

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50655; File No. SR-CBOE-2004-04)

November 10, 2004

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Inc. to Amend its Guaranteed Participation Rule Relating to Facilitation and Crossing Transactions

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 16, 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 Exchange. On November 3, 2004, CBOE submitted Amendment No. 1 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

CBOE proposes to amend its guaranteed participation rule relating to facilitation and crossing transactions. The text of the proposed rule change is set forth below. Additions are italicized. Deletions are bracketed.

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Rule 6.74. "Crossing" Orders

(a) – (c) No change

(d) * * * * *

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter from Stephen Youhn, Legal Division, CBOE, to Nancy J. Sanow, Assistant

(i) No change

(ii) [The percentage of the order which a Floor Broker is entitled to cross, a]After all public customer orders that were (1) on the limit order book and then (2) represented in the trading crowd at the time the market was established have been satisfied, [is determined as follows:] the Floor Broker will be entitled to cross 40% of the remaining contracts, provided the order trades at or between the best bid or offer given by the crowd in response to the broker's initial request for a market.

[(A) 20% of the remaining contracts in the order if the order is traded at the best bid or offer given by the crowd in response to the broker's initial request for a market; or

(B) 40% of the remaining contracts in the order if the order is traded between the best bid or offer given by the crowd in response to the broker's initial request for a market.]

(iii) – (iv) No change

(v) If a trade pursuant to this paragraph (d) occurs at the DPM's principal bid or offer in its appointed class, then the DPM's guaranteed participation level which is established pursuant to Exchange Rule 8.87 [(or Exchange circulars issued pursuant to Exchange Rule 8.87)] shall apply only to the number of contracts remaining after the following orders have been satisfied: those public customer orders which trade ahead of the cross transaction as indicated in sub-paragraph (d)(ii) above, and any portion of a customer order being crossed against the original order or the firm facilitation order as described in sub-paragraph (d)(ii) being represented by the Floor Broker. [The DPM's guaranteed

Director, Division of Market Regulation ("Division"), Commission, dated November 2, 2004 ("Amendment No. 1"). Amendment No. 1 replaced and superseded the original

participation may only be 25% for orders crossed pursuant to this paragraph unless the Floor Broker has chosen to cross less than its 20% entitlement, in which case the DPM's guaranteed entitlement] DPMs are not entitled to any guaranteed participation for trades occurring pursuant to this paragraph (d) unless the Floor Broker crosses less than its guaranteed 40%, in which case the DPM's guarantee will be a percentage that when combined with the percentage the firm crossed, [is no more than] does not exceed 40% of the order. If the trade occurs at a price other than the DPM's principal bid or offer, the DPM is entitled to no guaranteed participation.

(vi) – (vii) No change

(e) No change

Interpretations and Policies . . .

.01 - .08 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

filing in its entirety.

CBOE Rule 6.74, Crossing Orders, provides the procedures for crossing and facilitation orders. Paragraph (d) of that rule details the procedures for the Exchange's "guaranteed" crossing rule. In short, paragraph (d) enables a floor broker to cross 20% of an order if it matches the crowd's price or 40% of an order if it improves upon the crowd's price ("20/40% rule"). Recently, the Exchange has begun to lose orders to another Exchange that is more crossing and facilitation friendly to order flow providers. To remain competitive, CBOE proposes to amend its 20/40% rule to make it a straight 40% rule, as described below.

Under the proposal, floor brokers would be entitled to cross 40% of an order, provided it trades at a price that matches or improves upon the price given by the trading crowd in response to the broker's initial request for a market. All other requirements would remain the same (e.g., customer priority, minimum order size, etc.). To effect this change, CBOE proposes to amend CBOE Rule 6.74(d)(ii) by removing subparagraphs (A) and (B) and replacing them with a new paragraph (D)(ii) that states: "After all public customer orders that were (1) on the limit order book and then (2) represented in the trading crowd at the time the market was established have been satisfied, the floor broker will be entitled to cross 40% of the remaining contracts, provided the order trades at or between the best bid or offer given by the crowd in response to the broker's initial request for a market." The procedure for facilitating orders would remain the same. The only change would be to the size of the firm's guaranteed entitlement, which would go from 20% to 40%.

Changing to a straight 40% rule would require corresponding changes to the DPM participation entitlement as it pertains to facilitation and crossing orders. Currently, CBOE Rule 6.74(d)(v) entitles the DPM to a participation entitlement of 20% of the original order size when the floor broker crosses its 20% at the crowd's price. If the floor broker improves upon the

crowd's price and takes its 40%, the DPM is not entitled to any participation guarantee. The Exchange proposes to retain this limitation (i.e., that the percentage of the entitlement when combined with the amount of the order the floor broker crosses may not exceed 40%), recognizing that in most instances the effect of this rule change would be that DPMs would not be entitled to participation guarantees (because the facilitating firm typically would take its 40% guaranteed amount). Necessary changes have been made to the proposed rule language to reflect this important limitation.

Competitive pressures mandate the change from a 20/40% rule to a straight 40% rule. International Securities Exchange ("ISE") Rule 716(d)(ii) provides Electronic Access Members with at least forty percent (40%) of the original size of the order for orders they submit through ISE's facilitation mechanism, whether executed at the current ISE displayed price or a better price. Accordingly, member firms have a strong inducement to send to the ISE orders they would like to facilitate. Recently, the Pacific Exchange received approval of rule filing SR-PCX-2003-64 in which it too adopted a straight 40% rule.⁴ Accordingly, CBOE represents that this proposal is necessary to remain competitive in the facilitation arena.

2. Statutory Basis

The Exchange believes the proposed rule change 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.⁵ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁶ requirements that the rules of an exchange be

⁴ See Securities Exchange Act Release No. 50473 (September 29, 2004), 69 FR 60206 (October 7, 2004).

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

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 will impose a 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

No written comments were solicited or received with respect to 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 Exchange consents, the Commission will:

- (A) by order approve such proposed rule change; 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 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-2004-04 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-2004-04. 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. Copies of such filing also will be available for inspection and copying at the principal office of 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-2004-04 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.⁷

Margaret H. McFarland
Deputy Secretary

⁷ 17 CFR 200.30-3(a)(12).