

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-68020; File No. SR-CBOE-2012-094)

October 9, 2012

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change to Update its Rule 31.10 - Corporate Governance - in Order to Comply With New Rule 10C-1 Under the Securities Exchange Act of 1934

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 25, 2012, 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, 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 the Substance of the Proposed Rule Change

CBOE proposes to update its Rule 31.10 - Corporate Governance - in order to comply with new Rule 10C-1 under the Act. The text of the proposed rule change is available on the Exchange’s Web site (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), 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, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

Effective July 27, 2012, the Commission adopted Rule 10C-1 (the "New Rule") to the Act.³

The New Rule directs national securities exchanges to establish listing standards that, among other things, require each member of a listed issuer's compensation committee to be a member of the board of directors and to be "independent", as defined in the listing standards of the national securities exchanges. The New Rule also discusses issuers' retention of compensation advisers. The Exchange hereby proposes to update its Rule 31.10, which discusses corporate governance requirements of issuers on the Exchange, in order to place Rule 31.10 in compliance with the New Rule.

Rule 31.10 currently states that compensation of the chief executive officer, and all other executive officers, of an issuer must be determined, or recommended to the board of directors of the issuer for determination, either by a majority of all independent directors or a compensation committee comprised solely of independent directors. The New Rule's requirements regarding a compensation committee, as well as the broad definition of "compensation committee" and the independence of those directors on the compensation committee (all described below), make Rule 31.10(c)'s statement that compensation of executive officers may be determined by a majority of all independent directors a bit superfluous. Due to the broad definition of the term "compensation committee" as defined in the New Rule, the Exchange hereby proposes to simply state that

³ See Securities Exchange Act Release No. 67220 (June 20, 2012) 77 FR 38422 (June 27, 2012) (File No. S7-13-11).

compensation of all executive officers of an issuer be determined, or recommended to the board of directors of the issuer for determination, by a compensation committee.

The New Rule provides a definition of “compensation committee”, which the Exchange proposes to adopt. For the purposes of Rule 31.10, the term “compensation committee” shall mean: (A) a committee of the board of directors that is designated as the compensation committee; or (B) in the absence of a committee of the board of directors that is designated as the compensation committee, a committee of the board of directors performing functions typically performed by a compensation committee, including oversight of executive compensation, even if it is not designated as the compensation committee or also performs other functions; or (C) in the absence of a committee as described in paragraphs (c)(1)(A) or (B) of Rule 31.10, the members of the board of directors who oversee executive compensation matters on behalf of the board of directors. The Exchange’s proposed definition of “compensation committee” is modeled after that described in the New Rule.⁴ The New Rule allows exchanges to exempt issuers who, in the absence of a committee as described in paragraphs (c)(1)(A) or (B) of Rule 31.10, have a “compensation committee” that is composed of the members of the board of directors who oversee executive compensation matters on behalf of the board of directors from those requirements described in paragraphs (a)(1) and (b) of proposed Interpretation and Policy .11 to Rule 31.10 (described and discussed below). However, the Exchange does not believe that it is unduly burdensome to require issuers who, in the absence of a committee as described in paragraphs (c)(1)(A) or (B) of Rule 31.10, have a “compensation committee” that is composed of the members of the board of directors who oversee executive compensation matters on behalf of the board of directors to comply with paragraphs (a)(1) and (b) of proposed Interpretation and

⁴ 17 CFR 240.10C-1(c)(2).

Policy .11. Further, providing this exemption might provide issuers with a way to avoid those requirements of paragraphs (a)(1) and (b) of proposed Interpretation and Policy .11 by simply not having a “compensation committee” as defined in paragraphs (c)(1)(A) or (B) of Rule 31.10. Therefore, the Exchange does not propose to exempt issuers who, in the absence of a committee as described in paragraphs (c)(1)(A) or (B) of Rule 31.10, have a “compensation committee” that is composed of the members of the board of directors who oversee executive compensation matters on behalf of the board of directors from those requirements described in paragraphs (a)(1) and (b) of proposed Interpretation and Policy .11 to Rule 31.10.

