

Applicants' Legal Analysis

1. Section 26(b) of the 1940 Act requires the depositor of a registered unit investment trust holding the securities of a single issuer to obtain Commission approval before substituting the securities held by the trust. Specifically, Section 26(b) states:

It shall be unlawful for any depositor or trustee of a registered unit investment trust holding the security of a single issuer to substitute another security for such security unless the Commission shall have approved such substitution. The Commission shall issue an order approving such substitution if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title.

2. Applicants state that the Proposed Substitution appears to involve a substitution of securities within the meaning of Section 26(b) of the 1940 Act and request that the Commission issue an order pursuant to Section 26(b) of the 1940 Act approving the Proposed Substitution.

3. The Contracts all provide to UNUM or First UNUM the right, subject to Commission approval, to substitute shared of another open-end management investment company for shares of an open-end management investment company held by a subaccount of the relevant Account. Applicants assert that the prospectuses for the Unassumed Contracts contain appropriate disclosure of this right.

4. Applicants assert that, although there are differences in the objectives and policies of the Replaced Funds and the Substitute Funds, their objectives and policies are sufficiently consistent to assure that, following the Proposed Substitution, the achievement of the core investment goals of the affected owners invested in the Replaced Funds will not be frustrated.

5. Applicants assert that the performance of the Calvert Social Balanced Portfolio was lower than that of a comparable securities index that had lower volatility (or risk), and was lower than the median of its peer group (domestic hybrid funds) over the three year period ending June 30, 1998. Applicants assert that the VIP II Asset Manager Portfolio has, however, performed better than its comparable securities index and ranks in the top decile of a similar peer group (large blend equities) over the three-year period ending June 30, 1998.

6. Applicants assert that the performance of American Century VP Capital Appreciation was lower than that of a comparable securities index that had lower volatility (or risk), and was lower than the median of its peer

group (mid-cap growth equities) over the three-year period ending June 30, 1998. Applicants assert that while the VIP Growth Portfolio performed below the comparable securities index and the median of its peer group (large cap equities) over the same time period, its performance was better than that of the comparable securities index and the median of its peer group for the one and five year periods ending June 30, 1998, and has substantially outperformed American Century VP Capital Appreciation in 1996, 1997 and since the inception of the VIP Growth Portfolio.

7. Each Substitute Fund has performed favorably over the past two years in comparison to the Replaced Fund. While past performance is not necessarily indicative of future performance, applicants assert that the Proposed Substitution is appropriate in light of the performance of the Replaced Funds.

8. Applicants assert that the Proposed Substitution would effectively consolidate the UNUM and First UNUM assets of each Substitute Fund with those of the corresponding Replaced Fund, with the goal of each Substitute Fund having lower future expense ratios than the past expense ratios of the Replaced Fund. The VIP II Asset Manager Portfolio is a larger Fund and has a lower expense ratio than the Calvert Social Balanced Portfolio. Moreover, the Calvert Social Balanced Portfolio is a small Fund, which has not grown significantly, and, Applicants assert, likely does not have prospects of significant growth. Based on these trends, the Applicants believe that the VIP II Asset Manager Portfolio is likelier to achieve economics of scale in the near and long term.

9. The VIP Growth Portfolio is a larger fund and has a lower expense ratio than American Century VP Capital Appreciation. Moreover, Applicants assert that American Century VP Capital Appreciation has diminished in size over the past two and one-half years, while the VIP Growth Portfolio has gained in size over the past two and one-half years. Based on these trends, the Applicants believe that the VIP Growth Portfolio is likelier to achieve economics of scale in the near and long term. With the addition of the UNUM and First UNUM assets, the size of each Substitute Fund is expected to further increase.

Conclusion

Applicants assert that, for the reasons summarized above, the Proposed Substitution is consistent with the protection of investors and the purposes

fairly intended by the policy and provisions of the 1940 Act.

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-40737; File No. SR-CBOE-98-46]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to the Evaluation of Trading Crowd Performance

December 2, 1998.

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 23, 1998, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The CBOE is proposing to modify CBOE Rule 8.60, *Evaluation of Trading Crowd Performance*, to provide limited remedial actions for members, individually or collectively as trading crowds, who have failed to meet minimum performance standards. The proposed rule also modifies procedures relating to the administration and enforcement of the Rule.

