rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the BSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BSE–2008–47 and should be submitted on or before November 17, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25536 Filed 10–24–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58817; File No. SR–CBOE–2008–105]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Registered Representative Fee and an Options Regulatory Fee

October 20, 2008.

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 October 14, 2008, the Chicago Board Options Exchange, Incorporated 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 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

Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') proposes to amend its Fees Schedule to eliminate registered representative fees and institute a new transaction-based ''Options Regulatory Fee.'' The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

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

In its filing with the Commission, 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. 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

Background

Registered representative fees (''RR Fees'') as well as other regulatory fees collected by the Exchange are intended to cover a portion of the cost of the Exchange's regulatory programs.[3] The Exchange has assessed RR Fees since 1990. Each CBOE member firm that registers a financial advisor (or registered representative), Registered Options Principal or Financial/Operations Principal is assessed RR Fees based on the action associated with the registration. There are annual fees as well as initial, transfer and termination fees.[4] Today all options exchanges, regardless of size, charge similar registered representative fees.

Some member firms have raised concerns that the current self-regulatory organization (''SRO'') regulatory fee structure, in which every options exchange charges similar fees to their member firms, does not appear justified. Each RR Fee is a fixed amount of money a member firm pays to the Exchange for each registered representative within the firm. The Exchange believes that RR Fees are no longer the most equitable manner to assess regulatory fees because today there are more Internet and discount brokerage firms with few registered representatives that pay little in RR Fees and fewer traditional brokerage firms with many registered representatives. The regulatory effort the Exchange expends to review the transactions of each type of firm is not commensurate with the number of registered representatives that each firm employs.

In addition, due to the manner in which RR Fees are charged, it is possible for a member firm to restructure its business to avoid paying these fees altogether. A firm can avoid RR Fees by terminating its CBOE membership and sending its business to the Exchange through another member firm, even an affiliated firm that has many fewer registered representatives. If member firms terminated their memberships to avoid RR Fees, the Exchange would suffer the loss of a major source of funding for its regulatory programs. The Exchange notes that one member firm has already terminated its membership to avoid RR Fees. The Exchange believes other firms will do the same unless the Exchange changes it regulatory fee structure.

Options Regulatory Fee

In order to address the concerns raised by member firms and to avoid the possibility of losing significant regulatory fee revenue, the Exchange proposes to eliminate RR Fees and replace them with a transaction-based ''Options Regulatory Fee'' (''ORF''). The ORF would be $.0045 per contract and would be assessed by the Exchange to each member for all options transactions executed by the member that are cleared by The Options Clearing Corporation (''OCC'') in the customer range (i.e., that clear in the customer account of the member's clearing firm at OCC), excluding P/A Orders as defined in the Options Intermarket Linkage Plan (''Linkage''). The ORF would be imposed upon all such transactions executed by a member, even if such transactions do not take place on the Exchange.[5] The ORF would be collected

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[17] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] In addition to RR Fees, CBOE derives revenue associated with its regulatory programs from Designated Examining Authority (''DEA'') Fees and Communication Review Fees. These fees are discussed further below.

[4] *See* Section 12(A) of the CBOE Fees Schedule and CBOE Rule 2.22.

[5] The ORF would apply to all ''B'', ''C'', and ''W'' account origin code orders executed by a member on the Exchange. CBOE order origin codes are defined in CBOE Regulatory Circular RG08–105. Exchange rules require each member to record the appropriate account origin code on all orders at the

indirectly from members through their clearing firms by OCC on behalf of the Exchange.

The ORF would become effective on January 1, 2009, at which time RR Fees would be eliminated. The ORF is designed to recover a portion of the costs to the Exchange of the supervision and regulation of its members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. The Exchange has set the ORF at a rate that it anticipates will approximately replace the amount of revenue that would be lost from the elimination of RR Fees.

The ORF would not be charged for member options transactions because members incur the costs of owning memberships and through their memberships are charged transaction fees, dues and other fees that are not applicable to non-members.[6] The dues and fees paid by members go into the general funds of the Exchange, a portion of which is used to help pay the costs of regulation. Thus, the Exchange believes members are already paying their fair share of the costs of regulation.[7] Moreover, because the ORF would replace RR Fees, which relate to a member's customer business, the Exchange believes it is appropriate to charge the ORF only to transactions that clear as customer at the OCC.

The Exchange expects that member firms will pass-through the ORF to their customers in the same manner that firms pass-through to their customers the fees charged by SROs to help the SROs meet their obligation under Section 31 of the Exchange Act.

The Exchange believes that revenue generated from the ORF, when combined with all of the Exchange's other regulatory fees, will be less than or equal to the Exchange's regulatory costs. The total amount of regulatory fees collected by the Exchange is significantly less than the regulatory costs incurred by the Exchange on an annual basis. In general, on a year over year basis, regulatory fee revenue (not including regulatory fine revenue) only covers about 65% of the Exchange's regulatory costs.

