

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50821; File No. SR-CBOE-2004-73)

December 8, 2004

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc. to Restrict a Designated Primary Market-Maker's Ability to Charge a Brokerage Commission

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 12, 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. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend its rules relating to a designated primary market-maker's ("DPMs") ability to charge a brokerage commission. Proposed new language is in italics.

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Rule 8.85. DPM Obligations

(a) Dealer Transactions. No Change.

(b) Agency Transactions. No Change.

(i) – (iii) No Change.

(iv) not charge any brokerage commission with respect to:

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

(1) the execution of any portion of an order for which the DPM has acted as both agent and principal, unless the customer who placed the order has consented to paying a brokerage commission to the DPM with respect to the DPM's execution of the order while acting as both agent and principal; or

(2) any portion of an order for which the DPM was not the executing floor broker, including any portion of the order that is automatically executed through an Exchange system; or

(3) any portion of an order that is automatically cancelled, or;

(4) any portion of an order that is not executed and not cancelled.

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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 aspects of such statements.

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

1. Purpose

The Exchange believes that the proposed rule change clarifies within CBOE rules that a DPM cannot charge a brokerage commission on orders for which they do not perform an agency function. The Exchange also believes the proposed rule change is both appropriate and

necessary to clarify to the investing public that orders sent to the CBOE will not be subject to excessive or arbitrary costs. In addition to protecting investors, the Exchange believes that this rule change also preserves the competitiveness of the Exchange.

Therefore, the Exchange proposes to amend CBOE rules that govern DPMs to specifically prohibit DPMs from charging a brokerage commission for an order, or the portion of an order, (1) for which the DPM was not the executing broker, which includes any portion of the order that is automatically executed through an Exchange system; (2) that is automatically cancelled; or (3) that is not executed, and not cancelled. The Exchange believes that the prohibition on charging floor brokerage commissions under the aforementioned order scenarios is appropriate simply because the DPM does not handle or perform any agency function for such orders.

Finally, the proposed rule change also proposes to make a technical clarification to current CBOE Rule 8.85(b)(iv), which is related to this filing and which prohibits a DPM from charging a brokerage commission for the portion of any order in which the DPM acts as both principal and agent. This proposal would add the term “portion” to the rule text to clarify that a DPM can charge a brokerage commission for the part of any order that it has not executed as principal, but did act as executing broker in the execution of that order. The Exchange believes that this is the current practice on the Exchange and in the industry.

## 2. Statutory Basis

The Exchange believes that restricting a DPM from unnecessarily charging brokerage commission for agency orders will benefit both investors and will preserve the competitiveness of the Exchange. The Exchange believes that the proposed rule change is

consistent with Section 6(b) of the Act<sup>3</sup> in general and furthers the objectives of Section 6(b)(5) of the Act<sup>4</sup> in particular in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and to protect investors and the public interest.

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

The Exchange believes that the proposed rule change does not impose any 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.

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

<sup>4</sup> 15 U.S.C. 78f(b)(5).

#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2004-73 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-2004-73. 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 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-2004-73 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.<sup>5</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>5</sup> 17 CFR 200.30-3(a)(12).