

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-67794; File No. SR-CBOE-2012-068)

September 6, 2012

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Customer Large Trade Discount

I. Introduction

On July 11, 2012, Chicago Board Options Exchange, Incorporated (“CBOE” or “Exchange”) filed with the Securities and Exchange Commission (the “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a rule change relating to the Customer Large Trade Discount (the “Discount”).

CBOE proposed to amend the Discount for any executing Trading Permit Holder (“TPH”) whose affiliate<sup>3</sup> is the issuer of one or more securities, the combined total asset value of which is \$1 billion or greater, that are based on or track the performance of VIX futures.<sup>4</sup> CBOE

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> CBOE defines “affiliate” as “a person who, directly or indirectly, controls, is controlled by, or is under common control with, such other person.” CBOE Rule 1.1(j). CBOE Rule 1.1(k) defines “control” as “the power to exercise a controlling influence over the management or policies of a person, unless such power is solely the result of an official position with such person. Any person who owns beneficially, directly or indirectly, more than 20% of the voting power in the election of directors of a corporation, or more than 25% of the voting power in the election of directors of any other corporation which directly or through one or more affiliates owns beneficially more than 25% of the voting power in the election of directors of such corporation, shall be presumed to control such corporation.” CBOE Rule 1.1(ff) defines “person” as “an individual, partnership (general or limited), joint stock company, corporation, limited liability company, trust or unincorporated organization, or any governmental entity or agency or political subdivision thereof.”

<sup>4</sup> CBOE Volatility Index® (“VIX”) measures market expectations of near term volatility conveyed by S&P 500 index option prices. Options on VIX offer a way for market participants to buy and sell option volatility. VIX option prices reflect the market's

designated the proposed rule change as immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Exchange Act.<sup>5</sup> The Commission published notice of filing of the proposed rule change in the Federal Register on July 26, 2012.<sup>6</sup> To date, the Commission has not received any comment letters on the Exchange's proposed rule change.

Pursuant to Section 19(b)(3)(C) of the Exchange Act, the Commission hereby is: (1) temporarily suspending the proposed rule change; and (2) instituting proceedings to determine whether to approve or disapprove the proposal.

## II. Summary of the Proposed Rule Change

The Exchange's proposal amended the Discount, which caps regular customer transaction fees on a per-order basis for large customer trades.<sup>7</sup> Specifically, CBOE's proposal lowered the transaction fee cap in VIX options from 10,000 contracts to 7,500 contracts per order in a qualifying calendar month but only for TPHs who have an affiliate that issues one or more securities, the combined total value of which is \$1 billion or greater, that are based on or track

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expectation of the VIX level at expiration and are exclusively traded on CBOE. See <http://www.cboe.com/micro/VIX/VIXoptionsFAQ.aspx>.

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A). Although the proposed rule change was effective upon filing, CBOE indicated that the fee change would take effect on August 1, 2012. See Notice, infra note 6, at 43880.

<sup>6</sup> See Securities Exchange Act Release No. 67481 (July 20, 2012) 77 FR 43879 ("Notice").

<sup>7</sup> Prior to the proposal, CBOE charged all TPHs transaction fees on the first 10,000 contracts in a single order in VIX options. For example, if a broker-dealer submitted a single order for 12,000 VIX contracts, the broker-dealer was only charged a transaction fee on the first 10,000 contracts and the remaining 2,000 contracts were not charged a transaction fee. The Discount also caps customer transaction fees up to the first 10,000 contracts for SPX; up to the first 5,000 contracts for other index options; and up to the first 3,000 contracts for ETF, ETN and HOLDRs options. Threshold levels for the other products subject to the Discount were not changed by this rule filing.

the performance of VIX futures (a “qualifying affiliate”).<sup>8</sup> Pursuant to that recent change, incremental volume above 7,500 contracts in a single order is not assessed a regular customer transaction fee for TPHs with such an affiliate. TPHs that do not have a qualifying affiliate do not qualify for the lower fee cap and continue to be assessed the regular customer transaction fee up to the first 10,000 contracts in VIX options.

### III. Suspension of the CBOE Proposal

Pursuant to Section 19(b)(3)(C) of the Exchange Act,<sup>9</sup> at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Exchange Act,<sup>10</sup> the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization 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 Exchange Act.

The Commission believes it is appropriate in the public interest to temporarily suspend the proposal to solicit comment on and evaluate further the statutory basis for CBOE’s proposal to lower the fee-cap for only certain TPHs, specifically those TPHs that have a qualifying affiliate.

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<sup>8</sup> On the first business day following the end of a calendar month, the Exchange will multiply the reported net asset value of each security that is based on or tracks the performance of VIX futures (as reported on the final calendar day of the month) by the amount of outstanding shares in that security to determine the total asset value of that security. See Notice, supra note 6, at 43880. The Exchange will then amalgamate the total asset values of all the securities that are based on or track the performance of VIX futures issued by the same issuer to determine if such issuer reaches the \$1 billion threshold. See id. If it does, the affiliated TPH would qualify for the 7,500 contract breakpoint for that month.

<sup>9</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>10</sup> 15 U.S.C. 78s(b)(1).

