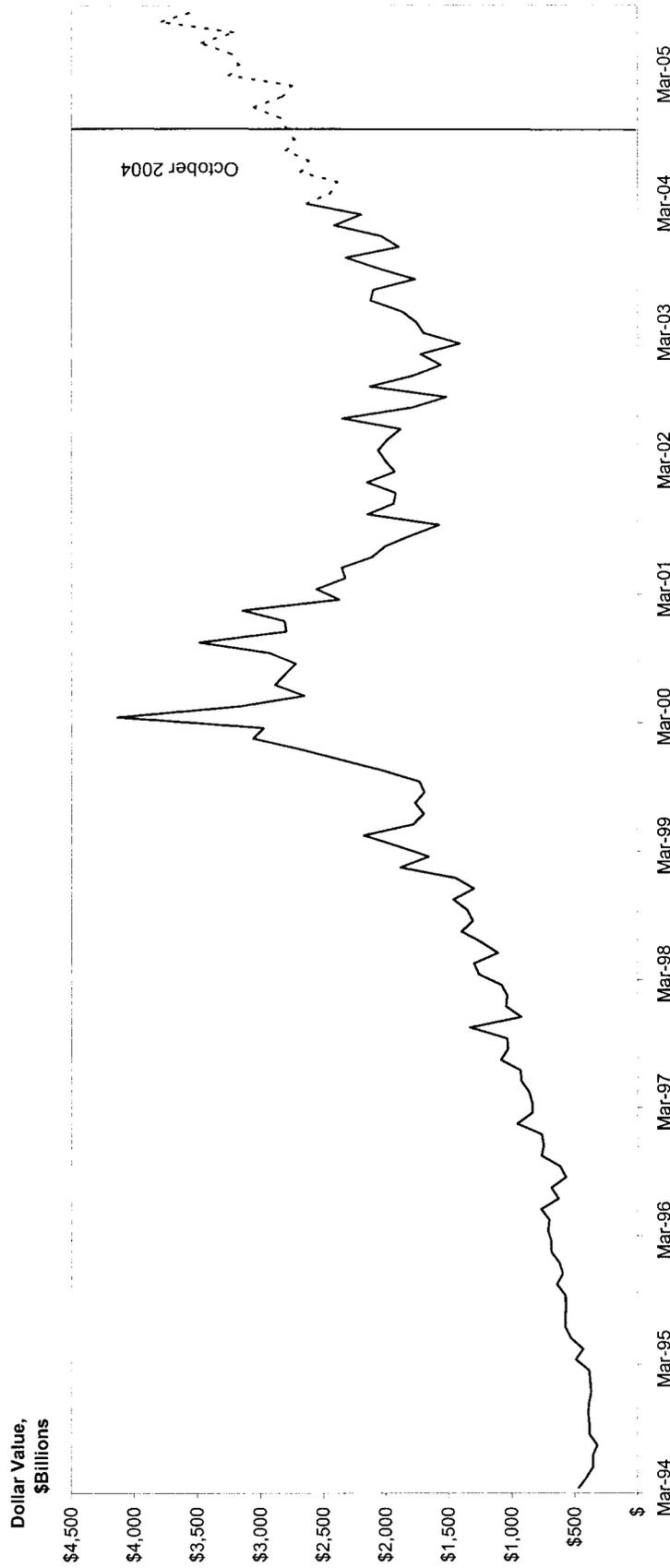


**Figure B.**  
Aggregate Dollar Amount of Sales Subject to Exchange Act Sections 31(b) and 31(c)<sup>1</sup>  
Methodology Developed in Consultation With OMB and CBO  
(Dashed Line Indicates Forecast Values)



<sup>1</sup>Forecasted line is not smooth because the number of trading days varies by month.

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49643; File No. SR-CBOE-2004-24]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Incorporated Allowing a New Type of Designated Primary Market-Maker—e-DPMs

April 30, 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 April 22, 2004, 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 April 30, 2004, the CBOE filed 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 amend its rules to allow remote competing Designated Primary Market-Makers (“DPMs”).

Below is the text of the proposed rule change, as amended.<sup>4</sup> Proposed new language is *italicized*.

