

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 Web site viewing and printing 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 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 available publicly. All submissions should refer to File Number SR-NASDAQ-2010-038 and should be submitted on or before April 14, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61732; File No. SR-CBOE-2010-027]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend CBOE Rule 31.85 to, Among Other Things, Prohibit Broker Discretionary Voting on the Elections of Directors

March 18, 2010.

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> notice is hereby given that on March 4, 2010, the Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder.<sup>4</sup> 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

CBOE proposes to amend CBOE Rule 31.85 to eliminate broker discretionary voting for all elections of directors at shareholder meetings, whether contested or not, except for companies registered under the Investment Company Act of 1940 (the "1940 Act"), to amend CBOE Rule 31.85 to preclude broker discretionary voting on a matter that materially amends an investment advisory contract with an investment company, and to define that a material amendment to an investment advisory contract would include any proposal to obtain shareholder approval of an investment company's investment advisory contract with a new investment advisor. 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.

### 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 those 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 parts of such statements.

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

##### 1. Purpose

A shareholder of a public company may hold shares either directly, as the record holder, or indirectly, as the beneficial holder, with the shares held in the name of the beneficial shareholder's broker-dealer, bank nominee, or custodian ("securities intermediary"), which is the record holder.<sup>5</sup> The latter generally is referred to as holding securities in "street name."<sup>6</sup> The number of beneficial owners holding securities in street name

has increased significantly over the past thirty-three years.

Currently, CBOE Rule 31.85 permits brokers to vote without voting instructions from the beneficial owner on uncontested elections of directors.<sup>7</sup> Rule 31.85 also lays out a list of enumerated items for which a member may not give a proxy to vote without instructions from the beneficial owner.<sup>8</sup> This list does not include the election of directors. Due to the increase in the holding of securities in street name, the impact of the broker vote on the election of directors has become increasingly significant. At the same time, the number of proxy campaigns, such as "just vote no" or "withhold" campaigns, that have targeted the election of directors without a formal contest has also increased. This has made the "uncontested" election of directors a more controversial, as opposed to routine, matter.<sup>9</sup>

In light of this development, the New York Stock Exchange proposed a rule filing to declare the election of directors ineligible for broker discretionary voting.<sup>10</sup> The Commission approved this filing, as amended, on July 1, 2009.<sup>11</sup> Correspondingly, CBOE proposes to amend CBOE Rule 31.85 to add all elections of directors at shareholder meetings whether contested or not, except for companies registered under the 1940 Act, to the list of enumerated items for which a member may not give a proxy to vote without instructions from the beneficial owner.

CBOE also proposes to amend CBOE Rule 31.85 to preclude broker discretionary voting on a matter that materially amends an investment advisory contract with an investment company and to define that a material amendment to an investment advisory contract would include any proposal to obtain shareholder approval of an investment company's investment advisory contract with a new investment advisor for which shareholder approval is required by the 1940 Act and the rules thereunder. These proposed amendments will help ensure the full and effective voting rights of investment company shareholders on material matters.

##### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the

<sup>7</sup> See CBOE Rule 31.85(a), which explains the process and situations in which brokers may vote without voting instructions from the beneficial owner.

<sup>8</sup> See CBOE Rule 31.85(b).

<sup>9</sup> See *supra* note 2 [sic].

<sup>10</sup> See SR-NYSE-2006-92.

<sup>11</sup> See *supra* note 2 [sic].

<sup>13</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> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>5</sup> See Commission Release No. 34-60215 (July 1, 2009).

<sup>6</sup> See *supra* note 2 [sic].

Securities Exchange Act of 1934 (the "Act")<sup>12</sup> and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.<sup>13</sup> The Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>14</sup> requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the Exchange believes that the proposed rule change will protect investors and the public interest by ensuring better corporate governance and transparency of the election process for directors and by promoting greater uniformity with the proxy rules of other exchanges.<sup>15</sup> In particular, for Exchange member firms that are also members of other exchanges, confusion might arise as to which exchange's proxy voting rules are applicable to a company listed on the Exchange if there are disparities between proxy voting rules of different exchanges.<sup>16</sup> The proposed rule change will better enfranchise shareholders and enhance corporate governance and accountability to shareholders.<sup>17</sup>

#### *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 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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>18</sup> and Rule 19b-4(f)(6) thereunder.<sup>19</sup> Because the proposed rule change does not: (i)

Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>20</sup> and Rule 19b-4(f)(6)(iii) thereunder.<sup>21</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>22</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>23</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. In making this request, the Exchange stated that the proposal is based upon the rules of NYSE and NYSE Amex. The Exchange stated that waiver of the 30-day operative delay will allow the change to become operative immediately and conform to the Commission's desire to eliminate any disparities involving voting.