The New Rule states that “each member of the compensation committee must be an independent member of the board of directors of the listed issuer, and must otherwise be independent.”⁵ The New Rule further clarifies that, in determining the independence requirements for the members of compensation committees, the Exchange must consider all relevant factors, including, but not limited to, the source of compensation for that director (including any consulting, advisory or other compensatory fee paid by the issuer to the director), and whether the director is affiliated with the issuer or a subsidiary or affiliate of a subsidiary of the issuer.⁶

The Exchange hereby proposes to amend Rule 31.10(c) to state that all members of a compensation committee must be “independent directors” as defined in Rule 31.10(h)(2). “Independent director” is defined in Rule 31.10(h)(2) as:

a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company's board of

⁵ 17 CFR 240.10C-1(b)(1)(i).

⁶ 17 CFR 240.10C-1(b)(1)(ii).

directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent:

(A) a director who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company;

(B) a director who accepted or who has a family member who accepted any payments from the company or any parent or subsidiary of the company in excess of \$60,000 during the current or any of the past three fiscal years, other than the following:

(i) compensation for board or board committee service;

(ii) payments arising solely from investments in the company's securities;

(iii) compensation paid to a family member who is a non-executive employee of the company or a parent or subsidiary of the company;

(iv) benefits under a tax-qualified retirement plan, or non-discretionary compensation; or

(v) loans permitted under Exchange Act Section 13(k).

Provided, however, that audit committee members are subject to additional, more stringent requirements under Exchange Act Rule 10A-3, which requirements are incorporated by reference in the Exchange rules pursuant to Rule 31.10(b).

(C) a director who is a family member of an individual who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company as an executive officer;

(D) a director who is, or has a family member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments for property or services in the current

or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or \$200,000, whichever is more, other than the following:

- (i) payments arising solely from investments in the company's securities; or
 - (ii) payments under non-discretionary charitable contribution matching programs;
- (E) a director of the listed company who is, or has a family member who is, employed as an executive officer of another entity where at any time during the past three years any of the executive officers of the listed company serve on the compensation committee of such other entity;
- (F) a director who is, or has a family member who is, a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor who worked on the company's audit at any time during any of the past three years; or
- (G) in the case of an investment company, in lieu of Rules 31.10(h)(2)(A) - (F), a director who is an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.⁷

The Exchange believes that the current definition of "independent director" meets the criteria listed for determining independence requirements under the New Rule. The requirements that a director is not considered "independent" if he or a family member has accepted any payments from the company or any parent or subsidiary of the company in excess of \$60,000 during the current or any of the past three fiscal years, other than compensation for board or committee

⁷ See CBOE Rule 31.10(h)(2).

service, payments arising solely from investments in the company's securities, compensation paid to a family member who is a non-executive employee of the company or a parent or subsidiary of the company, benefits under a tax-qualified retirement plan, or non-discretionary compensation, or loans permitted under Exchange Act Section 13(k) demonstrates that the definition of “independent” considers the sources of compensation of a member of the compensation committee.

The Exchange believes that the current definition of “independent director” meets the requirement in the New Rule that the Exchange’s rules must consider whether the director is affiliated with the issuer or a subsidiary or affiliate of a subsidiary of the issuer. For purposes of the New Rule, an “affiliate” of, or a person “affiliated” with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.⁸ Rule 31.10(h)(2) states that a director is not “independent” if, in the opinion of the issuer’s board of directors, the person has a relationship which would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Any kind of affiliate relationship, under the definition provided above, could be viewed as a conflict of interest that might interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Therefore, by nature, a board of directors would have to consider any affiliate relationship in coming to that manner of opinion. As such, a rule that requires a board of directors to consider whether a director has a relationship which would interfere with the exercise of independent judgment in carrying out the

⁸ 17 CFR 240.12b-2. The term “control” (including the terms “controlling,” “controlled by” and “under common control with”) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. 17 CFR 240.12b-2.

responsibilities of a director in order to determine whether or not the director is “independent” naturally requires consideration of whether the director is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer.

