

## 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 Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

The purpose of the proposed rule change is to amend the Revenue Sharing Program that is currently part of the BSE's Transaction Fee Schedule. Currently, the minimum amount of monthly transaction related revenue the BSE must generate before it shares excess revenue with eligible member firms is \$1,700,000. The BSE proposes to revise this amount to \$1,900,000, to meet the budgeted costs of operating the Exchange in the upcoming fiscal year.<sup>4</sup>

The Exchange is seeking to amend only its existing revenue sharing program, and only in the area of the amount of revenue the Exchange must generate before sharing excess revenue. No changes are being sought to the fundamental structure of the existing program.

<sup>4</sup> The Exchange notes that this revision would apply to the Transaction Fee Schedule currently in place for the BSE. On September 11, 2002, the Commission approved a proposed rule change that amended the BSE's Floor Operations and Transactions Fees Schedules. See Securities Exchange Act Release No. 46488 (September 11, 2002), (SR-BSE-2002-11). Normally, such changes are sought to run concurrent with the BSE's fiscal year, which begins on October 1. However, as part of the changes to its overall fee structure, the BSE sought to replace its current revenue sharing program with two new programs. The amendments to the BSE's revenue sharing program were the subject of a separate, but related, rule proposal, which has been published for notice and public comment. See Securities Exchange Act Release No. 46496 (September 19, 2002), (SR-BSE-2002-10). In seeking the changes to its Transaction Fee Schedule sought in SR-BSE-2002-11, which have been approved by the Commission, the Exchange stated that it would implement such changes only upon approval of its new revenue sharing programs, which were the basis of SR-BSE-2002-10. Since SR-BSE-2002-10 is still pending with the Commission, the BSE will not amend its Transaction Fee Schedule on October 1, 2002. Thus, the existing Transaction Fee Schedule (the one that was operative for the BSE's fiscal year that ends on September 30, 2002) will remain in effect, until such time as it is amended in response to Commission action on SR-BSE-2002-10.

The BSE is seeking to make this change operative only until the Commission acts on SR-BSE-2002-10. Upon such Commission action, the BSE will either implement the proposed revenue sharing program detailed in SR-BSE-2002-10, and the accompanying changes to the Transaction Fee Schedule that have been approved in SR-BSE-2002-11, or reevaluate its revenue sharing program and accompanying fee schedule.

#### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act,<sup>5</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>6</sup> in particular, in that the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among the BSE's members.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition.

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

The Exchange has neither solicited nor received comments on the proposed rule change.

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

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>7</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder,<sup>8</sup> because it involves a due, fee, or other charge. At any time within 60 days of the filing of the proposed rule change, 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.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission,

450 Fifth Street, NW., Washington, DC 20549-0609. 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 Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to file number SR-BSE-2002-17, and should be submitted by November 5, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46607; File No. SR-CBOE-2002-51]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Incorporated Relating to a Safe Harbor From the Unbundling Rule

October 7, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on September 6, 2002, the Chicago Board Options Exchange, Incorporated ("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 September 27, 2002, CBOE submitted to the Commission Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission

<sup>9</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 217 CFR 240.19b-4.

<sup>3</sup> Amendment No. 1 revised the text of the proposed rule change to clarify that the safe-harbor from the unbundling rule applies to orders entered outside of any 15-second period. See letter from Steve Youhn, Legal Division, CBOE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated September 26, 2002.

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

<sup>6</sup> 15 U.S.C. 78f(b)(4).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>8</sup> 17 CFR 240.19b-4(f)(2).

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 seeks to adopt a safe-harbor provision from its unbundling rule, Rule 6.8(c)(vii). Below is the text of the proposed rule change. Proposed deletions are in brackets; proposed new language is *italicized*.

\* \* \* \* \*

#### Rule 6.8 RAES Operations

(a)–(b) No change.

(c)(i)–(vi) No change.