The Commission believes that the waiver of the 30-day operative delay period is consistent with the protection of investors and the public interest.<sup>24</sup> The proposal would permit the Exchange to comply with the Commission's stated goal that self-regulatory organizations who currently allow members to use discretionary voting for director elections conform their rules to the NYSE's rules to eliminate any voting disparities depending on where the shares are held. Further, the proposal would conform the Exchange's rule to the NYSE's rule with respect to voting on investment advisory contracts. Moreover, the Commission notes that the NYSE's adopted rule changes were subject to full notice and comment, and

considered and approved by the Commission.<sup>25</sup> Based on the above, the Commission finds that waiving the 30-day operative delay period is consistent with the protection of investors and the public interest and the proposal is therefore deemed effective upon filing.

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](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2010-027 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-CBOE-2010-027. 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 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10

<sup>20</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>21</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the pre-filing requirement.

<sup>22</sup> 17 CFR 240.19b-4(f)(6).

<sup>23</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>24</sup> For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>25</sup> See *supra* note 5.

<sup>12</sup> 15 U.S.C. 78s(b)(1).

<sup>13</sup> 15 U.S.C. 78f(b).

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

<sup>15</sup> See Securities Exchange Act Release No. 34-61292 (January 5, 2010), 75 FR 1664 (January 12, 2010) (SR-NYSEAmex-2009-93).

<sup>16</sup> See *supra* note 12 [sic].

<sup>17</sup> See *supra* note 2 [sic].

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

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 available publicly. All submissions should refer to File Number SR-CBOE-2010-027 and should be submitted on or before April 14, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61731; File No. SR-ISE-2010-18]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a Fee Credit

March 18, 2010.

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> notice is hereby given that on March 1, 2010, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission 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 ISE is proposing to amend its Schedule of Fees by adopting a per contract fee credit related to the execution on ISE of customer orders exposed to members before those orders are sent out for execution on another exchange through the intermarket linkage. The text of the proposed rule change is available on the Exchange's Web site (<http://www.ise.com>), at the principal office of the Exchange, 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, 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 Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

Before a Primary Market Maker ("PMM") sends a customer order to another exchange for execution when ISE is not at the national best bid or offer ("NBBO"), the Exchange exposes these customer orders to all its members to give them an opportunity to match the NBBO. This exposure is intended to allow ISE to retain more order flow by giving these customer orders additional opportunity to be executed at the NBBO at ISE, which also reduces PMM costs by reducing the number of orders they must send to other exchanges on behalf of customer orders.

Specifically, before a PMM sends an order on behalf of a customer, the customer order is exposed at the NBBO price for a period established by the Exchange not to exceed one second. During this exposure period, Exchange members may enter responses up to the size of the order being exposed in the regular trading increment applicable to the option. The Exchange currently has fee waivers in place for members who step up and match or improve the NBBO during the exposure period.<sup>3</sup> If at the end of the exposure period, the order is executable at the then-current NBBO and ISE is not at the then-current NBBO, the order is executed against responses that equal or better the then-current NBBO. The exposure period is terminated if the exposed order becomes executable on the ISE at the prevailing NBBO or if the Exchange receives an unrelated order that could trade against the exposed order at the prevailing NBBO price. If, after an order is

exposed, the order is not executed in full on the Exchange at the then-current NBBO or better, and it is marketable against the then-current NBBO, the PMM sends an order on the customer's behalf for the balance of the order as provided in Rule 803(c)(2)(ii). If the balance of the order is not marketable against the then-current NBBO, it is placed on the ISE book.

All customer orders, including professional customer orders, receive trade through protection under the ISE's rules.<sup>4</sup> Therefore, all customer orders are exposed when ISE is not at the best bid or offer. Members, however, do not know whether an order being exposed is for a Priority Customer<sup>5</sup> or a professional customer. Members have a natural incentive to step up to trade against Priority Customers as they view this as providing a service to retail customers. Members do not have a natural incentive to trade against professional customers who they view as their competitors. Thus, to encourage members to participate in the flash auction and thereby keep trades at the Exchange, ISE proposes to adopt a fee credit. Specifically, ISE proposes to adopt a \$0.20 per contract fee credit for members who execute a transaction as a response to a Professional Order<sup>6</sup> in the Exchange's flash auction.

###### 2. Basis

The basis under the Securities Exchange Act of 1934 (the "Exchange Act") for this proposed rule change is the requirement under Section 6(b)(4) that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, the proposed rule change will allow ISE to retain more order flow by giving these customer orders additional opportunity to be executed ISE at the NBBO or better and will also reduce PMM costs by reducing the number of orders they must send to other exchanges for execution.

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

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

<sup>4</sup> See ISE Rule 1902.

<sup>5</sup> A Priority Customer is defined in ISE Rule 100(a)(37A) as a person or entity that is not a broker or dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

<sup>6</sup> A Professional Order is defined in ISE Rule 100(a)(37C) as an order that is for the account of a person or entity that is not a Priority Customer.

<sup>26</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> See Exchange Act Release Nos. 58164 (July 15, 2008), 73 FR 42638 (July 22, 2008); 58216 (July 23, 2008), 73 FR 44302 (July 30, 2008).