The New Rule states that any exchange to which the New Rule applies must provide issuers an opportunity to cure any violations of the rules that such exchange may put in place as a result of the New Rule.⁹ The New Rule further states that an exchange’s rule regarding the curing of violations may state that if a member of a compensation committee ceases to be an “independent director” for reasons outside of that member’s reasonable control, that person, with notice by the issuer to the applicable exchange, may remain a compensation committee member until the earlier of the next annual shareholders meeting of the issuer or one year from the occurrence of the event that caused the member to no longer be an “independent director”. As such, the Exchange proposes to adopt this language and state that if a member of a compensation committee ceases to be an “independent director” for reasons outside of that member’s reasonable control, that person may remain a compensation committee member until the earlier of the next annual shareholders meeting of the issuer or one year from the occurrence of the event that caused the member to no longer be an “independent director”. The Exchange will require that an issuer relying on this provision must provide notice to the Exchange immediately upon learning of the event or circumstance that caused the member to cease to be an “independent director”.

Rule 31.10(c) currently provides an exception to the independence requirement for compensation committee members. This exception states that, notwithstanding said independence requirements, if the compensation committee is comprised of at least three

⁹ 17 CFR 240.10C-1(a)(3).

members, one director, who is not independent as defined in Rule 31.10(h)(2) and is not a current officer or employee or a family member of an officer or employee, may be appointed to the compensation committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the proxy statement for the next annual meeting subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination. A member appointed under this exception may not serve longer than two years.¹⁰ However, the New Rule includes no such exception to the independence requirements. The Exchange therefore proposes to delete this exception. The Exchange believes that independence of compensation committee members is important to ensure that there exist no undue influences in the compensation of executive officers. Further, in these times during which executive compensation has (understandably) fallen under some scrutiny, it is important to provide the appearance of a transparent and not-unduly-influenced process to determine executive compensation, and an exception that allows issuers to have non-independent directors influence compensation can have a damaging impact on the markets.

Currently, Rule 31.10(c) states that the chief executive officer of an issuer may not be present during voting or deliberations regarding his salary. CBOE proposes to extend this clause to all executive officers and state that the executive officer for whom compensation is being determined may not be present during voting or deliberations regarding compensation of that executive officer. The Exchange believes that this extension is appropriate and will further

¹⁰ See CBOE Rule 31.10(c)(3).

prevent any executive officer for whom compensation is being determined from having undue or inappropriate influence on his compensation.

The New Rule exempts from the independence requirements limited partnerships, companies in bankruptcy proceedings, open-end management investment companies registered under the Investment Company Act of 1940, and any foreign private issuer that discloses in its annual report the reasons that the foreign private issuer does not have an independent compensation committee.¹¹ The Exchange thereby proposes to incorporate those exemptions into proposed Rule 31.10(f)(6) by reference by stating that the categories of issuers listed in §240.10C-1(b)(1)(iii)(A) of the Securities Exchange Act of 1934 [sic] are also exempt from the requirements Rule 31.10(c)(2) (which discusses independence of directors on an issuer's compensation committee). These categories of issuers are still subject to all other requirements regarding executive compensation (unless otherwise noted).

Rule 31.10(f) currently exempts a number of other categories of issuers from the executive compensation requirements of Rule 31.10(c). These types of issuers are controlled companies, registered management investment companies (which are similar to open-end management investment companies), and asset-backed issuers and other passive issuers, cooperatives.¹² The Exchange determined to exempt these categories of issuers from executive compensation requirements of Rule 31.10(c) due to their various unique attributes.¹³ While the New Rule changes some of the executive compensation requirements, The Exchange believes that these categories of issues [sic] should still be exempt from all executive compensation

¹¹ 17 CFR 240.10C-1(b)(1)(iii).