RR Fees make up the largest part of the Exchange's total regulatory fee revenue. The Exchange collects other regulatory revenues from DEA Fees,[8] and Communication Review Fees.[9] The Exchange notes that its regulatory responsibilities with respect to member compliance with options sales practice rules have been allocated to FINRA under a 17d–2 agreement. The ORF is not designed to cover the cost of options sales practice regulation.

The Exchange would monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The Exchange expects to monitor regulatory costs and revenues at a minimum on an annual basis. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange would adjust the ORF by submitting a fee change filing to the Commission. The Exchange would notify members of adjustments to the ORF via regulatory circular.

The Exchange believes the proposed ORF is equitably allocated because it would be charged to all members on all their customer options business (as defined above). The Exchange believes the proposed ORF is reasonable because it will raise revenue related to the amount of customer options business conducted by members, and thus the amount of Exchange regulatory services those members will require, instead of how many registered persons a particular member firm employs.[10]

The Exchange believes it is reasonable and appropriate for the Exchange to charge the ORF for options transactions regardless of the exchange on which the transactions occur. The Exchange has a statutory obligation to enforce compliance by its members and their associated persons with the Exchange Act and the rules of the Exchange and to surveil for other manipulative conduct by market participants (including non-members) trading on the Exchange. The Exchange cannot effectively surveil for such conduct without looking at and evaluating activity across all options markets. Many of the Exchange's market surveillance programs require the Exchange to look at and evaluate activity across all options markets, such as surveillance for position limit violations, manipulation, insider trading, frontrunning, contrary exercise advice violations and locked/crossed markets in connection with the Linkage.[11] Also, CBOE and the other options exchanges are required to populate a consolidated options audit trail (''COATS'') system in order to surveil member activities across markets.[12]

In addition to its own surveillance programs, the Exchange works with other SROs and exchanges on intermarket surveillance related issues.[13] Through its participation in the Intermarket Surveillance Group (''ISG'') the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket

time of entry in order to allow the Exchange to properly prioritize and route orders and assess transaction fees pursuant to the rules of the Exchange and report resulting transactions to the OCC. The Exchange represents that it has surveillances in place to verify that members mark orders with the correct account origin code.

[6] For example, non-broker-dealer customers generally are not charged transaction fees to trade equity options on the Exchange.

[7] If the Exchange changes its method of funding regulation or if circumstances otherwise change in the future, the Exchange may decide to impose the ORF or a separate regulatory fee on members if the Exchange deems it advisable.

[8] The Exchange assesses the DEA Fee to each firm for which the SEC has designated the Exchange to be the DEA pursuant to SEC Rule 17d–1. The DEA Fee is intended to reimburse the Exchange for its costs associated with examining member firms and is generally the same throughout the SRO community. Currently the rate is set at $0.40 per $1,000.00 of gross revenue for the firm. *See* Section 12(C) of the CBOE Fees Schedule.

[9] Although the Financial Industry Regulatory Authority (''FINRA'') is the SRO that reviews most securities industry advertisements and other communications, a number of firms still prefer to have CBOE review their materials. These requests are charged at $150 per regular occurrence (unless it involves extended review, such as a book) and $1,000 for an expedited, two-day turnaround. *See* Section 12(E) of the CBOE Fees Schedule.

[10] The Exchange expects that implementation of the proposed ORF will result generally in many traditional brokerage firms paying less regulatory fees while Internet and discount brokerage firms will pay more.

[11] The Exchange and other options SROs are parties to a 17d–2 agreement allocating among the SROs regulatory responsibilities relating to compliance by their common members with rules for expiring exercise declarations (formerly known as contrary exercise advices). *See* Securities Exchange Act Release No. 56941 (December 11, 2007), 72 FR 71723 (December 18, 2007). *See also* Securities Exchange Act Release No. 57649 (April 11, 2008), 73 FR 20976 (April 17, 2008) (approving an amendment which sought to add The Nasdaq Stock Market, LLC as a participant to such agreement). The Exchange and other options SROs have recently filed with the Commission an amendment to this agreement to include the allocation of examination responsibility with respect to options position limits. The Exchange retains significant regulatory responsibilities under this agreement. The Exchange notes within the last year it brought charges against members in two separate cases relating to member activity on CBOE as well as on another exchange. One case involved a contrary exercise advice violation and the other a position limit violation.

[12] COATS effectively enhances intermarket options surveillance by enabling the options exchanges to reconstruct markets promptly, effectively surveil them and enforce order handling, firm quote, trade reporting and other rules.