\* \* \* \* \*

Chicago Board Options Exchange, Incorporated

\* \* \* \* \*

Rules

\* \* \* \* \*

#### Rule 1.1 Definitions

(a)–(ff) Unchanged.

(gg) The term “lessee” means an individual or organization that has leased a transferable membership from the owner thereof in accordance with the provisions of Rule 3.17. For the duration of the lease agreement, a lessee

shall be deemed to be a member[.]. *Except as otherwise expressly provided in the Constitution or Rules, a lessee shall be subject to all of the provisions of the Constitution and Rules that are applicable to the owner of an Exchange membership[, except that the provisions of the Constitution and Rules, which] other than those provisions that concern the ownership of membership [are not applicable to a lessee].*

(hh)–(yy) Unchanged.

.01–05 Unchanged.

\* \* \* \* \*

#### Rule 3.3 Qualifications and Membership Statuses of Member Organizations

(a)–(d) Unchanged.

Interpretation and Policies:

.02 Member organization membership statuses that are approved by Exchange bodies other than the Membership Committee (along with the primary Exchange Rule that provides for such approval) include: Designated Primary Market-Maker (Rule 8.83), *Electronic DPMs (Rule 8.92)*, SBT Designated Primary Market-Makers and SBT Lead Market-Makers (Rule 42.1).

\* \* \* \* \*

#### Rule 6.23A Member Electronic Connectivity

*The Exchange may limit the number of messages sent by members accessing the Exchange electronically in order to protect the integrity of the Hybrid trading system. In addition, the Exchange may impose restrictions on the use of a computer connected through an API if it believes such restrictions are necessary to ensure the proper performance of the system. Any such restrictions shall be objectively determined and submitted to the Commission for approval pursuant to a rule change filing under Section 19(b) of the Exchange Act.*

\* \* \* \* \*

#### Rule 6.45A Priority and Allocation of Trades for CBOE Hybrid System

Generally: The rules of priority and order allocation procedures set forth in this rule shall apply only to option classes designated by the Exchange to be traded on the CBOE Hybrid System. *The term “market participant” as used throughout this rule refers to an in-crowd Market-Maker, a Market-Maker complying with the in-person requirements of Rule 8.7.03(B)(1) who submits quotes from off of the floor of the Exchange through the facilities of the Exchange, an in-crowd DPM, an e-DPM, and a floor broker representing orders in the trading crowd. The term*

*“in-crowd market participant” only includes an in-crowd Market-Maker, in-crowd DPM, or floor broker representing orders in the trading crowd.*

(a) Allocation of Incoming Electronic Orders: The Exchange shall apply, for each class of options, the following rules of trading priority.

(i) Ultimate Matching Algorithm (“UMA”): Under this method, [an in-crowd market maker, in-crowd DPM, or in-crowd floor broker representing orders (“market participant”)] a *market participant* who enters a quotation and whose quote is represented by the disseminated CBOE best bid or offer (“BBO”) shall be eligible to receive allocations of incoming electronic orders for up to the size of its quote, in accordance with the principles described below. As an initial matter, if the number of contracts represented in the disseminated quote is less than the number of contracts in an incoming electronic order(s), the incoming electronic order(s) shall only be entitled to receive a number of contracts up to the size of the disseminated quote, in accordance with Rule 6.45A(a)(i)(B). The balance of the electronic order will be eligible to be filled at the refreshed quote either electronically (in accordance with paragraph (a)(i)(B) below) or manually (in accordance with Rule 6.45A(b)) and, as such, may receive a split price execution.

(A)–(B) No change.

(C) DPM Participation Entitlement: If a DPM or e-DPM is eligible for an allocation pursuant to the operation of the Algorithm described in paragraph (a) of Rule 6.45A, the DPM or e-DPM shall be entitled to receive an allocation (not to exceed the size of the DPM’s or e-DPM’s quote) equal to either:

(1) The greater of the amount [he] it would be entitled to pursuant to the [DPM] participation right established pursuant to Rule 8.87 (and Regulatory Circulars issued thereunder) or the amount [he] it would otherwise receive pursuant to the operation of the Algorithm described above *provided, however, that in calculating the DPM’s allocation under the Algorithm, DPMs utilizing more than one membership in the trading crowd where the subject class is traded shall count as two market participants for purposes of Component A of the Algorithm*; or

(2) the amount [he] it would be entitled to pursuant to the [DPM] participation right established pursuant to Rule 8.87 (and Regulatory Circulars issued thereunder).

