

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-49659; File No. SR-CBOE-2004-15)

May 6, 2004

Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Inc. Relating to Automatic Executions for Underlying Specialists

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 March 2, 2004, 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. On April 28, 2004, the CBOE filed an amendment to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The CBOE proposes to amend CBOE Rule 6.13 relating to access to the automatic execution feature of its Hybrid System. The text of the proposed rule change appears below.

Proposed new language is in *italics*; proposed deletions are in [brackets].

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Steve Youhn, Counsel, CBOE, to Deborah Flynn, Assistant Director, Division of Market Regulation (“Division”) Commission, dated April 27, 2004 (“Amendment No. 1”). Amendment No. 1 clarifies the access to the Exchange’s automated execution system for stock exchange specialists’ orders in options classes overlying stocks in which they are not specialists.

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Rule 6.13: CBOE Hybrid System’s Automatic Execution Feature

(a) No change

(b) Automatic Execution

(i) Eligibility: Orders eligible for automatic execution through the CBOE Hybrid System may be automatically executed in accordance with the provisions of this Rule. This section governs automatic executions and split-price automatic executions. The automatic execution and allocation of orders or quotes submitted by market participants shall be governed by Rules 6.45A(c) and (d).

(A) - (B) No change

(C) Access:

(i) Non-broker-dealer public customers and broker-dealers that are not market makers or Specialists on an options exchange who are exempt from the provisions of Regulation T of the Federal Reserve Board pursuant to Section 7(c)(2) of the Securities Exchange Act of 1934 are eligible for automatic execution. The eligible order size for these classifications must be the same.

(ii) (A) Options Exchange Market Makers: The appropriate FPC may also determine, on a class-by-class basis, to allow orders for the accounts of market makers or specialists on an options exchange (collectively “options market makers”) who are exempt from the provisions of Regulation T of the Federal Reserve Board pursuant to Section 7(c)(2) of the Securities Exchange Act of 1934 to be eligible for automatic execution. The

appropriate FPC may establish the maximum order size eligibility for such options market maker [or specialist] orders at a level lower than the maximum order size eligibility available to non-broker-dealer public customers and non-market maker or non-specialist broker-dealers. Pronouncements pursuant to this provision regarding [BD] options market maker access shall be made by the appropriate FPC and announced via Regulatory Circular.

(B) Stock Exchange Specialists: The appropriate FPC may determine, on a class-by-class basis, to allow orders for the account of a stock exchange specialist, with respect to a security in which it acts as a specialist, to be eligible for automatic execution in the overlying option class. The appropriate FPC may establish the maximum order size eligibility for such specialist orders at a level lower than the maximum order size eligibility available to options exchange market makers. Stock exchange specialists, with respect to orders in securities in which they do not act as specialist, will be treated as broker-dealers that are not market makers or specialists on an options exchange and will be eligible to submit orders for automatic execution in accordance with subparagraph (i) above.

(ii) - (iv) No change

(c) – (e) No change

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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 Exchange 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. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

In May 2003, the Commission approved the CBOE's Hybrid System ("Hybrid").⁴ Hybrid merges the electronic and open outcry trading models, offering market participants the ability to stream electronically their own firm disseminated market quotes representing their trading interest. CBOE Rule 6.13 governs Hybrid's automatic execution ("auto-ex") feature. Currently, CBOE Rule 6.13(b)(i)(C)(ii) allows the appropriate floor procedure committee ("FPC") to determine whether to provide all market makers and specialists, whether on an options or stock exchange, with auto-ex access to CBOE's markets. The purpose of this filing is to amend this section to allow the FPC to provide different levels of auto-ex access to: (i) options exchange market makers and specialists (collectively, "options market makers"); and (ii) stock exchange specialists.

⁴ See Securities Exchange Act Release No. 47959 (May 30, 2003), 68 FR 34441 (June 9, 2003) ("Hybrid Release"). In December 2003, CBOE submitted a rule filing for immediate effectiveness, which permits the trading of index options and options on ETFs on the Hybrid System. See Securities Exchange Act Release No. 48953 (December 18, 2003), 68 FR 75004 (December 29, 2003).

