



January 5, 2004

Mr. Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609

Re: File No. SR-CBOE-2004-73

Dear Mr. Katz:

Susquehanna Investment Group (“SIG”) is a designated primary market maker (“DPM”) on the Chicago Board Options Exchange, Inc. (“CBOE” or “Exchange”), and serves in a similar status and capacity on other options exchanges. SIG appreciates the opportunity to comment on the above referenced proposed rule change submitted by the CBOE pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 19b-4 thereunder.

The CBOE proposed rule change (the “Proposal”), if approved, would amend CBOE Rule 8.85 to prohibit a DPM from charging a commission for handling any portion of an order (i) for which the DPM was not the executing floor broker, (ii) that is automatically executed, or (iii) that is not executed and not cancelled. In its Rule filing, the CBOE states three bases for the Proposal: (i) the Proposal “clarifies . . . that a DPM cannot charge a brokerage commission on orders for which they do not perform an agency function”; (ii) the Proposal is “appropriate and necessary to clarify to the investing public that orders sent to the CBOE will not be subject to excessive or arbitrary costs”; and (iii) the Proposal helps “preserve the competitiveness of the Exchange.”

We conceptually agree with the first articulated basis for this rule change and we do not object to the Proposal. However, in order to promulgate this rule change, the Exchange should be required to expressly provide that DPMs never have any agency or order handling responsibilities towards the orders for which they are prohibited from charging a commission. If, instead, the CBOE and/or Commission believe that DPMs have agency or order handling responsibilities for these orders, the proposed Rule will be effectively the fixing of DPMs commissions (i.e., at zero) in contravention of Section 6(e) of the Exchange Act. Section 6(e) very clearly provides that exchanges cannot

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impose a schedule of commissions. But this is exactly what the CBOE would be doing by telling one class of brokers, *i.e.*, DPMs, that they can charge zero commissions for assuming agency obligations.¹

Thank you for this opportunity to respond.

Sincerely,

Todd Silverberg

Todd Silverberg
General Counsel

¹ Section 6(e) of the Exchange Act prohibits any exchange from imposing any schedule or fixing commission rates, allowances, discounts, or other fees charged by its members. The new provision did empower the Commission to permit an exchange to fix rates, but only if it observed specified due process requirements and found that the rates (i) are reasonable in relation to the costs of providing the service for which such fees are charged (and the Commission publishes the standards employed in adjudging reasonableness) and (ii) do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, taking into consideration the competitive effects of permitting such schedule or fixed rates weighed against the competitive effects of other lawful actions which the Commission is authorized to take under the Exchange Act. See Exchange Act Section 6(e)(1)(B).

Special process and procedures are required by the Exchange Act in reviewing exchange proposals to fix commissions. Specifically,

[b]efore approving or disapproving any proposed rule change submitted by a national securities exchange which would impose a schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange, the Commission shall afford interested persons (i) an opportunity for oral presentation of data, views, and arguments and (ii) with respect to any such rule concerning transactions effected after November 1, 1976, if the Commission determines there are disputed issues of material fact, to present such rebuttal submissions and to conduct (or have conducted under subparagraph (B) of this paragraph) such cross-examination as the Commission determines to be appropriate and required for full disclosure and proper resolution of such disputed issues of material fact.

See Section 6(e)(3)(A) of the Exchange Act. The Commission also is responsible to assure that a transcript is made of any oral presentation and cross-examination. See Section 6(e)(3)(D). Finally, special appellate court procedures are set forth in Section 6(e)(3)(E).