The appropriate FPC shall determine which of the preceding two entitlement formulas will be in effect for all classes under its jurisdiction. All

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

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

<sup>3</sup> Amendment No. 1 replaces and supercedes the CBOE’s original 19b-4 filing in its entirety.

<sup>4</sup> Upon the Exchange’s request, the Commission made a technical corrections to the proposed rule text. Telephone conversation between Angelo Evangelou, Senior Attorney, Legal Division, CBOE, and Deborah L. Flynn, Assistant Director, Division of Market Regulation, Commission, on April 30, 2004.

pronouncements regarding the entitlement formula shall be made via Regulatory Circular. The [DPM's] participation entitlement percentage is expressed as a percentage of the remaining quantity after all public customer orders in the electronic book have been executed.

(b)-(d) No change.

Interpretations and Policies:

\* \* \*

No change.

\* \* \* \* \*

### Rule 8.87 Participation Entitlements of DPMs and e-DPMs

(a) Subject to the review of the Board of Directors, the MTS Committee may establish from time to time a participation entitlement formula that is applicable to all DPMs.

(b) [To the extent established pursuant to paragraph (a) of this Rule, each DPM shall have a right to participate for its own account with the Market-Makers present in the trading crowd in transactions in securities allocated to the DPM that occur at the DPM's previously established principal bid or offer.]

The participation entitlement for DPMs and e-DPMs (as defined in Rule 8.92) shall operate as follows:

(1) Generally.

(i) To be entitled to a participation entitlement, the DPM/e-DPM must be quoting at the best bid/offer on the Exchange.

(ii) A DPM/e-DPM may not be allocated a total quantity greater than the quantity that the DPM/e-DPM is quoting at the best bid/offer on the Exchange.

(iii) The participation entitlement is based on the number of contracts remaining after all public customer orders in the book at the best bid/offer on the Exchange have been satisfied.

(2) Participation Rates applicable to DPM Complex. The collective DPM/e-DPM participation entitlement shall be: 50% when there is one Market-Maker also quoting at the best bid/offer on the Exchange; 40% when there are two Market-Makers also quoting at the best bid/offer on the Exchange; and, 30% when there are three or more Market-Makers also quoting at the best bid/offer on the Exchange.

(3) Allocation of Participation Entitlement Between DPMs and e-DPMs. The participation entitlement shall be as follows: If the DPM and one or more e-DPMs are quoting at the best bid/offer on the Exchange, the e-DPM participation entitlement shall be one-half (50%) of the total DPM/e-DPM entitlement and shall be divided equally by the number of e-DPMs quoting at the

best bid/offer on the Exchange. The remaining half shall be allocated to the DPM. If the DPM is not quoting at the best bid/offer on the Exchange and one or more e-DPMs are quoting at the best bid/offer on the Exchange, then the e-DPMs shall be allocated the entire participation entitlement (divided equally between them). If no e-DPMs are quoting at the best bid/offer on the Exchange and the DPM is quoting at the best bid/offer on the Exchange, then the DPM shall be allocated the entire participation entitlement. If only the DPM and/or e-DPMs are quoting at the best bid/offer on the Exchange (with no Market-Makers at that price), the participation entitlement shall not be applicable and the allocation procedures under Rule 6.45A shall apply.

\* \* \* \* \*

### Rule 8.92 Electronic DPM Program

(a) Definition. An Electronic DPM ("e-DPM") is a member organization that is approved by the Exchange to remotely function in allocated option classes as a DPM and to fulfill certain obligations required of DPMs except for Floor Broker and Order Book Official obligations. The DPM provisions of Rules 8.81 through 8.91 only apply to e-DPMs to the extent they are specifically referenced in Rules 8.92 through 8.94.

(b) No change.

(c) Allocation of Option Classes. The Board of Directors or a committee designated by the Board of Directors shall grant e-DPMs allocations in option classes. Factors to be considered in granting allocations include performance, capacity, performance commitments, efficiency, competitiveness, and operational factors. In addition, the following shall apply:

(i) More than one e-DPM may be allocated to the same option class;

(ii) Option classes that have been allocated to a DPM may be concurrently allocated to e-DPMs.

