

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52474; File No. SR-CBOE-2005-72)

September 20, 2005

Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto Relating to Marketing Fee Assessed on Options on DIAMONDS (“DIA”)

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 September 1, 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 Exchange. On September 7, 2005, the CBOE submitted Amendment No. 1 to the proposed rule change.³ The CBOE has designated this proposal as one changing a fee imposed by the CBOE under Section 19(b)(3)(A)(ii) of the Act⁴ and Rule 19b-4(f)(2) thereunder,⁵ which renders the proposal, as amended, 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 CBOE proposes to amend its marketing fee program to assess the marketing fee on options on DIAMONDS[®] (“DIA”). The fee would be imposed at the rate of \$.22 per contract. The Exchange will assess a marketing fee on DIA options commencing on September 2, 2005.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, the Exchange revised the proposed rule change to insert rule text that is contained in CBOE’s Fees Schedules but was omitted from the initial filing.

⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

⁵ 17 CFR 240.19b-4(f)(2).

Below is the text of the proposed rule change, as amended. Proposed new language is in italics; proposed deletions are in [brackets].

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CHICAGO BOARD OPTIONS EXCHANGE, INC.

FEES SCHEDULE

[August 24, 2005] September 1, 2005

1. No Change.
2. [Market-Maker, RMM, e-DPM & DPM] Marketing Fee [(in option classes in which a DPM has been appointed)] (6) (16)

3-4. No Change.

Footnotes:

(1) – (5) No Change.

(6) The Marketing Fee will be assessed only on transactions of Market-Makers, RMMs, e-DPMs, [and] DPMs, and LMMs at the rate of \$.22 per contract on all classes of equity options, options on HOLDRs, [and] options on SPDRs, and options on DIA. 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 and options on DIA). 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, and LMMs.

(7) – (16) 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 the proposed rule change, as amended, and discussed any comments it received on the proposed rule change, as amended. 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, CBOE amended its marketing fee program.⁶ The current marketing fee is assessed upon DPMs, e-DPMs, Market-Makers, and Remote Market-Makers (“RMMs”) at a rate of \$0.22 for every contract they enter into on CBOE other than Market-Maker-to-Market-Maker transactions (which includes all transactions between any combination of DPMs, e-DPMs, Market-Makers, and RMMs). The marketing fee is currently assessed in all equity option classes and options on HOLDRs⁷ and options on SPDRs,⁸ all of which are classes in which a DPM has been appointed. All funds generated by the marketing fee are collected by CBOE and recorded according to the DPM, station, and class where the options subject to the fee are traded. The money collected is disbursed by CBOE according to the instructions of the DPM. Those funds are available to the DPM solely for those trading crowds where the fee was

⁶ For a description of the CBOE’s marketing fee program, see Securities Exchange Act Release No. 50736 (November 24, 2004), 69 FR 69966 (December 1, 2004) (SR-CBOE-2004-68).

⁷ HOLDRs are trust-issued receipts that represent an investor's beneficial ownership of a specified group of stocks. See CBOE Rule 5.3.07.

⁸ See Securities Exchange Act Release No. 51052 (January 18, 2005), 70 FR 3757 (January 26, 2005) (SR-CBOE-2005-05).

assessed and may only be used by that DPM to attract orders in the classes of options for which the fee was assessed.

CBOE now proposes to amend its marketing fee to assess the fee on options on DIA, an Exchange Traded Fund (“ETF”).⁹ The marketing fee would now be assessed upon LMMs,¹⁰ as well as Market-Makers, e-DPMs, and RMMs at a rate of \$0.22 for every contract they enter into on CBOE other than Market-Maker-to-Market-Maker transactions (which includes all transactions between any combination of LMMs, Market-Makers, e-DPMs, and RMMs). The Exchange would commence to assess the fee on DIA options on September 2, 2005.

Additionally, in option classes like DIA in which an LMM instead of a DPM has been appointed,¹¹ CBOE proposes to amend its marketing fee plan to allow an LMM that has been appointed by the Exchange to perform the functions that a DPM typically performs under the marketing fee plan. Specifically, the LMM, like the DPM, would be expected to negotiate with payment accepting firms to pay for that firm’s order flow. All funds generated by the marketing fee would be collected by CBOE, and disbursed by CBOE according to the instructions of the LMM. The Exchange is not making any other changes to its marketing fee plan.

⁹ ETFs are shares of trusts that hold portfolios of stocks designed to closely track the price performance and yield of specific indices.

¹⁰ Under CBOE rules, LMMs may be appointed in an option class for which a DPM has not been appointed. See CBOE Rule 8.15A.

¹¹ Currently, the only option class in which an LMM instead of a DPM has been assigned is the DIA option class and the CBOE has no plans to change this at this time. Telephone conversation between Michou Nguyen, Attorney Advisor, Division of Market Regulation, Commission, and Andrew Spiwak, Assistant Secretary, CBOE, on September 7, 2005.

2. Statutory Basis

The Exchange believes that its proposal, as amended, is consistent with Section 6(b) of the Act¹² in general, and furthers the objectives of Sections 6(b)(4) of the Act¹³ in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among 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 inappropriate burden on competition.

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

No written comments were either solicited or received.

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

The foregoing proposed rule change, as amended, has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁴ and Rule 19b-4(f)(2)¹⁵ thereunder, because it establishes or changes a due, fee, or other charge imposed by the Exchange. Accordingly, the proposal will take effect upon filing with the Commission. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4).

¹⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁵ 17 CFR 240.19b-4(f)(2).

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.¹⁶

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-2005-72 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-CBOE-2005-72. 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

¹⁶ The effective date of the original proposed rule change is September 1, 2005, and the effective date of Amendment No. 1 is September 7, 2005. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposal, the Commission considers the period to commence on September 7, 2005, the date on which the Exchange submitted Amendment No. 1.

relating to the proposed rule change, as amended, 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 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-2005-72 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.¹⁷

Jonathan G. Katz
Secretary

¹⁷ 17 CFR 200.30-3(a)(12).