

public filings, subpoenas or adjudicative processes.

9. "Influential", when used in the phrase "influential scientific, financial, or statistical information", means that the agency can reasonably determine that dissemination of the information will have or does have a clear and substantial impact on important public policies or important private sector decisions. Each agency is authorized to define "influential" in ways appropriate for it given the nature and multiplicity of issues for which the agency is responsible.

10. "Reproducibility" means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision. For information judged to have more (less) important impacts, the degree of imprecision that is tolerate is reduced (increased). If agencies apply the reproducibility test to specific types of original or supporting data, the associated guidelines shall provide relevant definitions of reproducibility (e.g., standards for replication of laboratory data). With respect to analytic results, "capable of being substantially reproduced" means that independent analysis of the original or supporting data using identical methods would generate similar analytic results, subject to an acceptable degree of imprecision or error.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No 34-45191; File No. SR-CBOE-2001-59]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Incorporated Relating to the Amendment of CBOE Disciplinary Rules 17.9 and 17.10 and the Addition of CBOE Disciplinary Rule 17.15

December 26, 2001.

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> notice is hereby given that on December 6, 2001, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items

have been prepared by the CBOE. The CBOE filed Amendment No. 1 on December 17, 2001.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The CBOE proposes to amend several provisions of its disciplinary rules and add a new disciplinary rule.

Below is the text of the proposed rule change, as amended. Proposed new language is *italicized* and proposed deletions are in brackets.

\* \* \* \* \*

#### Chicago Board Options Exchange, Incorporated Rules

##### Chapter XVII—Discipline

##### Rule 17.9. Decision

Following a hearing conducted pursuant to Rule 17.6 of this Chapter, the Panel shall issue a decision in writing, based solely on the record, determining whether the Respondent has committed a violation and imposing the sanction, if any, therefor. Where the Panel is not composed of at least a majority of the members of the Business Conduct Committee, its determination shall be automatically reviewed by a majority of the Committee, which may affirm, reverse or modify in whole or in part or may remand the matter for additional findings or supplemental proceedings. Such modification may include an increase or decrease of the sanction. The decision shall include a statement of findings and conclusions, with the reasons therefor, upon all material issues presented on the record. Where a sanction is imposed, the decision shall include a statement specifying the acts or practices in which the Respondent has been found to have engaged and setting forth the specific provision of the Securities Exchange Act of 1934, as amended, rules and regulations promulgated thereunder, constitutional provisions, by-laws, rules, interpretations or resolutions of the Exchange of which the acts are deemed to be in violation. The Respondents *and the Office of Enforcement* shall be promptly sent a copy of the decision. After Board review pursuant to Rule 17.10, or the time for such review has expired, the decision

will be considered final, and the Exchange shall publish a summary of the decision in the Exchange Bulletin.

##### Rule 17.10. Review

(a)(1) Petition. *Both t[T]he Respondent and the Office of Enforcement* shall have 15 days after service of notice of *any[a]* decision made pursuant to Rule 17.9 of this Chapter to petition for review of the decision by filing a copy of the petition with the Secretary of the Exchange ("Secretary") and *with all other parties to the hearing* [the Exchange's Office of Enforcement]. Such petition shall be in writing and shall specify the findings and conclusions to which exceptions are taken together with reasons for such exceptions. Any objections to a decision not specified by written exception shall be considered to have been abandoned.

(2) Written Submissions. Within 15 days after a [Respondent's] petition for review has been filed with the Secretary of the Exchange pursuant to paragraph (a)(1) of this Rule, *the other parties to the hearing* [Exchange staff] may *each* submit to the Secretary a written response to the petition. A copy of the response must be served upon the *petitioner* [Respondent]. *The petitioner* [A Respondent] has 15 days from the service of the response to file a reply with the Secretary and the *other parties* [Office of Enforcement].

