

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51101; File No. SR-CBOE-2005-09)

January 28, 2005

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Inc. to Amend its Marketing Fee Program to Provide for a Monthly Refund of Any Surplus

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 January 14, 2005, the Chicago Board Options Exchange, Inc. ("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 CBOE. The CBOE has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the CBOE under Section 19(b)(3)(A)(ii) of the Act,³ 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

The CBOE proposes to amend its marketing fee program to provide for a monthly, rather than quarterly, refund of any surplus. Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in [brackets].

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).

CHICAGO BOARD OPTIONS EXCHANGE, INC.

FEE SCHEDULE

1.-4. No change.

NOTES:

(1)-(5) No change.

(6) The Marketing Fee will be assessed only on transactions of Market-Makers, e-DPMs and DPMs at the rate of \$.22 per contract on all classes of equity options, options on HOLDERS[®], and options on SPDRs[®]. The fee will not apply to Market-Maker-to-Market-Maker transactions. This fee shall not apply to index options and options on ETFs (other than options on SPDRs). Should any surplus of the marketing fees at the end of each month occur, [those funds would be carried forward to the following month. T]the Exchange would then refund such surplus at the end of the month[quarter,] if any, on a pro rata basis based upon contributions made by the Market-Makers, e-DPMs and DPMs.

(7) – (14) No change.

* * * * *

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

In its filing with the Commission, the CBOE included statements concerning the purpose of and basis for its proposal and discussed any comments it had received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The 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

On October 29, 2004, the CBOE amended its marketing fee program.⁵ The current marketing fee is assessed upon DPMs, e-DPMs, and Market-Makers at a rate of \$0.22 for every contract they enter into on the Exchange, other than Market-Maker-to-Market-Maker transactions, including all transaction between any combination of DPMs, e-DPMs, and Market-Makers.⁶ Currently, the marketing fee is assessed in all equity option classes, options on HOLDRs,⁷ and options on SPDRs[®].⁸ Furthermore, should any surplus of the marketing fees at the end of each month occur, those funds are carried forward to the following month. The Exchange then refunds such surplus at the end of the quarter.

The Exchange now proposes to amend its marketing fee program to provide for a monthly, rather than quarterly, refund of any surplus.⁹ The CBOE states that, based on its recent experience with the current marketing fee program, it now believes that a

⁵ See Securities Exchange Act Release No. 50736 (November 24, 2004), 69 FR 69966 (December 1, 2004) (SR-CBOE-2004-68) ("Release No. 34-50736").

⁶ See Release No. 34-50736 for a more detailed description of the CBOE's marketing fee program.

⁷ HOLDRs are trust-issued receipts that represent an investor's beneficial ownership of a specified group of stocks. See Interpretation .07 to CBOE Rule 5.3.

⁸ See Securities Exchange Act Release No. 51052 (January 18, 2005), 70 FR 3757 (January 26, 2005) (SR-CBOE-2005-05).

⁹ The Exchange states that the Marketing Fee Oversight Committee will continue to conduct quarterly reviews of the marketing fee program, including aspects related surpluses and the program's effectiveness. Telephone conversation between Andrew Spiwak, Director Legal Division and Chief Enforcement Attorney, CBOE, and David Liu, Attorney, Division of Market Regulation ("Division"), Commission, on December 18, 2005.

monthly, rather than quarterly, refund is more efficient for administrative purposes.¹⁰

The Exchange states that, consistent with the current marketing fee program, it will continue to refund any surplus on a pro rata basis based upon contributions made by the Market-Makers, e-DPMs, and DPMs.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act¹¹ in general, and furthers the objectives of Section 6(b)(4) of the Act¹² in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among the CBOE's members.

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

The Exchange 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

The CBOE neither solicited nor received written comments with respect to the proposed rule change.

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

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to

¹⁰ Telephone conversation between Andrew Spiwak, Director Legal Division and Chief Enforcement Attorney, CBOE, and David Liu, Attorney, Division, Commission, on December 18, 2005.

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4).

Section 19(b)(3)(A)(ii) of the Act¹³ and subparagraph (f)(2) of Rule 19b-4 thereunder.¹⁴ Accordingly, the proposal will take effect upon filing with the Commission. At any time within 60 days of the 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-2005-09 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-CBOE-2005-09. 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

¹³ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁴ 17 CFR 240.19b-4(f)(2).

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. Copies of the filing also will be available for inspection and copying at the principal office of the 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-2005-09 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

Margaret H. McFarland
Deputy Secretary

¹⁵ 17 CFR 200.30-3(a)(12).