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September 17, 2009

VIA FACSIMILE AND FEDERAL EXPRESS

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: SR-ISE-2009-35, Securities Exchange Release No. 60584
Response to Motion to Lift Automatic Stay

Dear Ms. Murphy:

I am writing as General Counsel for Chicago Board Options Exchange, Incorporated ("CBOE"). Enclosed please find the original and three copies of Response to Motion of International Securities Exchange, LLC to Lift Automatic Stay in relation to the above-captioned matter. This Petition was sent via facsimile to telephone number 202-772-9324 and via Federal Express on September 17, 2009. Also enclosed, please find a Certificate of Service and a facsimile confirmation sheet.

Any questions concerning this matter can be directed to me at:

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Sincerely,

Joanne Moffic-Silver
General Counsel and Corporate Secretary for
Chicago Board Options Exchange, Incorporated

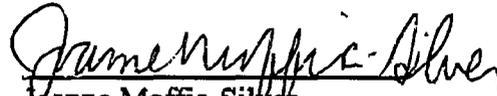
CERTIFICATE OF SERVICE

I, Joanne Moffic-Silver, General Counsel for Chicago Board Options Exchange, Incorporated, hereby certify that on September 17, 2009, I caused a true and correct copy of our RESPONSE OF CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED TO MOTION OF INTERNATIONAL SECURITIES, LLC TO LIFT AUTOMATIC STAY, to be served on:

Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, by way of facsimile telephone number (202) 772-9324. Contemporaneously, a non-facsimile original with a manual signature was sent by Federal Express to 100 F Street, NE, Washington, DC 20549-1090; and

Michael J. Simon, Secretary and General Counsel, International Securities Exchange, LLC by way of facsimile telephone number (212) 635-0210 and Federal Express to 60 Broad Street, New York, NY 10004

September 17, 2009
Date


Joanne Moffic-Silver
General Counsel and Corporate Secretary for
Chicago Board Options Exchange, Incorporated

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petition of:)	
)	File No. SR-ISE-2009-35
Chicago Board Options Exchange, Incorporated)	
)	
)	

**RESPONSE OF CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED
TO MOTION OF INTERNATIONAL SECURITIES EXCHANGE, LLC
TO LIFT AUTOMATIC STAY**

Chicago Board Options Exchange, Incorporated (“CBOE”), pursuant to Rule 154 of the Securities and Exchange Commission’s Rules of Practice, 17 CFR 201.154, hereby responds to the Motion to Lift the Commission Rule 431(e) Automatic Stay of Delegated Action Triggered by Chicago Board Options Exchange, Incorporated’s Notice of Intention to Petition for Review (the “Motion”), filed by the International Securities Exchange, LLC (the “ISE”), and requests that the Motion be denied.

INTRODUCTION

On August 28, 2009, the Division of Trading and Markets (the “Division”), acting pursuant to delegated authority, approved File No. SR-ISE-2009-35 (“QCC Rule Filing”), which involved ISE’s request for approval of a new method to cross option orders called the “Qualified Contingent Cross” mechanism.¹ On September 4, 2009, CBOE, which previously filed a comment letter in opposition to the QCC Rule Filing, filed its Notice of Intention to Petition for Review (the “CBOE Notice”) with the Commission. Pursuant to Rule 431(e) of the SEC’s Rules

¹See Exchange Act Release No. 60584 (August 28, 2009), 74 FR 45663 (September 3, 2009) (the “Division Approval Order”).

of Practice, 17 CFR 201.431(e), the filing of the CBOE Notice automatically caused the stay of the effectiveness of the Division Approval Order until and unless “the Commission orders otherwise.”

On September 11, 2009, ISE filed its Motion and its Brief in Support of its Motion (the “ISE Brief”). On September 14, 2009, CBOE filed its Petition for Review (the “CBOE Petition”), setting forth the reasons why the Commission should undertake to review the Division Approval Order and why that Order should be set aside.² For the following reasons, the automatic stay imposed by Rule 431(e) should remain in effect until the Commission has taken action on CBOE’s Petition.