The text of the proposed rule change is available at the Office of the Secretary, CBOE 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, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

The Exchange is proposing to modify CBOE Rule 8.60 to clarify and improve the market performance evaluation of members and trading crowds on the Exchange. The proposed rule change accomplishes this by giving the appropriate Market Performance Committee³ ("appropriate Committee") greater procedural flexibility to address the issue of member performance, while at the same time providing a clearer description of the due process safeguards that apply to the exercise of the appropriate Committee's authority.

1. Generally

The purpose of CBOE Rule 8.60 is to provide the appropriate Committee with a means to work with trading crowds and individual members to improve market quality and competition among members. The crowd evaluation process has significantly assisted the appropriate Committee in working with trading crowds and members to improve performance. The proposed changes will allow the appropriate Committee to take certain remedial actions after an informal meeting with members or crowds who have been identified through the evaluations. Currently, under CBOE Rule 8.60, the appropriate Committee must hold a formal hearing to impose more serious sanctions such as (i) suspension, (ii) termination or (iii) restriction of a market-maker's registration, appointments to option classes or right to trade at a particular trading station, but does not explicitly have the right to take limited remedial actions.

2. The Proposed Changes

One of the proposed amendments to CBOE Rule 8.60(a) is to identify the Exchange rather than the appropriate Committee as the entity that prepares, administers and distributes the results of the member evaluation. The results of the member evaluation are provided by the Exchange's Market Procedures and Planning staff to the appropriate Committee for their review. Paragraph (a) of CBOE Rule 8.60 is being amended to provide that the appropriate Committee, in connection with its

evaluation of member performance, may take into consideration factors other than the four factors currently enumerated in the Rule.⁴ To assist the Exchange in gathering market performance data in a timely manner, the proposed rule change moves language from paragraph (c) to paragraph (a). This language requires that members, persons associated with a member, or member firms answer market performance survey questions by the date specified and to the best of their ability and knowledge. In addition, the term market-maker is being replaced with the terms member or trading crowd to provide the appropriate Committee with more discretion in enforcing market performance standards.

The Exchange is rewording paragraph (b) of CBOE Rule 8.60 to enable the appropriate Committee to determine whether there has been a failure to meet minimum performance standards based on the totality of factors considered, including whether a member or trading crowd is ranked in the bottom 10% of trading crowds.

The language in paragraph (c) of CBOE Rule 8.60 as to the distribution of a Questionnaire on a six month periodic basis is being deleted. The Evaluation will be done as needed. Paragraph (c) of CBOE Rule 8.60 also will incorporate the existing language from paragraph (d). This incorporated language gives the appropriate Committee discretion to have an informal meeting with one or more members to discuss their performance.

Paragraph (d) of CBOE Rule 8.60 is being amended to clarify that the appropriate Committee is authorized to take certain remedial actions against a member or trading crowd if the appropriate Committee believes that certain performance standards are not being met. These remedial actions are of a less serious nature than those provided for in paragraph (a). Paragraph (d) of CBOE Rule 8.60 is intended to provide the appropriate Committee with greater flexibility to take limited actions to improve overall market performance in those cases where more severe actions are not warranted, and without incurring the expense and delay associated with a formal evidentiary-type hearing which is required in cases where more severe actions are taken. The following measures are proposed as limited remedial actions that the appropriate Committee may take:

(1) require that the trading crowd submit a business plan to the Committee

detailing those steps that the crowd intends to take to improve its performance;

(2) require that one or more members execute 100% of their opening transactions in that crowd in person;

(3) restrict crowd members' ability to participate on the Retail Automatic Execution System;

(4) restrict the eligibility of the crowd to be allocated new option classes or other securities;

(5) require that one or more members attend a meeting or series of meetings as the Committee shall require for the purpose of education or improving the performance of the members;

(6) require that all bookable orders be booked if not executed immediately upon presentation in the crowd; or

(7) take any other limited remedial action which is comparable to the foregoing.

Paragraph (d) would provide members an opportunity to be heard by the appropriate Committee, prior to the appropriate Committee taking remedial action.

Paragraph (e) of CBOE Rule 8.60 clarifies and expands on the due process requirements to be fulfilled if the appropriate Committee deems that the actions listed in paragraph (a) are to be imposed. It will also be made clear that all affected members will be provided a written decision.

The Exchange is also amending Paragraph (f) to provide the appropriate Committee with the authority to impose the proposed limited remedial sanctions of paragraph (d) for members who fail to appear before the committee when asked to do so under paragraph (c), without reasonable justification. The amended language also states that the appropriate Committee may refer any member's failure to appear to the Business Conduct Committee.

