on services provided that are in addition to, rather than duplicative of, services provided pursuant to any Underlying Fund's advisory contract. This finding, and the basis upon which it was made, will be recorded fully in the minute books of the Index Plus Fund or Upper Tier Fund.

2. Applicants will comply with all provisions of section 129d(1)(G), except for section 12(d)(1)(G)(i)(II) to the extent that it restricts an Index Plus Fund or Other Upper Tier Fund from investing in Index Securities and Other Securities as described in the application.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-41625; File No. SR-CBOE-99-25]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to the Market-Maker Surcharge Fee Schedule

July 19, 1999.

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>

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

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

notice is hereby given that on June 17, 1999, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The CBOE is proposing to make changes to its fee schedule pursuant to CBOE rule 2.40, *Market-Maker Surcharge for Brokerage*.<sup>3</sup>

### 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 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

Pursuant to CBOE Rule 2.40, the Equity Floor Procedure Committee ("Committee") approved the following fees for the following option classes:

Option class	Market-maker surcharge (per contract)	Order book official brokerage rate (per contract) <sup>4</sup>
AboveNet Communications ...	\$0.08	\$0.00
Prodigy Communications Corp. ....	0.03	0.00

The fees for AboveNet will be effective retroactive to May 10, 1999, and the fees for Prodigy will be effective

<sup>3</sup> See Securities Exchange Act Release No. 41121 (February 26, 1999), 64 FR 11523 (March 9, 1999) (order approving CBOE Rule 2.40).

<sup>4</sup> The surcharge will be used to reimburse the Exchange for the reduction in the Order Book Official brokerage rate from \$0.20 in the relevant option classes. Any remaining funds will be paid to Stationary Floor Brokers as provided in Exchange Rule 2.40.