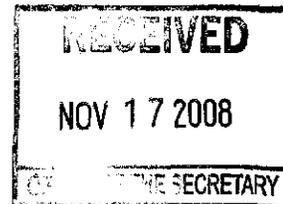


November 13, 2008

Florence E. Harmon,
Acting Secretary
U.S. Securities and Exchange Commission
100 F. Street, NE
Washington, D.C. 20549 - 1090



Re: File No. SR-CBOE -2008-105 - Proposed rule change to eliminate registered representative fees and institute an options regulatory fee

Dear Ms. Harmon:

optionsXpress, Inc. ("optionsXpress") is a registered Broker-Dealer and Futures Commission Merchant that provides an online trading platform and execution services to self-directed retail investors and clearing services for domestic equity and options transactions. optionsXpress is a member of all major Securities Exchanges, Associations and Commodity and Futures Exchanges. optionsXpress' Designated Examining Authority is the Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange"). optionsXpress' clients include retail individuals and entities that place self-directed orders for their individual, joint, IRA, and corporate accounts. optionsXpress does not engage in proprietary trading.

optionsXpress appreciates the opportunity to respond to the above-referenced filing. The CBOE proposes to amend its Fees Schedule to eliminate the Registered Representative fees paid by member firms and replace that lost revenue with a new Options Regulatory Fee ("ORF") assessed on each option contract executed by the member and cleared by The Options Clearing Corp. ("OCC") in the customer range ("Proposal").¹ The Proposal is to be effective on January 1, 2009.

optionsXpress respectfully requests that the Securities Exchange Commission ("SEC" or "Commission") abrogate the above-referenced filing pursuant to its authority under the

¹ SEC Release No. 34-58823, 73 F.R. 63744 (October 27, 2008) ("Proposal").

Securities Exchange Act of 1934 ("Exchange Act"), since the Proposal fails to satisfy the equitable allocation standards of Section 6(b)(4) of the Exchange Act, and for the additional reasons set forth below.² While optionsXpress supports CBOE's efforts to propose a new fee, such a fee must be transparent, uniform, operationally feasible, and equitably allocated among those users that the regulatory costs serve.

I. The ORF is applied inequitably solely to customer-range transactions

The CBOE proposes that a \$.0045 per contract ORF would be assessed to each member for all options transactions executed by the member and cleared by OCC in the customer range regardless of whether the transactions took place on the CBOE. Transactions in the firm range would not be subject to the ORF. Imposing the ORF solely on customer range transactions to replace the registered representative fee revenue paid by firms in order to fund the CBOE regulatory pool that regulates all firms is not justifiable. Assessing this fee to customer range accounts only seems to stray from the chief role of regulators, which is to protect investors and maintain a fair marketplace.

A. There is no justifiable nexus between solely customer range transactions on the CBOE and the "regulatory costs" that the ORF seeks to recoup.

Section 6(b)(4) of the Act requires the equitable allocation of reasonable dues, fees and other charges among members, issuers and other persons, including retail customers, using the Exchange. The ORF does not achieve such an equitable allocation. The CBOE seeks to use FINRA's Trading Activity Fee³ as "established precedent" for its ORF, but FINRA's TAF is not

² Section 6(e)(2) grants the Commission the authority to "abrogate any exchange rule which imposes a schedule or fixes rates of . . . fees, if the Commission determines that such schedule or fixed rates are no longer reasonable, in the public interest, or necessary to accomplish the purposes of this chapter." 15 U.S.C. 78f(e)(2). Section 6(b)(4) of the Exchange Act requires the equitable allocation of fees among members and the retail investors using the Exchange's facilities: "The rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities." 15 U.S.C. 78f(b)(4).

³ See 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003).

analogous to the ORF. FINRA's TAF does not discriminate among or between retail versus member transactions and applies the fee evenly across all users. The CBOE's ORF discriminates in its application by favoring member option transactions in the firm range. The CBOE's reliance on FINRA's TAF, as precedent in support of its ORF, is misplaced because the TAF is assessed amongst all member firms regardless of trading range and directly funds FINRA's member regulatory activities. The CBOE should be required to explain the nexus between the ORF and the regulatory duties that the ORF is funding. Further, the CBOE should be required to provide a cost analysis detailing how and why its regulatory obligations paid for by the ORF apply only to customer range transactions and not firm range transactions.