(c)(vii) For purposes of determining whether an order meets the maximum size requirement set forth in subparagraph (c)(v), a customer's order cannot be split up (*i.e., unbundled*) such that its parts are eligible for entry into RAES. *Orders entered in compliance with CBOE Rule 6.8(e)(iii) (i.e., outside of any 15-second period) will not be considered to have been unbundled.*

(d) No change.

(e)(i)–(ii) No change.

(e)(iii) Neither enter nor permit the entry of multiple orders *on the same side of the market* in [a call class and/or a put class for the same] *an* option issue within any 15-second period for an account or accounts of the same beneficial owner.

### 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 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 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

CBOE Rule 6.8(c)(vii) states “for purposes of determining whether an order meets the maximum [RAES] size requirement, a customer's order cannot be split up such that its parts are eligible for entry into RAES.” This “unbundling” provision is designed to prevent customers from splitting up non-RAES eligible orders into smaller

RAES-eligible orders. Additionally, CBOE Rule 6.8(e)(iii) requires order-entry firms to prevent the entry of multiple orders in a call class and/or put class for the same option issue within any 15-second period for an account or accounts of the same beneficial owner. This “15-second” rule essentially prevents users from sending through RAES multiple orders in the same class within any 15-second period.

The purpose of this rule filing is to amend Rule 6.8(c)(vii) to create a “safe harbor” from the unbundling provision by referencing the 15-second rule.<sup>4</sup> In this respect, customers will not be deemed to have unbundled an order provided they comply with the 15-second rule (*i.e., they do not enter multiple orders within 15 seconds of each other*).<sup>5</sup> Orders entered in compliance with the 15-second rule will not be deemed to have been unbundled. The Exchange believes the proposed rule change will provide more certainty to order-entry firms and customers alike by creating an objective, bright-line test as to activity that does not constitute unbundling.<sup>6</sup> Previously, a customer could enter orders more than 15 seconds apart in the same class; however, the order entry firm might not be able to determine if the orders had been unbundled. This rule change will eliminate the need to make this determination. The Exchange represents that this proposed rule change is

<sup>4</sup> CBOE has represented that this proposed rule change supersedes the effectiveness of its Regulatory Circular 00–27 and that it will advise its members accordingly. Telephone conversation between Nancy Sanow, Assistant Director, Division of Market Regulation, Commission and Steve Youhn, Legal Division, CBOE, October 4, 2002.

<sup>5</sup> Under Rule 6.8(e)(iii), if two orders on the same side of the market are entered exactly 15 seconds apart, entry of the second order would violate the rule and the safe-harbor would *not* be available. However, if the two orders are entered more than 15 seconds apart, entry of the second order would not violate the rule and the safe-harbor *would* be available. For example, if the first order is entered at 11:00:00 a.m. and the second order is entered at 11:00:15 a.m., entry of the second order would violate the rule. However, if the first order is entered at 11:00:00 a.m. and the second order is entered at 11:00:16 a.m., entry of the second order would *not* violate the rule. Telephone conversation between Steve Youhn, Legal Division, CBOE and Gordon Fuller, Counsel to the Assistant Director, Division of Market Regulation, Commission (September 25, 2002). Amendment No. 1 clarifies this point.

<sup>6</sup> The Exchange notes that the 15-second rule speaks to member firms (*i.e., “Order Entry Firms shall \* \* \* neither enter nor permit the entry of multiple orders \* \* \* within any 15-second period \* \* \*”*) As such, disciplinary action for violations is against the Order Entry Firm that allows the orders to be transmitted and NOT against the customer that submitted the orders. In this regard, member firms have an obligation to have reasonable procedures in place to ensure that the rule is complied with.

virtually identical to existing Pacific Exchange Rule 6.87(d)(2).

