

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49574; File No. SR-Amex-2003-110]

### Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto Relating to Procedures Applicable to Continued Listing Evaluation and Follow-Up

April 16, 2004.

On December 12, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("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> a proposed rule change clarifying the procedures applicable to listed companies with regard to continued listing evaluation and follow-up. On February 19, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The proposed rule change, as amended, was published for comment in the **Federal Register** on March 10, 2004.<sup>4</sup> The Commission received no comments on the proposal.

The Exchange proposes to revise Section 1009 of the Amex Company Guide ("Company Guide") to clarify that Exchange staff may establish a time period of less than 18 months for a listed company to regain compliance with some or all of the continued listing standards, if the nature and circumstances of the company's particular continued listing status warrant such shorter time period. In determining whether to establish a time period of less than 18 months for a company to regain compliance with some or all of the continued listing standards, the Exchange staff would consider whether, in view of the nature and severity of the particular continued listing deficiency, including the investor protection concerns raised, 18 months would be an inappropriately long period of time to regain compliance. While it is not possible to enumerate all possible circumstances, the following is a non-exclusive list of the types of continued listing deficiencies that, based on a

particular listed company's unique situation, may result in imposition of a shorter time period: delinquencies with respect to Commission filing obligations; severe short-term liquidity and/or financial impairment; present or potential public interest concerns;<sup>5</sup> and/or deficiencies with respect to the requisite distribution requirements that make the security unsuitable for auction market trading.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange<sup>6</sup> and, in particular, the requirements of section 6(b) of the Act<sup>7</sup> and the rules and regulations thereunder. The Commission finds that the proposed rule change is consistent with section 6(b)(5)<sup>8</sup> of the Act, which requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission notes that the proposed rule change clarifies the Amex's existing authority to establish a time period of less than 18 months for a company to regain compliance with some or all of the Amex continued listing standards. In addition, Section 1009 of the Company Guide sets forth several factors that the Exchange would consider in its determination. Such criteria should provide transparency to the process of continued listing evaluation and follow-up, thereby benefiting listed companies and investors.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act<sup>9</sup>, that the proposed rule change (File No. SR-Amex-2003-110), as amended, be, and hereby is, approved.

<sup>5</sup> Public interest concerns could include, for example, situations where the company, a corporate officer or affiliate is the subject of a criminal or regulatory investigation or action; or the company's auditors have resigned and withdrawn their most recent audit opinion raising concerns regarding the internal controls and financial reporting process. However, other situations not specifically enumerated could also raise public interest concerns regarding the appropriateness of a particular company's continued listing.

<sup>6</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04-9193 Filed 4-22-04; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49575; File No. SR-CBOE-2004-13]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change, and Amendment No. 1 Thereto, by the Chicago Board Options Exchange, Inc. Relating to Retroactive Crediting of DPM Principal Acting as Agent Order Transaction Fees

April 16, 2004.

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 March 9, 2004, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") submitted to 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 March 31, 2004, the CBOE submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> 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 change its Fee Schedule to retroactively credit Designated Primary Market-Makers ("DPMs") for transaction fees they incur in executing outbound "principal acting as agent" ("PA") Orders, as defined in the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage (the "Linkage Plan").

The text of the proposed fee schedule is below. Proposed additions are in *italics*. Proposed deletions are in [brackets].

\* \* \* \* \*

<sup>10</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.

<sup>3</sup> See Letter from Chris Hill, Attorney, CBOE, to Nancy Sanow, Assistant Director, Commission, dated March 26, 2004 ("Amendment No. 1"). In Amendment No. 1, the CBOE submitted a new Form 19b-4, which replaced and superceded the original filing in its entirety.

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

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

<sup>3</sup> See Letter from Claudia Crowley, Vice President, Listing Qualifications, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated February 18, 2004 ("Amendment No. 1"). In Amendment No. 1, the Amex replaced the text of the proposed rule change in its entirety.

<sup>4</sup> See Securities Exchange Act Release No. 49351 (March 2, 2004), 69 FR 11467.

Chicago Board Options Exchange,  
Incorporated Rules

## FEE SCHEDULE

May 1, 2004

1–20. (No Change).

### 21. DPM Fees Credit Relating to Duplicate Transactions re Linkage

Effective *July 1, 2003* [February 2, 2004], DPM transaction and trade match fees generated from “scratched” (or linked) transactions with outbound principal acting as agent (PA) orders will be credited to DPMs (currently \$.24 per contract). In addition, *when DPMs incur fees to execute PA orders at other exchanges, those DPMs will be credited up to an additional 50% of the CBOE transaction and trade match fees related to those outbound PA transactions, up to the amount of total fees CBOE receives from inbound linkage* [inbound] transaction and trade match fees. At current rates, this amounts to an additional credit of up to \$.12 per contract, for a total credit of up to \$.36 per contract.

\* \* \* \* \*

## 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 had 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

The purpose of this proposed rule change is to amend the Exchange fee schedule to retroactively establish certain fee relief that was provided prospectively in a previous CBOE rule change filing<sup>4</sup> and to clarify when such relief is available.

As explained in that previous proposed rule change, pursuant to Linkage Plan, CBOE DPMs are required in certain circumstances to send a PA Order to another exchange in order to

obtain the National Best Bid or Offer (“NBBO”) price for their customers. The DPM usually pays transaction fees to the other exchange as well as to the Options Clearing Corporation (“OCC”) to execute this PA Order at the other exchange. Then, under the Linkage procedure,<sup>5</sup> when the DPM receives a fill of its PA Order from the other exchange, the CBOE DPM must then re-trade the order back to their customer, resulting in additional transaction fees (this time from CBOE and the OCC.) Thus, the Linkage procedure’s requirement to re-trade means that DPMs who send such PA Orders to other exchanges may incur duplicate transaction and OCC fees on PA Orders that substantially increase the costs of such transactions for the DPMs.

