

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-51650; File No. SR-CBOE-2005-34)

May 3, 2005

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Inc. Amending its Marketing Fee Relating to Remote Market-Makers

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 April 25, 2005, 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 26, 2005, the CBOE submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> The CBOE has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the CBOE under Section 19(b)(3)(A)(ii) of the Act,<sup>4</sup> and Rule 19b-4(f)(2) thereunder,<sup>5</sup> which renders the proposal effective upon filing with the Commission. 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 Exchange proposes to amend its marketing fee to impose the fee on transactions of Remote Market-Makers ("RMMs"). The marketing fee will be assessed at the rate of \$.22 per contract on all classes of equity options, options on **HOLDERS**<sup>®</sup>, and options on **SPDRs**<sup>®</sup>. The fee

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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> In Amendment No. 1, the CBOE made technical corrections to the rule text of the proposed rule change.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>5</sup> 17 CFR 240.19b-4(f)(2).

will not apply to Market-Maker-to-Market-Maker transactions. Below is the text of the proposed rule change, as amended. Proposed new language is italicized.

CHICAGO BOARD OPTIONS EXCHANGE, INC.

FEE SCHEDULE

- 1. No change.
- 2. MARKET-MAKER, RMM, e-DPM & DPM MARKETING FEE (in option classes in which a DPM has been appointed)(6).....\$.22
- 3.-4. No change.

NOTES:

- (1)-(5) No change.
- (6) The Marketing Fee will be assessed only on transactions of Market-Makers, RMMs, e-DPMs and DPMs at the rate of \$.22 per contract on all classes of equity options, options on HOLDERS<sup>®</sup>, and options on SPDRs<sup>®</sup>. The fee will not apply to Market-Maker-to-Market-Maker transactions. This fee shall not apply to index options and options on ETFs (other than options on SPDRs). Should any surplus of the marketing fees at the end of each month occur, the Exchange would then refund such surplus at the end of the month if any, on a pro rata basis based upon contributions made by the Market-Makers, RMMs, e-DPMs and DPMs.
- (7) – (15) 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 CBOE included statements concerning the purpose of and basis for its proposal and discussed any comments it had received regarding the proposal.

The text of these statements may be examined at the places specified in Item IV below. The CBOE 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

On October 29, 2004, the CBOE amended its marketing fee program.<sup>6</sup> The current marketing fee is assessed upon Designated Primary Market-Makers ("DPMs"), electronic Designated Primary Market-Makers ("e-DPMs"), and Market-Makers at a rate of \$.22 for every contract they enter into on the Exchange other than Market-Maker-to-Market-Maker transactions (which includes all transactions between any combination of DPMs, e-DPMs, and Market-Makers). The marketing fee is assessed in all equity option classes, options on HOLDRs<sup>®</sup>,<sup>7</sup> and options on SPDRs<sup>®</sup>.<sup>8</sup> The Exchange recently established a new membership status called RMMs.<sup>9</sup> The RMM program allows individuals and member organizations to stream quotes into designated Hybrid 2.0 classes from locations outside of the Exchange's physical trading crowds. RMMs may create customized class appointments, called virtual trading crowds ("VTCs"),

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<sup>6</sup> For a description of the CBOE's marketing fee program, see Securities Exchange Act Release No. 50736 (Nov. 24, 2004), 69 FR 69966 (Dec. 1, 2004) (SR-CBOE-2004-68).

<sup>7</sup> HOLDRs are trust-issued receipts that represent an investor's beneficial ownership of a specified group of stocks. See Interpretation .07 to CBOE Rule 5.3.

<sup>8</sup> See Securities Exchange Act Release No. 51052 (Jan. 18, 2005), 70 FR 3757 (Jan. 26, 2005) (SR-CBOE-2005-05).

<sup>9</sup> See Securities Exchange Act Release No. 51366 (Mar. 14, 2005), 70 FR 13217 (Mar. 18, 2005) (SR-CBOE-2004-75).

which allow them to cover a range of classes irrespective of their geographic locations on the CBOE trading floor.<sup>10</sup>

This proposed rule change amends the marketing fee program to include RMMs in the classification of Exchange members subject to the marketing fee. The Exchange states that the purpose of the marketing fee plan is to provide the members of the Exchange with the ability to compete for the opportunity to trade with those orders that may otherwise be routed to other exchanges. The marketing fee will be assessed whereby DPMs, e-DPMs, RMMs, and Market-Makers will be debited \$.22 for every contract they enter into on the Exchange other than Market-Maker-to-Market-Maker transactions (which includes all transactions between any combination of DPMs, e-DPMs, RMMs, and Market-Makers).

According to the Exchange, all funds generated by the marketing fee will be collected by the Exchange and recorded according to the DPM, station, and class ("Trading Crowds") where the options subject to the fee are traded. The money collected will be disbursed by the Exchange according to the instructions of the DPM. The CBOE states that those funds will be available to the DPM solely for those Trading Crowds where the fee was assessed and may only be used by that DPM to attract orders in the classes of options where the DPM is appointed. Funds collected from RMMs and e-DPMs will be used to attract order flow for the classes in which the RMM and e-DPM are appointed. The Exchange notes that its Board of Directors has previously established a Marketing Fee Oversight Committee, which will conduct a quarterly review to determine the effectiveness of the marketing fee and which may recommend to the Exchange that it modify the fee in the future based upon its effectiveness.

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<sup>10</sup> On April 19, 2005, the SEC granted accelerated approval to SR-CBOE-2005-23, amending CBOE Rule 8.4 to remove the Physical Trading Crowd appointment alternative for RMMs. See Securities Exchange Act Release No. 51543 (Apr. 14, 2005), 70 FR 20952 (Apr. 22, 2005) (SR-CBOE-2005-23).

As in the current marketing fee program, the Exchange states that it will not be involved in the determination of the terms governing the orders that qualify for payment with any payment accepting firm or the amount of any such payment. The Exchange will provide administrative support for the program in such matters as maintaining the funds, keeping track of the number of qualified orders each firm directs to the Exchange, and making the necessary debits and credits to the accounts of the traders and the payment accepting firms to reflect the payments that are made. The Exchange states that fees collected during a calendar month shall only be available to the DPM for payment for that calendar month's order flow.

The Exchange believes that it is important to note that Exchange Market-Makers, RMMs, DPMs, and e-DPMs will have no way of identifying prior to execution whether a particular order is from a payment-accepting firm, or from a firm that does not accept payment for their order flow.

Consistent with the current marketing fee, the Exchange states that it will continue to refund any surplus at the end of the month on a pro rata basis based upon contributions made by the Market-Makers, RMMs, e-DPMs, and DPMs.

## 2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act<sup>11</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>12</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among the CBOE's members.

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

The Exchange does not believe that the proposed rule change, as amended, will impose any

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<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(4).

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

The CBOE neither solicited nor received written comments with respect to the proposed rule change, as amended.

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

Because the foregoing rule change, as amended, establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to

Section 19(b)(3)(A)(ii) of the Act<sup>13</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder.<sup>14</sup>

Accordingly, the proposal will take effect upon filing with the Commission. At any time within 60 days of the filing of the proposed rule change, as amended, the Commission may summarily abrogate such rule change 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 Act.<sup>15</sup>

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:

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>14</sup> 17 CFR 240.19b-4(f)(2).

<sup>15</sup> For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, as amended, under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on April 26, 2005, the date on which the Exchange submitted Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

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-2005-34 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-2005-34. 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, as amended, 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 Room. Copies of the 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-2005-34 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>16</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>16</sup> 17 CFR 200.30-3(a)(12).