¹² See CBOE Rule 31.10(f)(1)-(4).

¹³ See Securities Exchange Act Release No. 49995 (July 9, 2004), 69 FR 42476 (July 15, 2004) (SR-CBOE-2004-028).

requirements in Rule 31.10(c) generally. To the extent that the above-referenced proposed Rule 31.10(f)(6)'s exemption of open-end management investment companies registered under the Investment Company Act of 1940 from the compensation committee director independence requirements of Rule 31.10(c)(2) conflicts with the more general already-existing exemption of registered management investment companies from the requirements of Rule 31.10(c), the more general exemption of registered management investment companies from the requirements of Rule 31.10(c) shall be controlling. As such, Rule 31.10(f)(2) shall be amended to state that the exemption of management investment companies from the requirements of Rule 31.10(c) shall be controlling over any other potentially-conflicting exemptions that may arise under Rule 31.10(f)(6).

The New Rule also discusses the retention of compensation consultants, independent legal counsel and other compensation advisers to assist the compensation committee of an issuer in determining compensation for executives.¹⁴ Rule 31.10 currently does not speak to this issue. Therefore, the Exchange proposes to adopt the provisions of the New Rule regarding this issue in a substantively identical manner to that in the New Rule in new Interpretation and Policy .11 to Rule 31.10. This new Interpretation and Policy would state that the compensation committee of an issuer, in its capacity as a committee of the board of directors, may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser. The compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel and other adviser retained by the compensation committee. Nothing in this Interpretation and Policy .11 to Rule 31.10 shall be construed to require the compensation committee to

¹⁴ 17 CFR 240.10C-1(b)(2).

implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the compensation committee, or to affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee.

Under this new Interpretation and Policy .11 to Rule 31.10, each listed issuer must provide for appropriate funding, as determined by the compensation committee, in its capacity as a committee of the board of directors, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the compensation committee.

Under this new Interpretation and Policy .11 to Rule 31.10, the compensation committee of a listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration the following factors: (1) the provision of other services to the issuer by the person that employs the compensation consultant, legal counsel or other adviser, (2) the amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser, (3) the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest, (4) any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee, (5) any stock of the issuer owned by the compensation consultant, legal counsel or other adviser, and (6) any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive office of the issuer. A compensation committee must consider these factors with

respect to any compensation consultant, legal counsel or other advisor that provides advice to the compensation committee (other than in-house legal counsel).

The requirements of this Interpretation and Policy .11 to Rule 31.10 shall not apply to (1) any controlled company or to any smaller reporting company, (2) the listing of a security futures product cleared by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q-1) or that is exempt from the registration requirements of section 17A(b)(7)(A) (15 U.S.C. 78q-1(b)(7)(A)), or (3) the listing of a standardized option, as defined in § 240.9b-1(a)(4), issued by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q-1). These exemptions comply with those stated in the New Rule.¹⁵ To be clear, small reporting companies are still subject to other corporate governance rules, as applicable

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act¹⁶ and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.¹⁷ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁸ 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. The proposed changes will protect investors by ensuring independent and well-informed determination of executive compensation. In addition,

¹⁵ 17 CFR 240.10C-1(b)(5).

¹⁶ 15 U.S.C. 78s(b)(1).

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(5).

the Exchange believes that the proposed changes bring the Exchange into compliance with the requirements described in the New Rule.

The Exchange further believes that the proposed changes are consistent with the New Rule. Further, these proposed changes, in ensuring independent determination of executive compensation, will also improve investor confidence regarding executive compensation. This improved investor confidence will perfect the mechanism for a free and open market and a national market system.

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

The Exchange neither solicited nor received comments on the proposed rule change.

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

Within 45 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 self-regulatory organization consents, the Commission will:

- A. by order approve or disapprove 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 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-2012-094 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-2012-094. 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 website (<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 website viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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-2012-094, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Kevin M. O'Neill
Deputy Secretary

¹⁹ 17 CFR 200.30-3(a)(12).