



Regulatory Circular RG08-155

Date: November 24, 2008

To: Members and Member Organizations

From: Division of Member and Regulatory Services

Re: Revisions to Options Communications Rules

The Securities and Exchange Commission ("SEC") has approved Chicago Board Options Exchange ("CBOE" or "the Exchange") rule filing SR-CBOE-2007-30, which amends Exchange Rule 9.21, *Communications to Customers*. A copy of the rule filing and the SEC's approval order¹ is available on CBOE's website at <http://www.cboe.org/legal>.

Members and member organizations that are solely members of the CBOE may avail themselves of these rule changes as soon as they make necessary amendments to their written supervisory procedures. Members and member organizations that are members of another options exchange or the Financial Industry Regulatory Authority ("FINRA") may not avail themselves of these rule changes until such other options exchanges or FINRA have adopted comparable rules.

Key Changes

- Elimination of all references to the term prospectus.
- Expands the types of communications covered by Rule 9.21 to include among other items, independently prepared reprints.
- Exempts certain options communications from the Registered Options Principal ("ROP") pre-approval requirement.
- General update and reorganization of Rule 9.21.
- Elimination of the term "educational material".

¹ See Securities Exchange Act Release No. 58823 (October 21, 2008), 73 FR 63747 (October 27, 2008).

Summary

Deletions from Rule 9.21²:

- 1) Rule 9.21(a)(iv), which referenced the Securities Act definition of a prospectus.
- 2) Rule 9.21(d), which incorporated Securities Act principles in that it prohibited written material concerning options from being furnished to any person who has not previously or contemporaneously received the options disclosure document (“ODD”).
- 3) Rule 9.21(e)(ii), which defined the term “educational material”.³
- 4) Interpretation and Policy .02A of Rule 9.21, which outlined what is permitted in an “advertisement”.
- 5) Interpretation and Policy .03 of Rule 9.21, which concerned educational material.

Amendments to Rule 9.21(a)

- 1) Former paragraph (a) has been redesignated as paragraph (d).
- 2) New paragraph (d) incorporates limitations on the use of options communications that were formerly contained in Interpretation and Policy .01 of Rule 9.21.
- 3) Rule 9.21(d)(iii) clarifies the types of cautionary statements and caveats that are prohibited.

Amendments to Rule 9.21(b)

- 1) “Correspondence” and “institutional sales material” are exempted from the requirement to be approved in advance by a ROP. Specifically, correspondence is exempt from the pre-approval requirement unless the correspondence is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes any financial or investment recommendation or otherwise promotes a product or service of the member.⁴ Institutional sales material is exempt from the pre-approval requirement if the material is distributed to “qualified investors” (as defined in Section 3(a)(54) of the Exchange Act).⁵

² These sections of Rule 9.21 have been deleted because they incorporated certain provisions of the Securities Act of 1933 (the “Securities Act”). Listed options are exempt under Rule 238 of the Securities Act from all provisions of the Securities Act except the antifraud provisions of Section 17. See Securities Act Release No. 8171 and Exchange Act Release No. 47082 (December 23, 2002), 68 FR 188 (January 2, 2003).

³ As discussed below, while the educational material category has been deleted, the definition of sales literature has been revised to include educational material.

⁴ See Rule 9.21(b)(ii).

⁵ See Rules 9.21(b)(iii) and 9.21(a)(iv).

- 2) Pre-approval by a ROP is required with respect to independently prepared reprints.⁶
- 3) Rule 9.21(b)(iv) requires that firms retain options communications in accordance with the record-keeping requirements of Rule 17a-4 under the Exchange Act⁷ and also requires that firms retain other related documents in the form and for the time periods required for options communications by Rule 17a-4.

Amendments to Rule 9.21(c)

- 1) Rule 9.21(c) is amended to require approval by the Exchange only with respect to options communications used prior to the delivery of a current ODD. The Exchange pre-approval requirement for options communications used subsequent to the delivery of the ODD has been eliminated because the ODD should help alert the customer to the characteristics and risks associated with trading in options and because Rule 9.21(b) requires the ROP of a member organization to pre-approve options communications (with certain exceptions for correspondence and institutional sales material).
- 2) In addition, Rule 9.21(c) is amended to include the types of communications added to the definition of “options communications” in Rule 9.21(a).

Amendments to Rule 9.21(e)

- 1) Paragraph (e), which defines terms used in Rule 9.21, has been redesignated as paragraph (a).
- 2) The definition of “options communications” in new Rule 9.21(a) is amended to expand the types of communications governed by Rule 9.21 to include correspondence, institutional sales material, public appearances and independently prepared reprints.
- 3) The definitions of advertisement and sales literature were amended and, as previously noted, the definition of educational material has been deleted because educational material is now included in the revised definition of sales literature.

New Rule 9.21(e)

New Rule 9.21(e) sets forth the standards applicable to options communications that are not preceded or accompanied by an ODD. These requirements generally clarify and restate the requirements formerly contained in Interpretation and Policy .02 of Rule 9.21.

⁶ See Rule 9.21(b)(i).

⁷ 17 CFR 240.17a-4. More specifically, Rule 17a-4(b)(4) requires that a broker-dealer retain “originals of all communications received and copies of all communications sent...including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public.”

Interpretation and Policy .01

- 1) Interpretation and Policy .01 is revised to include the provisions formerly found in Interpretation and Policy .02A regarding how to satisfy the requirement (set forth in Rule 9.21(e)(i)(B)) that options communications contain contact information for obtaining a copy of the ODD.
- 2) In addition, as noted above, the provisions of Interpretation and Policy .01 regarding limitations on the use of options communications have been incorporated into Rule 9.21(d).

Interpretations and Policies .02 and .03

- 1) As previously noted, the provisions of Interpretation and Policy .02 that outline what is permitted in an advertisement have been deleted and the provisions relating to standards for options communications used prior to delivery of the ODD have been incorporated into Rule 9.21(e)(ii).
- 2) Also as previously noted, Interpretation and Policy .03, which concerned educational material, has been deleted.

Interpretation and Policy .04

- 1) Interpretation and Policy .04A has been redesignated as Rule 9.21(d)(vii). This provision sets forth the requirement that options communications shall state that supporting documentation for any claims, comparisons, recommendations, statistics or other technical data, will be supplied upon request.
- 2) Interpretation and Policy .04B, which pertains to standards for sales literature that contains projected performance figures, has been redesignated as Interpretation and Policy .02.
- 3) Interpretation and Policy .04C, which pertains to standards for sales literature that contains historical performance figures, has been redesignated as Interpretation and Policy .03.
- 4) The ODD delivery requirement applicable to sales literature has been modified to provide that an ODD must precede or accompany any communication that conveys past or projected performance figures involving options or constitutes a recommendation pertaining to options.⁸
- 5) A notice providing the name and address of a person from whom the ODD may be obtained is required in sales literature that does not contain a recommendation or past or projected performance figures. This requirement

⁸ See Rule 9.21(e)(i)(C) and Interpretations and Policies .02 and .03.

will allow communications that are educational in nature to continue to be disseminated without being preceded or accompanied by a copy of the ODD.

- 6) Interpretation and Policy .04D, which pertains to standards for options programs, has been redesignated as Interpretation and Policy .04. Interpretations and Policies .04E and .04F have been deleted.

Any questions regarding this Regulatory Circular may be addressed to David Carlson at (312-786-7052) or Lawrence J. Bresnahan at (312-786-7713).