The Exchange also proposes to restrict applicability of the 15-second rule by clarifying that it will only apply to orders on the same side of the market in a particular class. Currently, the rule applies to orders on either side of the market, which would prevent a customer from submitting two orders on opposite sides of the market within 15 seconds. The Exchange represents that this interpretation may hinder the ability of investors to engage in legitimate trading strategies through RAES (*e.g., legging into a spread*). The changes proposed to Rule 6.8(e)(iii) will now allow customers to send in orders on the opposite side of the market within 15 seconds without violating the rule.

##### 2. Statutory Basis

This proposal provides a safe harbor from the unbundling rule by creating an objective test, which the Exchange believes will aid customers and firms alike in determining what constitutes unbundling. The proposal also limits applicability of the 15-second rule by clarifying that it will apply only to orders submitted on the same side of the market within a particular class. Accordingly, 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. Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>7</sup> requirements that the rules of an exchange be 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

The CBOE does not believe that the proposed rule change will impose any burden on competition 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.

<sup>7</sup> 15 U.S.C. 78(f)(b)(5).

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

Because the foregoing proposed rule change, as amended: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission, the proposed rule change<sup>8</sup> has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(6)<sup>10</sup> thereunder.

At any time within 60 days of the filing of the proposed rule change, 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>11</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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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 at

<sup>8</sup> As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date or such shorter period as designated by the Commission.

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

<sup>11</sup> See Section 19(b)(3)(C) of the Act, 15 U.S.C. 78b(3)(C).

the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to the File No. SR-CBOE-2002-51 and should be submitted by November 5, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46616; File No. SR-CHX-2002-33]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by The Chicago Stock Exchange, Incorporated Relating to Execution of Limit Orders Following Exempted ITS Trade-Through

October 8, 2002.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 3, 2002, the Chicago Stock Exchange, Incorporated ("CHX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II and III below, which Items have been substantively 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 extend, for a period of 30 days, an existing pilot rule change that amends certain provisions of CHX Article XX, Rule 37, which governs, among other things, execution of limit orders in a CHX specialist's book following a trade-through in the primary market. Specifically, the CHX seeks to render voluntary a CHX specialist's obligation to fill limit orders in the specialist's book following a primary market trade-through, if such trade-through constitutes an Exempted Trade-Through (as defined below). The text of the proposed rule change, which would be

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

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

<sup>2</sup> 17 CFR 240.19b-4.

in effect for a pilot period of 30 days, is available at the Commission and at the CHX.

#### 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 CHX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX 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 August 28, 2002, the Commission issued an order granting a *de minimis* exemption (the "Exemption") for transactions in certain exchange-traded funds ("ETFs") from the trade-through provisions of the Intermarket Trading System ("ITS") Plan.<sup>3</sup> The Exemption was proposed by Commission staff to permit rapid execution of orders in certain ETFs at prices that may trade through the quotations of other markets, including the NBBO price. Because Exempted Trade-Throughs will, by definition, be exempt from ITS restrictions, a market participant that reports execution of an Exempted Trade-Through will not be required to satisfy an administrative request from any ITS participant for satisfaction following the Exempted Trade-Through.<sup>4</sup>

Article XX, Rules 37(a)(3) and 37(b)(6) of the CHX Rules, which govern execution of limit orders in a CHX specialist's book, provide for execution

<sup>3</sup> See Securities Exchange Act Release No. 46428, 67 FR 56607 (September 4, 2002). At present, the Exemption extends to transactions in three designated ETFs—the Nasdaq-100 Index ("QQQ"), the Dow Jones Industrial Average ("DIAMONDS") and the Standard & Poor's 500 Index ("SPDRs")—when the transactions are "executed at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS" (each, an "Exempted Trade-Through"). The Exemption is effective as of September 4, 2002.

<sup>4</sup> Under current ITS rules and practice, if an ITS participant trades through the quotation of another ITS participant, thereby violating the ITS trade-through prohibition, the non-violating participant is entitled to send an administrative message noting the trade-through and the violating participant is required to respond with a commitment to trade at the price and size quoted by the non-violating participant.