B. The Proposal lacks support to show that the fees are reasonable.

Without any cost data or economic analysis supporting the Proposal, the ORF seeks to recoup "regulatory costs" of the Exchange lost due to an elimination of the licensing fee paid for registered representatives of CBOE member firms. In its Concept Release Concerning Self-Regulation, the Commission stated that regulatory fees should be "reasonably designed to recover the [SRO's] costs related to regulation and oversight of its members."⁴

The Proposal states that the "ORF is reasonable because it will raise revenue related to the amount of customer options business conducted by members, and, thus, the amount of Exchange regulatory services these members will require." This means that traditional brokerage firms and market makers will pay less while retail customers absorb the cost. Ultimately, the CBOE's Proposal fails to equitably allocate the ORF among those using its facilities. Fees charged on retail customer option trading will ultimately be used to fund the CBOE's regulatory program, which is designed to regulate market makers, and proprietary and retail firms. The CBOE has provided no evidence to support their allocation of a higher burden on online and discount firms in comparison to its other members.

⁴ Concept Release Concerning Self-Regulation, SEC Release No. 34-50700 (Nov. 18, 2004) (citing 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003)).

C. There is no justifiable nexus between solely customer range transactions on other exchanges and the regulatory activities of the CBOE.

In its Concept Release Concerning Self-Regulation, the Commission noted that it would not approve a regulatory fee that “has little or no nexus to the regulatory tasks performed by the SRO.”⁵ However, the Proposal seeks to impose the ORF on “all transaction executed by a member, even if such transactions do not take place on the Exchange.”⁶ This approach fails to protect and serve the best interests of retail investors, and instead seeks to subsidize CBOE member firm regulatory activity through forced taxation of retail, customer range transactions occurring on other markets. Rather than an exchange fee, the ORF more closely mirrors a federal mandate, tax, or appropriation bill across state lines. Such a scope is overbroad and promotes taxation of retail customers trading options on exchanges having no nexus to the CBOE.

We understand that the market is changing, and as an industry we need to consider that. However, all firms and all persons engaged in the marketplace should bear the burden of those costs equally. Alternatively, if truly driven by the Intermarket Surveillance Group (“ISG”), and ISG provides an essential market surveillance function, then perhaps the SEC is best suited to analyze and propose the appropriate fee across the marketplace. optionsXpress is concerned that the CBOE’s Proposal may encourage the other exchanges to seek their own fees to recoup “regulatory costs”, which could result in significant fees for retail investors trading options. We encourage the Commission to work with the CBOE and these other exchanges to ensure that any new fees imposed on options trading are tied to the regulatory costs these exchanges will seek to recoup, are evenly applied, and not so burdensome as to discourage retail investor from trading options.

⁵ *Id.* at n.207 (citing Trading Activity Fee Approval Order, SEC Release No. 34-47946 (May 30, 2003)).

⁶ File No. SR-NASD-2008-105.

D. The Proposal encourages routing to a market maker to avoid facing a competitive disadvantage.

The Commission should abrogate the above-referenced filing because it hinders rather than promotes competition.⁷ Inherent in the Proposal is the loophole enabling a retail firm to route would-be customer range orders through an affiliated market maker on an omnibus basis to avoid the ORF. The Proposal encourages routing through a broker-dealer rather than directly to an exchange. This alone is a basis to reconsider, if not abrogate, the Proposal.

Ultimately, the Proposal encourages retail firms to affiliate with a market maker to pass along a lower cost to customers, or otherwise, face a competitive disadvantage. Should the Proposal become effective it would "impose a burden on competition not necessary or appropriate" in furtherance of Section 6 of the Exchange Act, and thereby violate Section 6(b)(8) of the Exchange Act.

E. The Proposal disadvantages retail customers.

Exchange rules should not be "designed to permit unfair discrimination between customers, issuers, brokers or dealers."⁸ Doing so harms the very public interest and investors that Section 6 was designed to protect.

Section 6(b)(5) of the Exchange Act makes clear that the rules of the Exchange are designated to "remove impediments" to "a free and open market." The ORF simply places an undue financial impediment on retail customers seeking equal access to the options marketplace. A tax on retail customers entering the options markets could likely drive marginal investors away from trading options, thereby inhibiting the marketplace. This harms competition.

⁷ Section 6(e)(2) grants the Commission the authority to "abrogate any exchange rule which imposes a schedule or fixes rates of . . . fees, if the Commission determines that such schedule or fixed rates are no longer reasonable, in the public interest, or necessary to accomplish the purposes of this chapter." 15 U.S.C. 78f(e)(2). One such purpose is to ensure that the Exchange's rules ". . . do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title." 15 U.S.C. 78f(b)(8).