In justifying its proposal, the Exchange stated that the proposal is reasonable because it allows TPHs with a qualifying affiliate to pay lower fees for large customer VIX options transactions.<sup>11</sup> The Exchange also argued that the proposed rule change is equitable<sup>12</sup> and not unfairly discriminatory<sup>13</sup> “because it is intended to incentivize the creation and issuance of securities that are based on or track the performance of VIX futures, which provides more trading opportunities for all market participants.”<sup>14</sup> The Exchange further stated that the lower threshold for qualifying TPHs encourages such TPHs to bring more customer VIX options orders to the Exchange<sup>15</sup> and the resulting increased volume and liquidity would benefit all market participants that trade VIX options.<sup>16</sup> The Exchange did not in its filing specifically analyze the burden, if any, of the fee change on competition.<sup>17</sup> For example, if both TPH #1 and TPH #2 bring a 12,000 contract order to CBOE, but only TPH #1 has a qualifying affiliate, CBOE’s

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<sup>11</sup> See Notice, supra note 5, at 43880. See also Section 6(b)(4) of the Exchange Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.”

<sup>12</sup> See Section 6(b)(4) of the Exchange Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.”

<sup>13</sup> See Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers.”

<sup>14</sup> See Notice, supra note 5, at 43880.

<sup>15</sup> See id.

<sup>16</sup> See id.

<sup>17</sup> See Section 6(b)(8) of the Exchange Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act].” See also Item 4 of Form 19b-4 (“Self-Regulatory Organization’s Statement on Burden on Competition (“Form 19b-4 Information”)). 17 CFR 249.819.

analysis did not address why it is not unfairly discriminatory or a burden on competition for TPH #1, but not TPH #2, to qualify for the lower discount level.

In temporarily suspending the fee change, the Commission intends to further assess whether the resulting fee-cap disparity between TPHs trading VIX options is consistent with the statutory requirements applicable to a national securities exchange under the Exchange Act. In particular, the Commission will assess whether the proposed rule change satisfies the standards under the Exchange Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.<sup>18</sup>

Therefore, the Commission finds that it is appropriate in the public interest,<sup>19</sup> for the protection of investors, and otherwise in furtherance of the purposes of the Exchange Act, to temporarily suspend the proposed rule change.

#### IV. Proceedings to Determine Whether to Approve or Disapprove the CBOE Proposal

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)<sup>20</sup> and 19(b)(2) of the Exchange Act<sup>21</sup> to determine

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<sup>18</sup> See 15 U.S.C. 78f(b)(4), (5) and (8).

<sup>19</sup> For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>20</sup> 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Exchange Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

<sup>21</sup> 15 U.S.C. 78s(b)(2).

whether the Exchange's proposed rule change should be approved or disapproved. Further, pursuant to Section 19(b)(2)(B) of the Exchange Act,<sup>22</sup> the Commission hereby is providing notice of the grounds for disapproval under consideration. The Commission believes it is appropriate to institute proceedings at this time in view of the significant legal and policy issues raised by the proposal. Institution of proceedings does not indicate, however, that the Commission has reached any conclusions with respect to the issues involved.

As discussed above, pursuant to CBOE's proposal, TPHs that have a qualifying affiliate (i.e., that issues securities valued at \$1 billion or greater that are based on or track the performance of VIX futures) pay a lower transaction fee for large VIX customer options orders as compared to TPHs that do not have such an affiliate. The Exchange Act and the rules thereunder require that an exchange's rules, among other things, provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Commission solicits comment on whether the proposal is consistent with these Exchange Act standards and whether CBOE has sufficiently met its burden in presenting a statutory analysis of how its proposal meets these standards.

In particular, the grounds for disapproval under consideration include whether CBOE's proposal is consistent with the following sections of the Exchange Act:

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<sup>22</sup> 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Exchange Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding. See id.

- Section 6(b)(4) of the Exchange Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;”<sup>23</sup>
- Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers;”<sup>24</sup> and
- Section 6(b)(8) of the Exchange Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act].”<sup>25</sup>

The Commission intends to assess whether CBOE’s proposal is consistent with these and other Exchange Act standards.

#### V. Commission’s Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>26</sup>

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<sup>23</sup> 15 U.S.C. 78f(b)(4).

<sup>24</sup> 15 U.S.C. 78f(b)(5).

<sup>25</sup> 15 U.S.C. 78f(b)(8).

<sup>26</sup> 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Exchange Act grants the Commission flexibility to determine what type of proceeding - either oral or notice and opportunity for

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following:

- As noted above, Section 6(b)(4) of the Exchange Act, requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.” The Commission seeks comment on whether it is an equitable allocation of reasonable dues to charge lower transaction fees to TPHs that have a qualifying affiliate for VIX customer options orders as compared to TPHs that do not have such an affiliate;
- Section 6(b)(5) of the Exchange Act requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers or dealers.” The Commission seeks comment on whether discrimination on the basis of whether a TPH has an affiliation with an issuer of securities that are based on or track the performance of VIX futures is a “fair” basis for discrimination among its participants with respect to the fees charged by the Exchange for the execution of customer orders in VIX options;
- The Commission seeks comment on whether the filing was sufficient under Section 19(b) of the Exchange Act in addressing issues regarding the basis for discrimination between a

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written comments - is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

TPH with a qualifying affiliate and a TPH that is not so affiliated, and whether the basis for such discrimination is fair, and why or why not;

- Section 6(b)(8) of the Exchange Act requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act].” The Commission seeks comment on whether the filing was sufficient in addressing issues regarding the potential effects of the proposed fee change on competition, and what, if any, impact the proposed fee change might have on competition; and
- Whether the proposed fee change will affect competition in the market for VIX options or the broader market, and if so, how and what type of impact might it have.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, including whether the proposed rule change is consistent with the Exchange 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](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2012-68 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-CBOE-2012-68. The 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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 publicly available. All submissions should refer to File Number SR-CBOE-2012-68 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Exchange Act,<sup>27</sup> that File No. SR-CBOE-2012-68, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>28</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>27</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>28</sup> 17 CFR 200.30-3(a)(57) and (58).