(iii) An e-DPM's allocation in an option class or group of classes is non-transferable unless approved by the Exchange.

(iv) The Exchange may impose a minimum number of option classes for which an e-DPM may be allocated.

(v) An e-DPM may not be allocated an option class for which the e-DPM organization serves as DPM on the trading floor.

(d) Membership Requirement. Until [insert date 3 years from Commission approval of program], each e-DPM organization is required to (i) own one Exchange membership for every 30 products allocated to the e-DPM; or (ii)

lease one Exchange membership for every 20 products allocated to the e-DPM. After [insert same date] each e-DPM organization is required to own one Exchange membership for every 30 products allocated to the e-DPM. An Exchange membership shall include a transferable regular membership or a Chicago Board of Trade full membership that has effectively been exercised pursuant to Article Fifth(b) of the Certificate of Incorporation. Memberships used to satisfy this requirement may not be used for any other purpose including being leased to another member, to comply with the DPM membership ownership requirement of Rule 8.85(e), or for trading on the trading floor. For purposes of this Rule, the term "product" refers to all options of the same single underlying security/value.

(e) Trade Participation. e-DPMs shall participate in trades as set forth in Rules 6.45A and 8.87.

\* \* \* \* \*

### Rule 8.93. e-DPM Obligations

Each e-DPM shall fulfill all of the obligations of a Market-Maker and of a DPM under the Rules (except those contained in Rules 8.85(a)(iv) and (vii)-(x), 8.85(b), 8.85(c)(i) and (v), and 8.85(e)), and shall satisfy each of the following requirements:

(i) provide continuous two-sided quotations in at least 90% of the series of each allocated class, or alternatively, respond to 98% of Requests for Quotes (RFQs) if RFQ functionality is enabled as determined by the Exchange;

(ii) assure that its market quotations are accurate;

(iii) comply with the bid/ask differential requirements of Rule 8.7(b)(iv);

(iv) assure that its market quotations comply with the minimum size requirements prescribed by the Exchange which shall be no less than 10 contracts;

(v) continue to act as an e-DPM and to fulfill all of the e-DPM's obligations as an e-DPM until the Exchange relieves the e-DPM of its approval and obligations to act as an e-DPM;

(vi) make competitive markets on the Exchange and otherwise to promote the Exchange in a manner that is likely to enhance the ability of the Exchange to compete successfully for order flow in the classes it trades;

(vii) as part of a pilot program until [insert 18 months after date of approval], not allow more than one market-maker affiliated with the e-DPM organization to trade on CBOE's trading floor in any specific option class allocated to the e-DPM and provided

such market-maker is trading on a separate membership (absent the pilot program, an e-DPM may not allow any market-makers affiliated with the e-DPM organization to trade on CBOE's trading floor in any class allocated to the e-DPM);

(viii) immediately notify the Exchange of any material operational or financial changes to the e-DPM organization as well as obtain the Exchange's approval prior to effecting changes to the ownership, capital structure, voting authority, distribution of profits/losses, or control of the e-DPM organization;

(ix) provide members with telephone access to a designated employee at all times during market hours for purposes of resolving problems involving trading on the Exchange; and

(x) maintain information barriers that are reasonably designed to prevent the misuse of material, non-public information with any affiliates that may conduct a brokerage business in option classes allocated to the e-DPM or act as specialist or market maker in any security underlying options allocated to the e-DPM, and otherwise comply with the requirements of Rule 4.18 regarding the misuse of material non-public information.

\* \* \* \* \*

#### **Rule 8.94. Review of e-DPM Operations and Performance**

(a) *Review.* The Exchange may conduct a review of an e-DPM's operations or performance at any time. Such review may include, among other things, an evaluation of the extent to which the e-DPM has satisfied its obligations under Rule 8.93. An e-DPM shall submit to the Exchange such information requested by the Exchange in connection with a review of the e-DPM's operations or performance on the Exchange.