⁸ 15 U.S.C. 78f(b)(5).

optionsXpress is concerned that imposing a per-contract fee on contracts traded in the customer range will result in a decreased number of retail customers trading options as a means to diversify their portfolios at a time of extreme market volatility in which the self-directed retail investor has realized the benefit of using derivatives as a hedge for their investment portfolio.⁹ The Proposal makes option trading more expensive for customer range investors seeking equal access to the option markets.¹⁰

The volume in the options markets is driven primarily by traditional firms and firm range traders, not customer range investors at online brokerages. Retail investors should not be treated differently from their institutional counterparts trading the same products in a different range. An equal access and benefit culture is essential to fuel a free market. Providing a fee advantage to those trading in the firm range, while disadvantaging retail customers, does not promote such a culture. Equal access and a level playing field among retail and institutional investors is critical to maintaining and developing a thriving options market that is open to, and encouraging of, the retail options investor. The Proposal seeks to tax the investors least using the Exchange, who are also least likely to organize and object to the ORF through a unified voice. optionsXpress objects to the ORF for itself and its retail investors.

II. The Proposal is operationally challenging

The Proposal is operationally challenging for firms to carry out. A *de minimus* exemption is appropriate, but has not been considered in the Proposal. Left unanswered by the Proposal is how the CBOE proposes to charge the customer range investor the \$.0045 ORF for trading a 1-lot, or for that matter, any odd-lot. Must the firm round the fee up to one penny or the next higher penny, resulting in the retail investor paying twice as much for the 1-lot trade or more for an odd-lot than an even-lot? Even if such an ORF were to be imposed, a *de minimis* exemption

⁹ Between December, 2007 and October, 2008, optionsXpress' customer assets have decreased less than the market average (S&P 500 and NASDAQ).

¹⁰ See Proposal at footnote 8.

is appropriate for those trades that would result in a fee below a certain threshold (i.e., below a penny).

By way of example, the Commission has, in the past, exempted Section 31 fees of options on narrow-based security indexes where the cost of tracking the transactions was much greater than the relatively small amount of revenue (below \$35,000) generated by the fees. See Securities Exchange Act Release No. 45371 (January 31, 2002), 67 FR 5199 (February 2, 2002). There, an exemption was found to be warranted "[i]n light of currently low dollar volume of sales of options on narrow-based security indexes and the resources that exchanges and associations must devote to monitoring the narrow-based status of the underlying indexes." 67 FR at 5200.

Similar logic applies here. The ORF fees on one-lot and two-lot transactions are under one penny. The resources a firm must devote to charge a one-lot trading retail customer \$0.0045 cents far exceeds the dollar value or any argued regulatory cost benefit of such a small transaction. The Commission should seek further comment on the appropriate small-lot threshold to which to apply a *de minimus* exemption. While a *de minimus* exemption would result in minor foregone fees for the CBOE, such an amount would be nominal in light of the processing, logistical, operational, and practical burdens on firms charging such fees. optionsXpress further urges the CBOE to consider, and the Commission to seek further comment, on how odd-lot transactions should be handled when calculating fees due. It is critical to establish a single, uniform methodology for calculation of amounts due in order to reduce the likelihood of errors due to inconsistent interpretation of the ORF as applied to small-lot and odd-lot transactions.

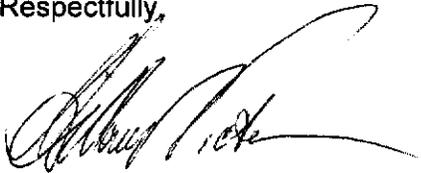
III. Conclusion

optionsXpress objects to the ORF for itself and its retail investors who don't have a unified voice to object and will ultimately pay the ORF. While optionsXpress supports CBOE's efforts to propose a new fee, such a fee must be transparent, uniform, operationally feasible, and equitably allocated among those users that the regulatory costs serve.

For the reasons set forth above, optionsXpress urges the Commission to abrogate the Proposal in its current form because it imposes an inequitable financial burden on customer range retail options traders. optionsXpress respectfully submits that if the ORF only applies to accounts in the customer range, the rule unfairly disadvantages retail customers while benefitting firm traders and large institutions. The Commission must protect the retail investing public from inequitable fees that impede competition, create inefficiency, and permit unfair discrimination among investors.

optionsXpress appreciates the opportunity to comment on the CBOE Proposed Rule. If you have any questions or need further clarification of the concerns raised herein, please do not hesitate to contact the undersigned. It is our hope that the CBOE will respond affirmatively to this petition so that a uniform standard can be communicated to the industry while serving the investors who the industry seeks to protect.

Respectfully,

A handwritten signature in black ink, appearing to read "Hillary Victor", written in a cursive style.

Hillary Victor,
Associate General Counsel
optionsXpress Holdings, Inc.