[13] Recently the Exchange, at the direction of the SEC, led a sweep examination of member firms relating to compliance with Regulation SHO that involved reviewing data with respect to members of other exchanges and coordinating such reviews with other exchanges. As a result of this examination, the Exchange has been assisting FINRA with a Regulation SHO review of a firm for which the Exchange is not the DEA.

manipulation and trading abuses.[14] The Exchange's participation in ISG helps it to satisfy the Exchange Act requirement that it have coordinated surveillance with markets on which security futures are traded and markets on which any security underlying security futures are traded to detect manipulation and insider trading.[15]

The Exchange believes that charging the ORF across markets will avoid having members direct their trades to other markets in order to avoid the fee and to thereby avoid paying for their fair share of regulation. If the ORF did not apply to activity across markets, then members would send their orders to the least cost, least regulated exchange. Other exchanges would, of course, be free to impose a similar fee on their member's activity, including the activity of those members on CBOE.

Finally, there is established precedent for an SRO charging a fee across markets, namely, FINRA's Trading Activity Fee.[16] While the Exchange does not have all of the same regulatory responsibilities as FINRA, the Exchange believes (as described above) that its broad regulatory responsibilities with respect to its members' activities, irrespective of where their transactions take place, supports a regulatory fee applicable to transactions on other markets. Unlike the TAF, the ORF would apply only to a member's customer options transactions.

Related Rule Text Changes: In addition to being set forth in Section 12 of the CBOE Fees Schedule, DEA Fees and RR Fees are also set forth in CBOE Rules 2.22(a) and (b), respectively. The Exchange proposes to delete paragraph (b) from Rule 2.22 to reflect the elimination of RR Fees. The Exchange proposes to delete paragraph (a) from Rule 2.22 relating to DEA Fees because the Exchange does not believe it is necessary for those fees to be set forth in the rule since they are included on the CBOE Fees Schedule. Also, as a housekeeping matter, the Exchange proposes to delete Interpretation and Policy .01 to Rule 2.22 because it relates to charges imposed for services rendered by Order Book Officials (''OBOs'') and the Exchange no longer employs OBOs.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (''Act''),[17] in general, and furthers the objectives of Section 6(b)(4) [18] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes that the ORF is objectively allocated to CBOE members because it would be charged to all members on all their transactions that clear as customer at the OCC. Moreover, the Exchange believes the ORF ensures fairness by assessing higher fees to those member firms that require more Exchange regulatory services based on the amount of customer options business they conduct.

The Exchange believes the initial level of the fee is reasonable because it relates to the recovery of the costs of supervising and regulating members and it is expected to equal the Exchange's revenue from RR Fees for 2007. The Exchange notes that the Commission has addressed the funding of an SRO's regulatory operations in the Concept Release Concerning Self-Regulation [19] and the release on the Fair Administration and Governance of Self-Regulatory Organizations.[20] In the Concept Release, the Commission states that: ''Given the inherent tension between an SRO's role as a business and as a regulator, there undoubtedly is a temptation for an SRO to fund the business side of its operations at the expense of regulation.'' [21] In order to address this potential conflict, the Commission proposed in the Governance Release rules that would require an SRO to direct monies collected from regulatory fees, fines, or penalties exclusively to fund the regulatory operations and other programs of the SRO related to its regulatory responsibilities.[22] The Exchange has designed the ORF to generate revenues that, when combined with all of the Exchange's other regulatory fees, will be less than or equal to the Exchange's regulatory costs, which is consistent with the Commission's view that regulatory fees be used for regulatory purposes and not to support the Exchange's business side.

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 that is 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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [23] and subparagraph (f)(2) of Rule 19b–4 [24] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–105 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–CBOE–2008–105. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will

[14] ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

[15] *See* Exchange Act Section 6(h)(3)(I).

[16] *See* Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003).

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(4).

[19] *See* Securities Exchange Act Release No. 50700 (November 18, 2004), 69 FR 71256 (December 8, 2004) (''Concept Release'').

[20] *See* Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126 (December 8, 2004) (''Governance Release'').

[21] Concept Release at 71268.

[22] Governance Release at 71142.

[23] 15 U.S.C. 78s(b)(3)(A).

[24] 17 CFR 240.19b–4(f)(2).

post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–CBOE–2008–105 and should be submitted on or before November 17, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Florence E. Harmon,

Acting Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58823; File No. SR–CBOE–2007–30]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Amendments to Rule 9.21 (Communications to Customers)

October 21, 2008.

On March 19, 2007, the Chicago Board Options Exchange, Incorporated (''CBOE'' 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 (''Exchange Act'') [1], and Rule 19b–4 thereunder.[2] CBOE filed Amendment No. 1 to the proposed rule change on June 9, 2008.[3] Notice of the proposal, as modified by Amendment No. 1, was published for comment in the **Federal Register** on July 17, 2008.[4] The Commission received one comment letter regarding the proposed rule change [5] and a response to comments from CBOE.[6] This order approves the proposed rule change.