Finally, the Exchange is amending Paragraph (g) to provide that any actions taken by the appropriate Committee, whether under paragraph (a) or (d), may be appealed according to the procedures of Chapter XIX of Exchange Rules. This change would have a member's appeal go directly to the Appeals Committee rather than the Board of Directors. This change would make the appeal procedure consistent with the appeal rights of most other Exchange committee decisions. Members would retain the right to appeal the Appeals Committee decision to the Board.

Interpretation and Policy .01 under CBOE Rule 8.60 would be amended to provide some flexibility as to how the appropriate Committee defines whether a market-maker is a member of a trading crowd. The proposed rule change also

³The appropriate Committee is the Market Performance Committee, the Index Market Performance Committee or the Modified Trading System Appointments Committee.

⁴The four factors are (i) quality of markets; (ii) competition among market-makers; (iii) observance of ethical standards, and (iv) administrative factors.

makes certain editorial changes to clarify CBOE Rule 8.60 without affecting its substance.

The Exchange believes the proposed rule change is consistent with and promotes the objectives of Section 6(b)(5) of the Act⁵ in that it is designed to enhance the ability of the appropriate Market Performance Committee to regulate standards of member performance on the Exchange, while providing due process standards to members who appear before the appropriate Committee, thereby promoting just and equitable principles of trade and protecting investors and the public interest.

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.

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 self-regulatory organization 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 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. 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. Copies of such filing will also be available for inspection and copying at the principal office of CBOE. All submissions should refer to File No. SR-CBOE-98-46 and should be submitted by December 31, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-40736; File No. SR-CBOE-98-37]

Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Order Approving Proposed Rule Change To Allow the Chairman of the Equity Floor Procedure Committee, or the Chairman's Designee, To Increase the Eligible Order Size for Entry into RAES

December 1, 1998.

On August 21, 1998, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") submitted to the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ a proposed rule change to permit the Chairman of the appropriate Floor Procedure Committee ("Committee"), or the Chairman's designee, to exercise the authority of the Committee to increase the size of orders eligible for entry into CBOE's Retail Automatic Execution System ("RAES") in certain circumstances.² The Exchange amended the proposed rule change on October 5, 1998.³

The proposed rule change was published for comment in the **Federal**

Register on October 30, 1998.⁴ The Commission received no comments on the proposal. This order approves the proposal, as amended.

Description of the Proposal

The Exchange is proposing to amend Exchange Rule 6.8, by adding Interpretation and Policy .05, to permit the Chairman of the Committee, or the Chairman's designee, to exercise the authority of the Committee to increase the size of orders eligible for entry into RAES when the Chairman or his or her designee believes that the action could alleviate a potential backlog of unexecuted orders where an options class is experiencing a large influx of orders. This decision may not extend for longer than one trading day. If the situation extends into a second day, the Chairman or his or her designee would have to make an independent decision to increase the RAES eligible order size for that subsequent day. The Equity Floor Procedure Committee ("EFPC") will review any decision to approve an increase for consecutive days. Pursuant to its discretion under Exchange Rule 6.8, the EFPC has established an eligible RAES order size of ten contracts for most equity options traded on the floor.

The EFPC has discovered through experience in overseeing the operation of RAES in equity options, however, that it is often beneficial to temporarily raise the eligible order size to the allowable limit of twenty contracts in situations where a particular class of equity options is experiencing a large influx of orders. By increasing the eligible order size, a large percentage of the order flow can be filled immediately at the Exchange's quotes or at the National Best Bid or Offer ("NBBO").⁵ The Exchange notes that such increase will allow the trading crowd to concentrate on filling the non-RAES eligible orders in a more expeditious manner.

Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6 of the Act⁶ and the rules and regulations

⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² RAES accepts, through the Exchange's Order Routing System, small public customer market or marketable limit orders for automatic execution. An Exchange marketmaker on RAES is assigned as the contraparty to these trades.

³ Letter from Timothy H. Thompson, Director, Regulatory Affairs, CBOE, to Sonia Patton, Attorney, Division of Market Regulation, Commission, dated September 15, 1998 ("Amendment No. 1").

⁴ See Exchange Act Release No. 40596 (Oct. 23, 1998), 63 FR 58434 (Oct. 30, 1998).

⁵ The Commission recently approved a proposed rule change that provides that in classes designated by the EFPC, RAES orders will be executed at the NBBO to the extent the NBBO is no more than one tick better than the CBOE quote. Exchange Act Release No. 40096 (June 16, 1998), 63 FR 34209 (June 23, 1998) (approving SR-CBOE-98-13).

⁶ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(5).