

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59193; File No. SR-CBOE-2008-128)

January 2, 2009

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Exchange Fees for Fiscal Year 2009

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 24, 2008, the Chicago Board Options Exchange, Incorporated (“CBOE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. CBOE has designated this proposal as one establishing or changing a due, fee, or other charge applicable only to a member under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Chicago Board Options Exchange, Incorporated (“CBOE” or “Exchange”) proposes to amend its Fees Schedule to make various changes for Fiscal Year 2009. The text of the proposed rule change is available on the Exchange’s website (<http://www.cboe.org/legal>), at the Exchange’s Office of the Secretary and at the Commission.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend the CBOE Fees Schedule to make various fee changes. The proposed changes are the product of the Exchange's annual budget review. The fee changes were approved by the Exchange's Board of Directors pursuant to CBOE Rule 2.22 and will take effect on January 1, 2009.

The Exchange proposes to amend the following fees:

A. Liquidity Provider Sliding Scale

The Exchange's Liquidity Provider Sliding Scale program reduces a Liquidity Provider's per contract transaction fee based on the number of contracts the Liquidity Provider trades in a month.⁵ The sliding scale applies to all Liquidity Providers (CBOE Market-Maker, Designated Primary Market-Maker ("DPM"), Electronic DPM ("e-DPM") and Lead Market-Maker ("LMM")) for transactions in all products.⁶

⁵ See Section 1 and Footnote 10 of the CBOE Fees Schedule.

⁶ Contract volume resulting from dividend, merger and short stock interest strategies as defined in Footnote 13 of the Fees Schedule does not apply towards reaching the sliding scale volume thresholds.

Under the current program, a Liquidity Provider's standard \$.20 per contract transaction fee is reduced if the Liquidity Provider reaches the volume thresholds set forth in the sliding scale in a month. As a Liquidity Provider's monthly volume increases, its per contract transaction fee decreases. The first 75,000 contracts traded in a month (first tier) are assessed at \$.20 per contract. The next 1,125,000 contracts traded (up to 1.2 million total contracts traded – second tier) are assessed at \$.18 per contract. The next 1.8 million contracts traded (up to 3 million total contracts traded – third tier) are assessed at \$.15 per contract and the next 1.8 million contracts traded (up to 4.8 million total contracts traded – fourth tier) are assessed at \$.10 per contract. The next 5.2 million contracts traded (up to 10 million total contracts traded – fifth tier) are assessed at \$.03 per contract. All contracts above 10 million contracts traded in a month (sixth tier) are assessed at \$.01 per contract. The Exchange aggregates the trading activity of separate Liquidity Provider firms for purposes of the sliding scale if there is at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A.⁷

The Exchange proposes to increase the sliding scale volume thresholds for fiscal year 2009 due to increased volume on the Exchange. Specifically, the Exchange proposes to change the first tier volume threshold from 75,000 contracts to 85,000 contracts, the second tier volume threshold from 1,125,000 contracts to 1,265,000 contracts (up to 1.35 million total contracts traded), the third tier threshold from 1.8 million contracts to 2,075,000 contracts (up to 3,425,000

⁷ A Liquidity Provider's monthly contract volume is determined at the firm affiliation level, e.g., if five Liquidity Provider individuals are affiliated with member firm ABC as reflected by Exchange records for the entire month, all of the volume from those five individual Liquidity Providers count towards firm ABC's sliding scale transaction fees for that month. If a Liquidity Provider firm has nominees that trade independently and have their own profit-loss accounts that are separate and distinct from those of other nominees of the firm, the independent nominee's individual contract volume shall not be grouped with the contract volume of the firm for purposes of calculating the firm's sliding scale monthly volume total.

total contracts traded), the fourth tier threshold from 1.8 million contracts to 2,050,000 contracts (up to 5,475,000 total contracts traded), the fifth tier threshold from 5.2 million contracts to 5,025,000 contracts (up to 10.5 million total contracts traded), and the sixth tier threshold from above 10 million contracts to above 10.5 million contracts. The Exchange does not propose to change any of the tier fee rates.