(b) Conduct of Review. The review shall be conducted by the Board or a committee of the Board composed of at least three Directors whose decision must be ratified by the Board. Any Director who participated in a matter before the Business Conduct or other Committee may not participate in any review of that matter by the Board. Unless the Board shall decide to open the record for the introduction of evidence or to hear argument, such review shall be based solely upon the record and the written exceptions filed by the parties. New issues may be raised by the Board; *the parties to the hearing* [Respondents] shall be given notice of and any opportunity to address any such new issues. The Board may affirm, reverse or modify, in whole or in part, the decision of the Business Conduct Committee. Such modification may include an increase or decrease of the sanction. The decision of the Board shall be in writing, shall be promptly served on the Respondent *and the Office of Enforcement*, and shall be final.

(c) Review on Motion of Board. The Board may on its own initiative order review of a decision made pursuant to Rule 17.7 or 17.9 of this Chapter within 30 days after notice of the decision has

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

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

<sup>3</sup> See letter from Christopher R. Hill, Attorney II, Office of Enforcement, Legal Division, CBOE, to Sapna Patel, Attorney, Division of Market Regulation, Commission, dated December 13, 2001 ("Amendment No. 1"). In Amendment No. 1, the CBOE made some technical corrections to the proposed rule text.

been served on the Respondent *and the Office of Enforcement*. Such review shall be conducted in accordance with the procedure set forth in paragraph (b) of this Rule.

(d) No change.

#### *Rule 17.15. Ex Parte Communications*

*Members and persons associated with members shall not make or knowingly cause to be made an ex parte communications with any member of the Board with the intent to influence the outcome of any pending investigation or disciplinary proceeding. Members of the Board shall not make a knowingly cause to be made an ex parte communication with any members or persons associated with members with the intent to influence the outcome of any pending investigation or disciplinary proceeding. No violation of this Rule shall be deemed to occur if the ex parte communication deals solely with procedural matters rather than the merits of the investigation or proceeding.*

#### *Interpretations and Policies:*

.01 "Ex parte communication" means an oral or written communication made without notice to all parties, that is, regulatory staff and Subjects of investigations or Respondents in proceedings. A written communication is ex parte unless a copy has been previously or simultaneously delivered to all interested parties. An oral communication is ex parte unless it is made in the presence of all interested parties except those who, on adequate prior notice, declined to be present.

\* \* \* \* \*

## **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**

*a. Ex Parte Communications With Board of Director ("Board") Members Prohibited*

Currently, Exchange Rule 17.4(d) prohibits members or persons associated with members from making or causing ex parte communications with any member of the Business Conduct Committee ("BBC") concerning the merits of any matter pending under the disciplinary rules of the Exchange. This prohibition is to eliminate the potential that such communications might somehow influence the outcome of an investigation or enforcement matter. The Exchange believes that Exchange disciplinary rules should also forbid ex parte communications with members of the Exchange Board. Such communications are already prohibited by other self-regulatory organizations.<sup>4</sup> Therefore, the exchange proposes to add a new Exchange Rule 17.15, "Ex Parte Communications," which would prohibit ex parte communications with members of the Board that are made with the intent to influence the outcome of any pending investigation or disciplinary proceeding. The Exchange represents that proposed Exchange Rule 17.15 would expressly create a safe harbor for communication dealing solely with procedural matters rather than the merits of the investigation or proceeding. The text of the current Interpretation and Policy .01 to Exchange Rule 17.4(d) defining "Ex Parte Communications" will be duplicated as Interpretation and Policy .01 of proposed Exchange Rule 17.15.

#### *b. Exchange Right to Appeal*

Exchange Rule 17.10(a) permits a Respondent in a disciplinary matter to appeal a decision of the BCC to the Board, but does not grant the Exchange's Office of Enforcement ("OOE") a similar right of appeal. Again, the Exchange believes that its OOE should have such a right, both to appeal factual findings that the OOE thinks may have been in error, as well as to appeal disciplinary sanctions that the OOE deems insufficient. Such appeals are already authorized at other exchanges.<sup>5</sup> Therefore, the Exchange proposes to amend Exchange Rules 17.9 and 17.10 to give the OOE and the Respondent equivalent rights in the appellate process.

#### **2. Statutory Basis**

The Exchange believes that the proposed rule change described above is

<sup>4</sup> See American Stock Exchange LLC Exchange Disciplinary Proceedings Rule 11(a); National Association of Securities Dealers, Inc. ("NASD") Rule 9143(a); and Pacific Exchange, Inc. Rule 10.3(a).