Under the proposal, the appropriate FPC will have the ability to allow options exchange market makers to have auto-ex access while stock exchange specialists do not have auto-ex access. Alternatively, the appropriate FPC may determine to set the auto-ex eligible order size level higher for options market makers than the corresponding order size level for stock exchange specialists. The proposal only applies to stock exchange specialists with respect to their options transactions in classes overlying stocks in which they are specialists. Further, the Exchange states that proposed CBOE Rule 6.13(b)(i)(C)(ii)(A) and (B) will enable the appropriate FPC to make the access determinations on a class-by-class basis. As such, proposed subparagraph (A) of CBOE Rule 6.13(b)(i)(C)(ii) clarifies that the appropriate FPC may determine, on a class-by-class basis, to allow options market makers to receive automatic execution. Further, proposed subparagraph (B) of CBOE Rule 6.13(b)(i)(C)(ii) allows the FPC to determine access treatment, on a class-by-class basis, with respect to stock exchange specialists' orders in their specialty stocks.⁵

With respect to the access treatment of specialists' orders in their non-specialty stocks, the Exchange clarifies, in proposed CBOE Rule 6.13 (b)(i)(C)(ii)(B), that these orders will be treated in the same manner as orders of broker-dealers that are not market makers or specialists on an options exchange and thus will be eligible for automatic execution in accordance with CBOE Rule 6.13(b)(i)(C)(i).⁶

The proposed amendment does not affect a responsible broker-dealer's firm quote

⁵ See Amendment No. 1, supra note 3. The Commission notes that, pursuant to CBOE Rule 6.13(b)(i)(C)(i), stock exchange specialists' orders in their non-specialty stocks will be eligible for automatic execution to the same extent as orders from public customers and broker-dealers that are not market makers on an options exchange.

⁶ Id.

obligations to broker-dealer orders (which includes options market makers and stock specialists), which will remain at one contract. Similarly, the proposal does not affect the auto-ex access currently available to public customer and non-market-maker/specialist broker-dealer orders, which is governed by CBOE Rule 6.13(b)(i)(C)(i).⁷

2. Statutory Basis

The Exchange believes it is reasonable and consistent with Section 6(b)(5) of the Act⁸ to distinguish between options market makers and stock exchange specialists for several reasons. First, underlying stock specialists have a distinct timing advantage with respect to stock price movements. This advantage could allow them to submit large options orders to hedge their risk before the same information publicly is available to CBOE market makers. This does not create a level playing field. Second, options market makers often need to sell stock short to hedge their positions. The existence of the “uptick rule” on a stock exchange can make hedging by options market makers extremely difficult, thereby subjecting them to even greater risk. This is exacerbated when a stock market specialist has already hedged its position through options transactions on CBOE. Third, some stock exchanges limit access to their automatic execution systems. For example, NYSE Direct+ currently allows automatic executions for up to 1099 shares. Providing the stock market specialist with electronic access to our full disseminated size while our market makers may only be able to access 1099 shares electronically gives the stock specialist a distinct advantage in terms of hedging risk.

⁷ At the request of the Exchange staff, the citation of CBOE Rule 6.13(b)(i)(B)(i) was amended to refer to CBOE Rule 6.13(b)(i)(C)(i). Telephone conversation between Steve Youhn, Counsel, CBOE, and Hong-Anh Tran, Special Counsel, Division, Commission on April 28, 2004.

⁸ 15 U.S.C. 78f(b)(5).

For these reasons, the Exchange believes the proposed rule change, as amended, is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act.⁹ Specifically, the Exchange believes the proposed rule change, as amended, is consistent with the Section 6(b)(5)¹⁰ requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

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

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

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

The Exchange neither solicited nor received written comments on the proposed rule change.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

- (A) by order approve such proposed rule change, as amended, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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-2004-15 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-2004-15. 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 Section, 450 Fifth

Street, NW, Washington, DC 20549-0609. Copies of such 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-2004-15 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.¹¹

Margaret H. McFarland
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).