Currently, the Exchange provides Liquidity Providers with two incentives to prepay annual transaction fees. First, in order to be eligible to participate in the sliding scale above 1.2 million contracts (i.e., at the \$.15 per contract rate and lower), a Liquidity Provider is required to prepay their transaction fees for the first two tiers of the sliding scale for the entire year (i.e., \$2.61 million). Second, if a Liquidity Provider prepays annual fees for the first four tiers of the sliding scale, the Liquidity Provider receives a \$600,000 prepayment discount (total amount of the prepayment would be \$7.41 million instead of \$8.01 million). As a result of the volume threshold changes described above, the \$2.61 million prepayment amount for the first two tiers would be revised to \$2,936,400. The discount for prepaying the first four tiers of the sliding scale would increase from \$600,000 to \$685,000 (total amount of the prepayment would be \$8,446,400 instead of \$9,131,400).

B. Member Firm Proprietary Sliding Scale

The Exchange's Member Firm Proprietary Sliding Scale program reduces a member firm's standard \$.20 per contract transaction fee if the member firm reaches the volume thresholds set forth in the sliding scale in a month.⁸ As a member firm's monthly volume increases, its per contract transaction fee decreases. The first 400,000 contracts traded in a month are assessed at \$.20 per contract. The next 200,000 contracts traded (up to 600,000 total

⁸ See Section 1 and Footnote 11 of the CBOE Fees Schedule.

contracts traded) are assessed at \$.15 per contract. The next 150,000 contracts traded (up to 750,000 total contracts traded) are assessed at \$.10 per contract and the next 100,000 contracts traded (up to 850,000 total contracts traded) are assessed at \$.05 per contract. All contracts above 850,000 contracts traded in a month are assessed at \$.02 per contract.

The Exchange proposes to increase the sliding scale volume thresholds for fiscal year 2009 due to increased volume on the Exchange. Specifically, the Exchange proposes to change the first tier volume threshold from 400,000 contracts to 450,000 contracts, the second tier volume threshold from 200,000 contracts to 225,000 contracts (up to 675,000 total contracts traded) and the third tier threshold from 150,000 contracts to 175,000 contracts (up to 850,000 total contracts traded). The fourth tier threshold would remain at 100,000 contracts (up to 950,000 total contracts traded) and the fifth tier threshold would change from above 850,000 contracts to above 950,000 contracts. The Exchange does not propose to change any of the tier fee rates.

Due to the Exchange's obligation to pay license fees on certain products, the Exchange currently assesses a \$.10 per contract license fee (a total of 10 cents per contract less any surcharge fees already assessed) on all licensed products when a firm reaches the fifth tier of the sliding scale. The Exchange proposes to increase this charge to \$.15 per contract for options on the Russell 2000 index (RUT), mini-Nasdaq-100 index (MNX) and Nasdaq-100 index (NDX) due to the increase in the surcharge fees for these products as described in the next section below.

C. Surcharge Fees

The Exchange currently charges a \$.10 per contract surcharge fee on all transactions in MNX, NDX and RUT options and on options on the Dow Jones Industrial Average (DJX and

DXL), excluding public customer orders and including voluntary professional and linkage orders.⁹ The Exchange proposes to increase the surcharge fee to \$.15 per contract for transactions in MNX, NDX and RUT options, excluding public customer orders and including voluntary professional and linkage orders. The surcharge fee is assessed to help the Exchange recoup license fees the Exchange pays to index licensors for the right to list these products for trading and is similar to surcharge fees charged by other exchanges.

D. XSP Transaction Fee

The Exchange waived transaction fees for all market participants in options on the mini-SPX (XSP) beginning on November 19, 2007 for an indefinite time period in conjunction with a marketing “re-launch” of the XSP product.¹⁰ The Exchange has reevaluated the fee waiver and determined to reinstate XSP transaction fees effective January 1, 2009.¹¹

E. Floor Broker Workstation Fees

The Floor Broker Workstation (FBW) is a system for electronically entering and electronically managing orders on the Exchange floor. The Exchange currently assesses a fee of \$425 per month for FBW functionality that is placed on a desktop terminal. The Exchange assesses an additional \$100 per month (\$525 total per month) if the FBW application resides on a workstation that also includes certain market data functionalities. The Exchange charges a fee of \$100 per month per login ID for mobile FBWs used in index option trading crowds. No fee is assessed for mobile FBWs used in equity option trading crowds. Additionally, the Exchange

⁹ See CBOE Fees Schedule, Section 1 (Index Options) and Footnote 14.