<sup>5</sup> See New York Stock Exchange, Inc. Rule 476(f); NASD Rule 9311; and Securities Exchange Act Release No. 43554 (November 14, 2001), 65 FR 69975 (November 21, 2001) (File No. SR-Amex-00-22).

consistent with the provisions of section 6(b)<sup>6</sup> of the Act, in general, and specifically furthers the objectives of sections 6(b)(1),<sup>7</sup> 6(b)(6),<sup>8</sup> and 6(b)(7)<sup>9</sup> of the Act, in particular, in that it will enhance the ability of the Exchange to enforce compliance by its members and persons associated with its members with provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. It will help ensure that members and persons associated with members are appropriately disciplined when they violate those provisions.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were solicited or received with respect to the proposed rule change.

## **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

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

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

## **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(1).

<sup>8</sup> 15 U.S.C. 78f(b)(6).

<sup>9</sup> 15 U.S.C. 78f(b)(7).

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR-CBOE-2001-59 and should be submitted by January 24, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

Margaret H. McFarland,

Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45193; File No. SR-Phlx-2001-118]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Implementation of a Fee with Respect to Certain Individuals Who Work on the Exchange's Trading Floor

December 27, 2001.

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> notice is hereby given that on December 19, 2001, the Philadelphia Stock Exchange, Inc. ("Phlx" 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 Exchange. 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 proposes to amend its schedule of dues, fees, and charges to adopt a fee of \$25 per month to be imposed on member/participant organizations for individuals employed by such member/participant organizations who work on the

Exchange's trading floor, but who are not registered as Exchange members or foreign currency options ("FCO") participants.<sup>3</sup> The Exchange intends to charge member/participant organizations a \$25 fee per month for such individuals registered as of the first trading day of the month. The Exchange states that it intends to implement this fee beginning on January 1, 2002.<sup>4</sup>

The text of the proposed rule change is available at the Office of the Secretary, the Phlx, 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 Exchange 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 Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

###### (1) Purpose

The Exchange states that the purpose of the proposed rule change is to impose a fee on Exchange member/participant organizations for their employees who are registered to be on the Exchange's trading floor, but are not registered as members or FCO participants. The Exchange states that this fee is intended to help it offset the costs it incurs in registering these individuals.<sup>5</sup>

<sup>3</sup> According to the Exchange, individuals registered to be on the Exchange's trading floor, but who are not registered as members or FCO participants, include trading floor personnel such as clerks, interns, stock execution clerks, and other associated persons of member/participant organizations. These individuals are required to be registered with the Exchange Pursuant to Exchange Rule 620(b).

<sup>4</sup> The Exchange states that this fee will be eligible for the monthly credit of up to \$1,000 to be applied against certain fees, dues and charges and other amounts owed to the Exchange by certain members. See Securities Exchange Act Release No. 44292 (May 11, 2001), 66 FR 27715 (May 18, 2001) (SR-Phlx-2001-49).

<sup>5</sup> According to the Exchange, individuals who are registered as inactive nominees pursuant to Exchange By-Law Article XII, Section 12-10 and Exchange Rule 21 will not be subject to the proposed fee.

###### (2) Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,<sup>6</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>7</sup> in particular, in that it is an equitable allocation of reasonable fees among the Exchange's members because the member/participant organizations who pay the additional, minimal amount for registering their employees incur the benefit of having these employees on the Exchange's trading floor.

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

The Exchange does not believe that the proposed rule change will impose any inappropriate 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 either solicited or received.

#### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or charge imposed by the Exchange and, therefore, has become effective upon filing pursuant to Section 19(b)(A)(ii) of the Act<sup>8</sup> and Rule 19b-4(f)(2) hereunder.<sup>9</sup> At any time within 60 days of the filing of such 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 purpose of the Act. The Exchange has stated that it intends to implement this fee beginning on January 1, 2002.

#### 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(4).

<sup>8</sup> 15 U.S.C. 78(s)(b)(3)(A)(ii).

<sup>9</sup> 17 CFR 240.19b-4(f)(2).

<sup>10</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.