ARGUMENT

I. THE POLICIES UNDERLYING RULE 430 REQUIRE THAT THE STAY REMAIN IN EFFECT.

SEC Rule of Practice 430(e) is unique because it reverses the normal procedure applicable to litigated appeals, where the party seeking review bears the burden to establish that a stay pending the completion of the appellate process is appropriate. Instead, Rule 430(e) provides for an automatic stay “[u]pon filing with the Commission of a notice of intention to petition for review . . . [of] an action made pursuant to delegated authority.” Thus, whenever the Division takes action pursuant to delegated authority and that action is challenged, the

² For the reasons set forth in its Petition, CBOE believes that there is a substantial likelihood both that the Commission will decide to review the Approval Order and that it will ultimately vacate that Order. This is particularly the case given that the Commission recently has placed a high priority on examining the significant issues involved in the non-exposure of orders as proposed by certain stock markets.

Commission's Rules of Practice evidence a policy preference for the Commission to review the decision *before* it goes into effect.³

The need for Commission review of the QCC Rule Filing before it goes into effect is particularly acute in this case. While ISE claims that its QCC Rule Filing "does not raise any novel policy issues" (*see* ISE Br. at 2), the Division actually found "that [ISE's] proposal would represent a change in certain long-held principles in the options markets because it would permit the execution of a cross order without requiring exposure or customer priority" (*see* Division Approval Order at 9.) Because the policy considerations and potential impact of SR-ISE-2009-35 (which are summarized below and discussed more fully in CBOE's Petition), are significant and represent potentially profound changes to market quality and customer protections in the options markets, the Commission should deny the request to lift the automatic stay.⁴

II. THE PUBLIC WILL BE HARMED IN THE ABSENCE OF A STAY.

As the Division recognized, the QCC Rule Filing would represent the first time that options cross orders will be permitted without affording priority to resting public customer

³ CBOE followed the Commission's Rules of Practice when it filed the CBOE Notice and the automatic stay of the Division Approval Order was thereafter imposed by those Rules. In addition, CBOE acted in good faith when it filed the CBOE Notice and its Petition for Review as a means of bringing what it believes to be significant issues to the Commission's attention. CBOE also believes that the rationale underlying the Commission's automatic stay rule is implicated in this matter because, as set forth below and in the Petition, the Division Approval Order involves far-reaching policy decisions of the type that should not go into effect until after the Commission considers the merits of CBOE's Petition. (*See* CBOE Pet. at 13-20.) In sum, there is absolutely no basis for ISE's claims that CBOE is somehow manipulating the Commission's rules to gain a competitive advantage.

⁴ ISE cites to *In re the Matter of Institutional Networks Corp.*, File No. 3-6926, Release No. 25039, 1987 WL 756909 (Oct. 15, 1987) ("*Instinet*") and suggests that it supports lifting the stay in this case. (ISE Br. at 2-3.) *Instinet*, however, involved a situation where a pilot program had been in effect for over a year before the filing of a notice of intention for petition for review. Under those circumstances, the Commission concluded that the stay should be vacated to avoid disrupting the market. ISE's QCC rule, however, has not gone into effect and therefore the market will not be disrupted if the stay remains in place.

orders. (See Division Approval Order at 9.) As a result, public customers will be harmed if ISE is permitted to implement its Qualified Contingent Cross mechanism, because those customers will lose priority and will not receive executions of their resting orders. (See, e.g., CBOE Pet. at 5-6, 9-10, 13, 17-19.)

The approval of SR-ISE-2009-35 also poses a significant risk of harm to the customers whose orders would be crossed under the Qualified Contingent Cross mechanism because their orders will never be exposed to other market participants for potential price improvement on an exchange. (See Division Approval Order at 9.) That scenario would contravene long-standing SEC policies requiring orders to be exposed to the market before crosses are allowed and might result in the cross being executed at a price that is inferior to the price that the customer would have received if the order had been exposed to the market. (See, e.g., CBOE Pet. at 9-10, 13, 17-19.)