¹⁰ See Securities Exchange Act Release No. 56862 (November 29, 2007), 72 FR 68918 (December 6, 2007).

¹¹ XSP option transaction fees are assessed pursuant to the Index Options transaction fee schedule set forth in Section 1 of the Fees Schedule.

assesses DPMs a fee of \$100 per month per login ID for use of an FBW, whether it is a desktop FBW or a mobile FBW.

The Exchange proposes to eliminate all of the distinctions described above and charge a fee of \$355 per month per login ID for use of any FBW, whether a mobile FBW or a desktop (stationary) FBW. FBW fees are charged to assist the Exchange in offsetting the cost of making FBWs available to members.

F. Position Transfer Fee

CBOE Rule 6.49A provides for a special procedure to permit option positions to be offered on the floor of the Exchange in the event that the positions are being transferred as part of a sale or disposition of all or substantially all of the assets or options positions of the transferring party where the transferring party would not continue to be involved in managing or owning the transferred positions. The rule also provides for off-floor transfers of positions based on certain specified exemptions, as well as with the approval of the Exchange's President under extraordinary circumstances.

The Exchange regularly accommodates both on-floor and off-floor transfers of positions. The primary reason that members prefer to transfer positions as opposed to trading out of them is that transferring positions affords a reduction in administrative overhead and cost. In the typical situation, a member is undergoing a structural change and a one-time movement of positions offers efficiency in that process.

Exchange Trading Floor Liaison and Help Desk staff participate in on-floor transfers by reviewing, preparing and executing the process, which can take several hours depending upon the size and number of classes involved.¹² Off-floor transfers are reviewed and approved by

¹² The procedure for on-floor transfers of positions is set forth in Rule 6.49A(c).

management of the Exchange's Market Regulation Department. Reviewing the position transfer data may take little time or several hours, again depending upon the size and number of classes involved.

The Exchange proposes to establish a fee for options position transfers to help offset the Exchange's costs to provide the services described above. The Exchange proposes to charge \$.02 per contract side for all options contracts transferred pursuant to Rule 6.49A. The fee would be capped at \$25,000 per transfer. The Exchange believes the proposed position transfer fee is reasonable in that even with the proposed fee the position transfer process provides members with significant cost savings as compared to the transaction fee costs that a member would incur by trading out of the positions.

G. PAR Workstation Fee

PAR Workstations are touch screen terminals designed to allow electronic representation of orders routed to it. PAR Workstations have been in service for many years with no user fee assessed by the Exchange. The Exchange proposes to assess a \$100 per month fee for use of a PAR Workstation, in order to help offset hardware costs incurred by the Exchange in making PAR Workstations available to members.

H. Miscellaneous Changes

The Exchange proposes the following housekeeping changes to its Fees Schedule. The Exchange proposes to delete a sentence in Footnote 1 of the Fees Schedule relating to a transaction fee waiver for binary options that expired on October 1, 2008.¹³ The Exchange also proposes to delete certain charges under the Trade Processing section (Section 9) of the Fees Schedule because those fees are no longer charged. Specifically, the Exchange proposes to

¹³ See Securities Exchange Act Release No. 58127 (July 9, 2008), 73 FR 41140 (July 17, 2008).

delete the RAES Market Maker Input charge because the RAES system is no longer in use, and the CBOE Hand Held Terminal Input charge because such terminals also are no longer in use.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (“Act”)¹⁴ in general, and furthers the objectives of Section 6(b)(4) of the Act¹⁵ in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members and other persons using its facilities. The Exchange believes the Liquidity Provider and Member Firm Proprietary Sliding Scale fee discounts are reasonable and appropriate in that they are based on the amount of business transacted on the Exchange. The Exchange believes the other proposed fee changes are equitable and reasonable in that they are designed to recoup or help offset costs incurred by the Exchange in making products and services available to members.

B. Self-Regulatory Organization’s Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁶ and subparagraph (f)(2) of Rule 19b-4¹⁷ thereunder. At any time within 60 days of the

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(4).

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(2).

filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CBOE-2008-128 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CBOE-2008-128. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those

that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2008-128 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

Florence E. Harmon
Acting Secretary

¹⁸ 17 CFR 200.30-3(a)(12).