December 3, 2008

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: SR-CBOE-2008-105

Dear Ms. Morris:

thinkorswim, Inc. ("thinkorswim") appreciates the opportunity to comment on the Chicago Board Options Exchange's (the "CBOE's" or the "Exchange's") proposal to implement a customer transaction "Options Regulatory Fee" (the "ORF").[1] thinkorswim, founded in 1999 and headquartered in Chicago, is a leading online brokerage company specializing in options. thinkorswim supports retail and institutional traders through proprietary trading platforms which are widely recognized as one of the industry's best for execution, professional analytics and real-time position management. thinkorswim is a member of the Financial Industry Regulatory Authority ("FINRA").

CBOE proposes to eliminate its registered representative fee – a fee based on the number of registered representatives at each member firm. The CBOE, like other exchanges, has maintained a registered representative fee as a means to support the costs of its regulatory oversight of options trading. In its place, CBOE proposes that the ORF (in the amount of $.0045 per contract) be charged for all customer transactions of CBOE members even where the customer transactions are directed to and executed on competing options exchanges.

As discussed in more detail below, thinkorswim has several substantive concerns about the filing but believes, as a matter of procedure, that the Securities and Exchange Commission ("Commission") should abrogate the CBOE rule, pursuant to Section 6(e)(2) of the Securities Exchange Act of 1934 ("Exchange Act"). The ORF raises significant market structure, competitive and fairness questions, which make a filing under Section 19(b)(3)(A) of the Exchange Act inappropriate. Instead, a filing as important and controversial as this one should not be approved until there has been sufficient time for industry comment and Commission consideration of these comments. In addition, the CBOE filing does not provide sufficient detail concerning its regulatory costs to justify the application and level of the proposed fee.

[1] SEC Release No. 34-58817; 73 FR 63744 (October 27, 2008) ("Proposal").

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thinkorswim urges the Commission to abrogate the CBOE filing, and require the CBOE to re-file with these details under Section 19(b)(2).[2]

I. The ORF is not Equitable or Reasonable and Fails to Comply with Section 6(b)(4) of the Exchange Act

CBOE's fees must comply with Exchange Act Section 6(b)(4) and provide for the "equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities." In this regard, the Exchange makes a blanket statement that member firms already pay "their fair share of the costs of regulation[,]"[3] but provides no data to support this statement. To evaluate the CBOE's claim, the Commission and firms must better understand the CBOE's regulatory costs attributable to member firms and those costs attributable solely to customer transactions. Without this important information, the CBOE has failed to demonstrate that the ORF is an equitable or reasonable fee.

Further, applying the fee to just customer transactions ignores the fact that all CBOE member firms interact and benefit from the volume attributable to customer orders and should therefore shoulder the regulatory costs of such orders. At a minimum, the CBOE should extend the ORF to apply to all CBOE member transactions (which is the case with FINRA's Trading Activity Fee or "TAF"), which would more fairly allocate the costs of CBOE regulatory activities for all options transactions executed by members that are cleared by the Options Clearing Corporation ("OCC").

II. The ORF Discriminates Unfairly between Member Firms and Fails to Comply with Section 6(b)(5) of the Exchange Act

Under Section 6(b)(5) of the Exchange Act, CBOE's rules must not permit "unfair discrimination between customers...brokers, or dealers..." The CBOE states that the new fee is "objectively allocated to CBOE members because it would be charged to all members on all their transactions that clear as customer at the OCC[,]" but concedes that the costs of the new fee will be higher for online firms than for more traditional firms.[4] The CBOE states that "the ORF ensures fairness by assessing higher fees to those member firms that require more Exchange regulatory services based on the *amount of customer options business* they conduct."[5]

[2] thinkorswim is not a member of the CBOE, but fully expects, as noted in the Proposal, that "member firms will pass-through the ORF to their customers in the same manner that firms pass-through to their customers the fees charged by SROs to help the SROs meet their obligation under Section 31 of the Exchange Act." Proposal at 63745.
[3] Id.
[4] Id. at 63746.
[5] Id. (emphasis added).

The CBOE fails to justify or substantiate the statement that online firms require more Exchange regulatory services than other CBOE member firms. The CBOE also fails to articulate why online and discount firms must subsidize the CBOE's regulation of traditional brokerage firms and proprietary traders, especially where the regulation of member firms with such business models requires considerably more surveillance and oversight (including the surveillance of frontrunning and anticipatory hedging, among other obligations). Online firms, like thinkorswim, typically handle unsolicited customer orders electronically on an agency basis, and do not recommend securities transactions to their customers. By contrast, traditional firms make recommendations to customers, and this activity gives rise to additional and important regulatory considerations such as suitability. Moreover, for FINRA member firms such as thinkorswim, FINRA handles the oversight of a number of significant regulatory issues, such as advertising and registration. In this context, CBOE should justify why online firms should be expected to bear more of the costs of regulation of CBOE activity. The amount of such firms' customer options business alone cannot justify the added cost that online firms and their customers would be forced to pay over firms that operate pursuant to a different business model that is demonstrably more expensive from a regulatory perspective.

Further, there is no explanation in the CBOE filing as to why this (or any) ORF should remain at $.0045 per contract when applied to transactions executed at competitor exchanges. Presumably the CBOE does not have to expend as many resources for orders sent to competitor exchanges for execution when those exchanges provide surveillance and regulatory oversight for such transactions. As discussed below, we object to the ORF applying to transactions on competitor exchanges, but at a minimum, CBOE should be required to justify why the ORF rate is not lowered for such transactions.

III. <u>The ORF Raises Significant Market Structure and Competition Issues</u>

CBOE's filing raises significant market structure and competitive issues that must be addressed before the Commission can approve CBOE's fee (or any similar fee from the other options exchanges). If the Commission permits one options exchange to charge a market-wide transaction fee, it will necessitate that the other options exchanges institute a similar market-wide fee as a means to avoid a competitive disadvantage in its regulatory programs.[6] These exchanges may seek to lower, or eliminate altogether, their registered representative fees and raise fees for member firms with a customer business. Even if the other exchanges object to an overly broad fee targeting customer transactions, they will have little choice but to attempt to capture the same level of revenue that the CBOE has now proposed.

[6] The CBOE acknowledges this possibility when it states, "[o]ther exchanges would, of course, be free to impose a similar fee on their member's activity, including the activity of those members on the CBOE." Id. at 63746.

The introduction of the ORF by the CBOE demonstrates that the Commission must address the duplication of surveillance and regulation across the options exchanges. In thinkorswim's view, the Commission cannot establish a precedent that, if replicated, will permit the exchanges to charge a member firm for the same transaction multiple times.

The CBOE justifies its new fee, in part, by noting that FINRA was permitted to charge the TAF to all FINRA members for any equity transaction executed on any exchange or trading venue. In that filing, the Commission had to make a finding that FINRA's mandate was broad, and that its regulatory obligations "exist separate and apart from any market-specific rules and obligations."[7] A principal factor in the Commission's approval was its explicit recognition of FINRA's broad responsibilities with respect to its members' activities, irrespective of where securities transactions take place. thinkorswim does not believe that the CBOE occupies a role similar to FINRA but, at a minimum, the Commission should make a finding on this point before allowing CBOE to implement a fee analagous to the TAF.

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If the Staff has questions regarding these comments, please contact the undersigned at (773) 244-6841.

Sincerely,

Peter D. Santori
Senior Vice President and General Counsel
thinkorswim Group Inc.

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[7] Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003).