CBOE EXECUTE SUCCESS℠

Joanne Moffic-Silver
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July 3, 2014

Via Email & Regular Mail
Steven D. Oppenheim
Faust Oppenheim LLP
488 Madison Avenue
New York, New York 10022

Re: CBSX April 2014 Invoice to WallachBeth Capital LLC

Dear Mr. Oppenheim:

I am writing in response to your June 16, 2014 letter, in which you request a refund of certain fees charged to your client, WallachBeth Capital LLC, pursuant to the CBSX fee schedule for cross trades in April 2014 that were not part of stock option trades. No such refund is permissible or appropriate.

It would be impermissible for CBOE to make the requested refund, because the fee in question was correctly calculated pursuant to an effective rule of the exchange. As an exchange, CBOE is obligated under the Exchange Act to obey and enforce its rules in a consistent fashion. The fee in question constitutes such a rule, because it was part of an amendment to the CBSX fee schedule (SR-CBOE-2014-028) that went into immediate effect on April 1, 2014, pursuant to Section 19(b)(3)(A) of the Exchange Act. Because the fee constitutes a rule of the exchange, the Exchange Act obligates CBOE to charge the fee as long as it is in effect, and CBOE has no authority to issue selective refunds to particular persons who are subject to that fee.

In any event, the fee change was proper in all respects, and there can be no legitimate basis to challenge it now. As you admit in your letter, CBOE gave notice of its proposed fee change in its rule change filing. Accordingly, your client and any other interested party had a full opportunity to oppose the fee and to ask that the rule be suspended. That official notice is all that CBOE was required to give, but CBOE did even more to alert trading permit holders about the proposed fee change. On March 27, 2014, it warned all CBSX trading permit holders in writing – including WallachBeth – about the nature and size of the impending fee increase. Your client therefore received both formal and individualized notice about this fee increase. Despite that official and unofficial notice, no one opposed the fee change. The time period for suspending the fee change has passed, and the rule is now final. In the face of the official and unofficial notice CBOE gave of this fee change, it is empty rhetoric to claim that your client had "no opportunity to object" to the proposed fee change. Your client had a full opportunity to object and simply failed to do so. It has only itself to blame if its viewpoints were not considered.

More than being untimely, though, your client's objections to the rule change are substantively baseless. There is nothing "exorbitant" about the fee in question. Before the rule change, those who engaged in cross trades that were not part of stock options trades paid nothing for the CBSX resources that their activity utilized. CBSX appropriately determined that those who engaged in such trades should pay their fair share for that privilege. Far from being "exorbitant," the fee charged for cross trades that were not part of stock options trades was quite reasonable. It was only 1/10 of a penny per share for securities priced at or greater than $1 and 1/10 of 1% of the value of a trade in which the securities were priced at less than $1, a fee that was well below the fee cap the Commission has mandated for equity trades. If your client thought the fee was unreasonable, it had the right to trade elsewhere and should have done so; and it had the duty to monitor the publicly announced fee structures of the competing exchanges to decide for itself where it preferred to trade.

The only other complaint you mention is that the fee in question was only in effect for one month, because CBSX terminated operations on April 30, 2014. That is not a valid complaint about the fee. The reasonableness of the fee turns on its nature and size and how it would be applied, not on how long it would be in effect. Like any fee, this fee was to be in effect (unless and until it was further amended) for as long as CBSX remained in business – whether that was one month or many years. Although CBOE expected to be allowed to terminate CBSX operations as of April 30, that proposal was subject to public comment and the possibility of Commission disapproval. CBSX was entitled to adjust its fee schedule as appropriate to govern its business in the meantime. The fact that the fee probably would be in effect for only one month is irrelevant to whether the fee change was proper under the Exchange Act.

Finally, to the extent you are suggesting that CBOE hid its intention to terminate CBSX's operations by April 30, 2014, the facts belie that contention. CBOE was completely transparent about its intention to terminate CBSX's operations as of April 30, assuming the Commission did not prevent that termination. As you admit, CBOE publicly filed a rule change proposal on April 1 in which it expressly sought Commission authorization to terminate CBSX's operations by April 30. It is impossible seriously to contend that CBOE was hiding its plans.

For these reasons, there is no legal or factual basis for CBOE to consider making a refund to your client of the fees that it was charged pursuant to this fully effective and valid exchange rule.

Sincerely,

Joanne Moffic-Silver

Joanne Moffic-Silver

cc: Mr. Kevin M. O'Neill (via email to: oneillk@sec.gov)
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