In SR–CBOE–2004–08,<sup>6</sup> the Exchange established a two-phased relief to offset these additional costs. First, the CBOE established rebates for all CBOE transaction and trade match fees related to the orders that CBOE DPMs fulfill by sending PA transactions to other exchanges (*i.e.*, the fees from the “re-trade.”) At current rates, this is \$.024 per contract.

Second, in order to help offset the transaction-related costs that the DPMs are assessed on PA orders sent to other exchanges by the OCC and the other exchanges, the Exchange credits CBOE DPMs who incur such costs an additional 50% of the CBOE transaction and trade match fees related to each outbound PA transaction. At current rates, this is \$.012 per contract. This second rebate will be funded by the amount of total transaction and trade match fees that CBOE receives from incoming PA orders from other exchanges (“incoming PA fees”), and the aggregate amount rebated in the second rebate will be limited to no more than the total amount of incoming PA fees.

SR–CBOE–2004–08<sup>7</sup> established the fee changes described above prospectively pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>8</sup> and Rule 19b–4(f)(2) thereunder.<sup>9</sup> In this filing, the Exchange proposes to extend this relief retroactively back to all applicable transactions occurring since the start of the CBOE fiscal year on July 1, 2003.

<sup>5</sup> “Linkage procedure” describes the process that CBOE DPMs undergo to fulfill the Customer order underlying a PA Order after another exchange fills the PA Order. The CBOE believes that this process is uniform among exchanges that are Participants in the Linkage Plan. Telephone conversation between Chris Hill, Attorney, CBOE and Tim Fox, Attorney, Commission on April 12, 2004.

<sup>6</sup> See *supra* note 4.

<sup>7</sup> *Id.*

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>9</sup> 17 CFR 240.19b–4(f)(2).

#### 2. Statutory Basis

The CBOE believes that the proposed rule is consistent with Section 6(b) of the Act,<sup>10</sup> in general, and furthers the objectives of section 6(b)(4)<sup>11</sup> in particular in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members.

### 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.

## 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 CBOE consents, the Commission will:

(A) By order approve such proposed rule change, as amended; or

(B) institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

## 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–2004–13 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission,

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(4).

<sup>4</sup> See Securities Exchange Act Release No. 49341 (March 1, 2004), 69 FR 10492 (March 5, 2004) (Notice of Filing and Immediate Effectiveness of SR–CBOE–2004–08).

450 Fifth Street, NW., Washington, DC 20549-0609. All submissions should refer to File Number SR-CBOE-2004-13. 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-2004-13 and should be submitted on or before May 14, 2004.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04-9192 Filed 4-22-04; 8:45 am]

**BILLING CODE 8010-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49576; File No. SR-NASD-2004-048]

**Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Create a Pilot Program Modifying SuperMontage Fees and Credits for Orders and Quotes Executed in the Nasdaq Closing Cross**

April 16, 2004.

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 March 16, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), submitted to 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 Nasdaq. Nasdaq has designated the proposed rule change

as "establishing or changing a due, fee, or other charge" under Section 19(b)(3)(A) of the Act,<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</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 from interested persons.

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

Nasdaq is filing this proposed rule change to waive, for a pilot period of three months, the Nasdaq National Market Execution System (commonly called SuperMontage) execution fees and credits for those quotes and orders executed in the Nasdaq Closing Cross. The pilot program will commence when Nasdaq implements the Closing Cross. The text of the proposed rule change is set forth below. Proposed new language is in *italics*.

\* \* \* \* \*

**Rule 7010. System Services**

(a)-(h) No change.

(i) Nasdaq National Market Execution System (SuperMontage)

(1) The following charges shall apply to the use of the Nasdaq National Market Execution System (commonly known as SuperMontage) by members:

**Order Entry:**

Non-Directed Orders (excluding Preferred Orders) .....	No charge.
Preferred Orders:	
Preferred Orders that access a Quote/Order of the member that entered the Preferred Order) .....	No charge.
Other Preferred Orders .....	\$0.02 per order entry.
Directed Orders .....	\$0.10 per order entry.

**Order Execution:**

Non-Directed or Preferred Order that accesses the Quote/Order of a market participant that does not charge an access fee to market participants accessing its Quotes/Orders through the NNMS:	
Charge to member entering order: Average daily shares of liquidity provided through the NNMS by the member during the month:	
400,000 or less .....	\$0.003 per share executed (but no more than \$120 per trade for trades in securities executed at \$1.00 or less per share).
400,001 to 5,000,000 .....	\$0.0027 per share executed (but no more than \$108 per trade for trades in securities executed at \$1.00 or less per share).
5,000,001 or more .....	\$0.0025 per share executed (but no more than \$100 per trade for trades in securities executed at \$1.00 or less per share).
Credit to member providing liquidity .....	\$0.002 per share executed (but no more than \$80 per trade for trades in securities executed at \$1.00 or less per share).

Non-Directed or Preferred Order that accesses the Quote/Order of a market participant that charges an access fee to market participants accessing its Quotes/Orders through the NNMS:

Charge to member entering order: Average daily shares of liquidity provided through the NNMS by the member during the month:

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

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

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

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

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