Please consider my additional comments

Consider the following from the filing.

"The purpose of providing these marketplace advantages to public customers orders is to attract retail investor order flow to the Exchange by leveling the playing field for retail investors over market professionals and providing competitive pricing."

1. When the CBOE first opened for trading in 1973, Equity options listed on the CBOE were traded exclusively on the CBOE; hence there was no competition to "attract order flow". The priority rules were designed to protect the public non-members, as well as to create an incentive for the market-makers to improve pricing, which has the effect of narrowing the spreads.
2. Another significant advantage the market-maker has over the customer, including the "Competitive customer" is the ability to react to an order and price improve in pennies, which is not available to the customer. Consider the following example: The market is 2.85 Bid and 3.00 Ask (2.85 -3.00) or a 15 cent spread. The Option trades in 5 cent increments. The CBOE market-maker is bidding 2.85 as well as ANY customer. The CBOE market maker has the advantage of BEING ABLE TO PRICE IMPROVE AND PAY 2.86 even though the quote being displayed is 2.85. This happens thousands of times daily. The CBOE market may pay 2.87 or even 2.88 depending on the competition. Remove the competing bids with priority, and you are removing the incentive for the market-makers to improve prices and make tighter markets.
3. 390 orders do not equal 390 executions. Given the nature of options and the fluctuations in the markets a "Competitive customer" could enter numerous orders before entering an order that results in a fill. If the SEC were to allow the CBOE to adopt the Professional designation, then the number of orders should not be 390 but some ratio of the number of orders that a Professional market-maker executes in a day given that The CBOE justification. A good number at 5% of a CBOE market-makers daily orders (250,000) would put the threshold for professional designation at 12,500 orders per exchange.
4. The CBOE would have the SEC believe that the "Competitive customer" is, in fact denying the retail customer an opportunity for an execution. I would argue that this untrue and in fact, the "Competitive customer" is competing with the CBOE market-maker to be on the Contra side of the retail customer order flow. Result being customer to customer execution. Additional liquidity in the marketplace. The CBOE has asked for this rule change to eliminate its competition. Clearly, if what the CBOE says is true then the SEC should investigate further and require the CBOE to produce documentation.

In conclusion, the SEC needs to realize that its responsibility is to protect the customer and the pricing mechanism in the marketplace. The CBOE and ISE have acted with this rule change are acting like bullies in the play ground. The Exchanges made the rules, others develop a strategy to profit, and compete against the Exchange members, which reduces the Exchange members profits, and all of a sudden the Exchanges want to change the rules to their advantage in the middle of the game. This clearly reeks of Antitrust. With that in mind, I would direct you to http://www.justice.gov/atr/cases/f6400/6460.htm

“On September 11, 2000, the United States filed a civil antitrust Complaint alleging that the defendants had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Defendants are option exchanges that provide a forum on which their members trade options. An option is the right either to buy or to sell a specified amount or value of a particular underlying interest (equity security, stock indices, government debt securities or foreign currencies) at a fixed exercise price by exercising the option before its specified expiration date. An equity option is one in which the underlying interest is an equity security. Since the early 1990s, exchanges have been permitted to list options on any equity security that meets certain listing criteria. The Complaint alleges that, beginning in the early 1990's, an agreement arose among the defendants to limit competition among themselves by not listing options that were already listed on another exchange.

On September 11, 2000, the United States and the defendants filed a Stipulation in which they consented to the entry of a proposed Final Judgment that requires defendants to eliminate the anticompetitive conduct identified in the Complaint. Specifically, the proposed Final Judgment prevents the defendants from allocating equity options between or among exchanges or from agreeing that an equity option will be traded exclusively on any one exchange. The proposed Final Judgment also prohibits an exchange from maintaining any rule, policy, practice, or interpretation that directly prohibits, or that has the purpose and an effect of indirectly prohibiting, the multiple listing of equity options. Further, the Final Judgment enjoins defendants from retaliating, harassing or intimidating any exchange or member of an exchange for listing an equity option or introducing a new equity option product.”

While the facts in that case are different, the conduct whereby the result would be to the benefit of the Exchange members to the detriment of others is the same. It is unfortunate that the SEC did not have the insight, to recognize that the ISE rule change, in fact, and in practice will only serve to benefit those members that are trading for their own accounts. This rule will have the effect of removing liquidity from the marketplace. This is another example of the SEC acting as a rubber stamp, similar to the SEC oversight of Mr. Madoff. How is it possible that the SEC would allow adoption of a rule without a shred of documentation? This rule is not in best interest of the public. The SEC needs to rescind the rule change enacted by the ISE.

Richard Weinstock