Finally, the approval of SR-ISE-2009-35 may significantly discourage price competition by “locking up” a significant volume of orders when they are crossed at ISE, which may have the effect of preventing market makers from aggressively making markets because their participation volume will be reduced to zero with respect to the orders that would be crossed under ISE’s QCC Rule Filing. Such a decrease in competition may ultimately result in wider spreads and reduced liquidity, which, in turn, will eventually have a negative impact on the quality of prices available to customers. (See CBOE Pet. at 9-13.)

III. CBOE WILL BE HARMED IN THE ABSENCE OF A STAY.

A lifting of the automatic stay also may result in significant harm to CBOE and its market participants. If the QCC Rule Filing goes into effect while the Commission considers the CBOE Petition, CBOE may lose significant order flow from firms that may be attracted to the possibility that they could execute some orders without having to expose them to an auction

market, even though CBOE strongly believes that the QCC Rule Filing is inconsistent with the policies underlying the Exchange Act (CBOE Pet. at 9-12). If the Commission then agreed with CBOE and set aside the Division Approval Order, CBOE would have already suffered substantial harm.

Alternatively, if the QCC Rule Filing goes into effect while the Commission considers the CBOE Petition, CBOE – and perhaps other options exchanges – may be forced to adopt a similar rule in the interim to avoid losing order flow. CBOE would be forced to consider such a competitive response as a protective measure even though it strongly believes that the QCC Rule Filing is inconsistent with the policies underlying the Exchange Act. Such a competitive response would require CBOE (and perhaps other options exchanges) to expend substantial financial and other resources – all of which would be wasted if the Commission then agreed with CBOE and set aside the Division Approval Order. Other market participants similarly would have to adopt their systems and procedures to account for the Qualified Contingent Cross mechanism, and to account for any other rules that CBOE and other exchanges are compelled to adopt for competitive reasons.

The continuation of the automatic stay avoids such harm and potential waste and ensures that no options exchange is forced to implement a rule that is similar to the QCC Rule Filing before the Commission has had the opportunity to consider the fundamental question of whether ISE's proposed Qualified Contingent Cross mechanism is consistent with the principles underlying the Exchange Act.

IV. ISE WILL NOT SUFFER IRREPARABLE HARM IF THE STAY REMAINS IN EFFECT.

ISE states in a conclusory fashion that its market will suffer a “significant competitive harm” if the automatic stay remains in effect. (ISE Br. at 8.) In support of that claim, ISE

asserts that CBOE can “execute large stock/option trades on its floor in open outcry,” while that alternative is not available to ISE.

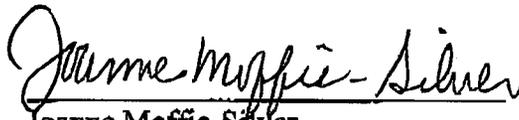
In response, CBOE notes that, by virtue of being represented on a trading floor in open outcry, an order is exposed for price improvement, which would not occur under the ISE’s proposed Qualified Contingent Cross mechanism. In addition, the stay does not prohibit ISE from executing “large stock/option” trades. It merely prevents ISE from executing such trades without first exposing them to the market. Finally, the stay does not prevent ISE from engaging in any of its current market activities. Instead, the stay serves the important function of prohibiting ISE from using its Qualified Contingent Cross mechanism until after the Commission has had an opportunity to review the Division Approval Order and to consider the policy implications of allowing ISE to utilize the Qualified Contingent Cross mechanism. The mere fact that ISE is delayed in implementing a crossing mechanism that the Commission may ultimately determine is not consistent with the purposes of the Exchange Act is not the sort of “irreparable harm” that would justify lifting the automatic stay.

CONCLUSION

For the foregoing reasons, and particularly so that the Commission has the opportunity to consider the serious policy issues raised in CBOE's Petition for Review without putting public customers or ISE's competitors at risk, CBOE requests that the Commission deny ISE's Motion to Lift the Commission Rule 431(e) Automatic Stay of Delegated Action Triggered by Chicago Board Options Exchange, Incorporated's Notice of Intention to Petition for Review.

Dated: September 17, 2009.

Respectfully submitted,



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