

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51173; File No. SR-CBOE-2004-85)

February 9, 2005

Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Order Approving a Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 Thereto Regarding Designated Primary Market-Makers' Handling of Non-Public Customer Orders

I. Introduction

On December 15, 2004, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend its rules regarding Designated Primary Market-Makers' handling of non-public customer orders. On December 21, 2004, the CBOE submitted Amendment No. 1 to the proposed rule change.³ The proposed rule change was published for comment in the Federal Register on December 29, 2004.⁴ The Commission received no comments on the proposal.

On February 4, 2005, the CBOE submitted Amendment No. 2 to the proposed rule change.⁵ This order approves the proposed rule change, as amended by Amendment

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 made technical corrections to the propose rule text of the proposed rule change.

⁴ See Securities Exchange Act Release No. 50909 (December 22, 2004), 69 FR 78072.

⁵ Amendment No. 2 deleted the language of Interpretation and Policy .03 of CBOE Rule 8.85, which defined "public customer" order for purposes of CBOE Rule 8.85(b)(iii). Since the term "public customer" order will no longer be in CBOE Rule 8.85(b)(iii), the interpretation is no longer necessary.

Nos. 1 and 2. Simultaneously, the Commission is providing notice of filing of Amendment No. 2 and granting accelerated approval of Amendment No. 2.

II. Description

The Exchange proposes to amend CBOE Rule 8.85(b)(iii) to require each Designated Primary Market-Maker ("DPM") to accord priority to both public and non-public customer orders which a DPM represents as agent over its own principal transactions, unless the customer who placed the order has consented to not being accorded such priority.⁶

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange⁷ and, in particular, the requirements of Section 6(b) of the Act⁸ and the rules and regulations thereunder. The Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,⁹ which requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove

⁶ On January 25, 2002, the Commission approved a CBOE proposed rule change eliminating from CBOE rules the obligation of DPMs to accord priority to non-public customer orders. See Securities Exchange Act Release No. 45341 (January 25, 2002), 67 FR 5016 (February 1, 2002). In this filing, the Exchange proposes to revert back to the original language.

⁷ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the Commission finds that requiring DPMs to accord priority to all orders, non-public as well as public customer orders, that they hold as agent in CBOE's rules should ensure that these orders are handled in compliance with federal securities laws and agency law principles.

In Amendment No. 2, the CBOE proposed to delete the language of Interpretation and Policy .03 of CBOE Rule 8.85, which defined the term "public customer" order for purposes of CBOE Rule 8.85(b)(iii). Because the term "public customer" order will no longer be in CBOE Rule 8.85(b)(iii), the interpretation is no longer necessary. The Commission notes that the proposed text of CBOE Rule 8.85(b)(iii) has been subject to notice and comment, and that no comments have been received. The Commission believes that the deletion of the language of proposed language of Interpretation and Policy .03 of CBOE Rule 8.85 will clarify CBOE Rule 8.85 by removing a definition that is no longer necessary and, therefore, merits approval. Accordingly, the Commission finds that there is good cause, consistent with Section 6(b)(5)¹⁰ and Section 19(b)(2) of the Act,¹¹ to approve Amendment No. 2 on an accelerated basis prior to the 30th day of the date of publication of notice of filing thereof in the Federal Register.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 2 is consistent with the Act.

Comments may be submitted by any of the following methods:

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ 15 U.S.C. 78s(b)(2).

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-2004-85 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-2004-85. 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. 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-2004-85 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹² that the proposed rule change (File No. SR-CBOE-2004-85), as amended by Amendment No. 1, be, and hereby is, approved, and that Amendment No. 2 to the proposed rule change be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland
Deputy Secretary

¹² 15 U.S.C. 78s(b)(2).

¹³ 17 CFR 200.30-3(a)(12).