I. Description of the Proposed Rule Change

On December 23, 2002, the Commission published final rules that exempt standardized options, as defined in Rule 9b–1 [7] under the Exchange Act, that are issued by a registered clearing agency and traded on a registered national securities exchange or on a registered national securities association, from all provisions of the Securities Act (other than the anti-fraud provisions) and the registration requirements of the Exchange Act.[8] Because the Securities Act of 1933 (''Securities Act'') [9] and the rules thereunder (other than the anti-fraud provisions) are no longer applicable to such standardized options, CBOE proposed to remove elements of the Securities Act that are embedded in CBOE Rule 9.21 (''Communications to Customers''). In particular, CBOE proposed to remove all references to a ''prospectus'' from Rule 9.21. Prospectuses are no longer required for such standardized options, and the Options Clearing Corporation has, in fact, ceased publication of a prospectus.[10] In addition, the proposed amendments expand the types of communications governed by Rule 9.21 to include independently prepared reprints and other communications between a member or member organization and a customer, exempt certain options communications from the pre-approval requirement by a Registered Options Principal (''ROP'') and update and reorganize Rule 9.21. The proposed amendments are similar to amendments filed with the Commission by the Financial Industry Regulatory Authority, Inc. (''FINRA'').[11]

A. Deletion of Certain Provisions

As noted above, CBOE Rule 9.21 contains a number of references to a prospectus and other Securities Act requirements. The Exchange proposed to delete the following from Rule 9.21:

(1) Rule 9.21(a)(iv), which references the Securities Act definition of prospectus,

(2) Rule 9.21(d), which incorporates Securities Act principles in that it prohibits written material concerning options from being furnished to any person who has not previously or contemporaneously received the ODD,

(3) Rule 9.21(e)(ii), which defines the term ''Educational Material,'' [12]

(4) Interpretation and Policy .02A of Rule 9.21, which outlines what is permitted in an ''Advertisement,'' [13] and

(5) Interpretation and Policy .03 of Rule 9.21, which concerns educational material.[14]

B. Redesignation of Rule 9.21(a) to Proposed Rule 9.21(d) and Related Amendments

Rule 9.21(a) currently contains an outline of the ''General Rule'' for options communications. CBOE proposed to redesignate paragraph (a) as paragraph (d), and to incorporate limitations on the use of options communications contained in Interpretations and Policies .01 of Rule 9.21 into proposed Rule 9.21(d). In addition, proposed Rule 9.21(d)(iii) would amend Rule 9.21(a)(iii) by clarifying the types of cautionary statements and caveats that are prohibited. Also, as previously noted, CBOE proposed to delete Rule 9.21(a)(iv).

C. Proposed Amendments to Rule 9.21(b)

CBOE proposed to amend Rule 9.21(b) to include the types of communications

[25] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaces the original filing in its entirety.

[4] *See* Securities Exchange Act Release No. 58138 (Jul. 10, 2008) 73 FR 40886 (Jul. 17, 2008) (SR–CBOE–2007–30) (notice).

[5] *See* Letter from Melissa MacGregor, Vice President and Assistant General Counsel, Securities Industry and Financial Markets Association (''SIFMA''), dated July 31, 2008.

[6] *See* Letter from Lawrence J. Bresnahan, Vice President, CBOE, dated September 30, 2008.

[7] 17 CFR 240.9b–1.

[8] *See* ''Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From the Registration Requirements of the Securities Exchange Act of 1934; Final Rule,'' Securities Act Release No. 8171 and Exchange Act Release No. 47082 (Dec. 23, 2002), 68 FR 188 (Jan. 2, 2003).

[9] 15 U.S.C. 77a *et seq.*

[10] The options disclosure document (''ODD'') prepared in accordance with Rule 9b–1 under the Exchange Act is not deemed to be a prospectus. 17 CFR 230.135b. *See, e.g.,* Securities Act Release No. 8049 (Dec. 21, 2001), 67 FR 228 (Jan. 2, 2002).

[11] *See* Securities Exchange Act Release No. 57720 (Apr. 25, 2008) 73 FR 24332 (May 2, 2008), Exchange Act Release No. 58738 (approval order) (Oct. 6, 2008) 73 FR 60371 (Oct. 10, 2008) (SR–FINRA–2008–13).

[12] This paragraph essentially incorporates language of Securities Act Rule 134a. While this amendment would eliminate the separate educational material category, as discussed below the Exchange also proposed to revise the definition of Sales Literature to include educational material.

[13] This paragraph essentially incorporates language of Securities Act Rule 134.

[14] *See* note 12, *supra.*