(b) *Revocation of Fee Rate.* The Exchange may, pursuant to a rule change filed with the Commission under Section 19(b) of the Exchange Act, adopt rules detailing objective criteria upon which e-DPMs' fee rates shall be reviewed. The criteria may include average quote size, average quote width, the percentage of time an e-DPM is quoting at the NBBO, and other objective performance related measurements. e-DPMs that fail to meet the objective standards may be summarily required to adhere to fee rates applicable to non-e-DPM Market-Makers.

(c) *Termination and other limitations.* The Exchange may terminate, place conditions upon, or otherwise limit a member organization's approval to act as an e-DPM on the same basis that

DPM privileges may be terminated and/or conditioned under Rules 8.60 and 8.90. If a member organization's approval to act as an e-DPM is terminated, conditioned, or otherwise limited by the Exchange pursuant to this Rule, the member organization may seek review of that decision under Chapter XIX of the Rules.

\* \* \* \* \*

#### **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**

In 2003, CBOE introduced the Hybrid Trading System, an electronic trading platform integrated with CBOE's floor-based open-outcry auction market.<sup>5</sup> CBOE now proposes to enhance the liquidity base of the Hybrid platform by adding a new category of CBOE market making participant-electronic DPMs ("e-DPMs"). e-DPMs will be member organizations appointed to operate on CBOE as competing DPMs in a broad number of option classes. e-DPMs will act as specialists on CBOE by entering bids and offers electronically from locations other than the trading crowds where the applicable options classes are traded, and will not be required to have traders physically present in the trading crowd. As specialists, e-DPMs will share in the DPM participation right in their allocated classes.

e-DPMs will be expected to attract order flow to the Exchange in allocated securities and to quote competitively. They will have special eligibility requirements and will have to meet market performance standards and certain obligations including quoting requirements. e-DPMs will be evaluated on how well they fulfill their market-making obligations as specialists, as well as on how successful they are at attracting order flow to the Exchange in

<sup>5</sup> See Securities Exchange Act Release No. 47959 (May 30, 2003), 68 FR 34441 (June 9, 2003).

allocated securities. e-DPMs may apply for and be granted an appointment in any option classes on the Hybrid Trading System other than those in which they are already operating as the DPM on the floor of the Exchange.<sup>6</sup>

###### **e-DPM Allocated Classes**

e-DPMs will be required to accept allocations in a broad number of options classes, as determined by the Exchange. All classes allocated by the Exchange to an e-DPM shall constitute the e-DPM's appointment. e-DPMs will have specific quoting obligations governing all classes comprising their appointment, as discussed below.

###### **e-DPM Quoting Obligations**

e-DPMs must continuously quote 90% of the series in each of their allocated classes, with a minimum size of at least 10 contracts. If an electronic request-for-quote ("RFQ") functionality is activated for Hybrid classes,<sup>7</sup> e-DPMs will have additional or alternative obligations regarding RFQs. For example, they will be obligated to respond to at least 98% of RFQs in their appointed classes (as is the standard for SBT DPMs under CBOE Rule 44.14). All e-DPM quotations must be firm and must comply with the maximum bid-ask width requirements contained in CBOE Rule 8.7(b)(iv).

###### **Participation Entitlement**

CBOE proposes to modify certain aspects of the DPM participation entitlement to accommodate the e-DPM program. Participation rights are granted to a DPM when the DPM is quoting on the prevailing bid or offer. CBOE's current DPM participation rights are 30%, 40%, or 50%.<sup>8</sup> Under this proposal, DPMs and e-DPMs (the "DPM Complex") will share in the existing DPM participation entitlement with the e-DPM participation right coming out of the existing DPM participation right established under CBOE Rule 8.87. CBOE proposes to codify the revised participation right applicable to the DPM Complex.

The allocation of the DPM participation entitlement shall be shared as follows: If the DPM and one or more

<sup>6</sup> The process and rules by which e-DPMs would be appointed was submitted to the Commission under a separate rule filing (SR-CBOE-2004-17). See Securities Exchange Act Release 49577 (April 19, 2004), 69 FR 22576 (April 26, 2004).

<sup>7</sup> The RFQ functionality exists for trading on CBOEdirect, the Exchange's purely screen-based trading platform.

<sup>8</sup> If there is one Market-Maker quoting with the DPM, the DPM entitlement is 50%. If there are two Market-Makers quoting with the DPM, the DPM entitlement is 40%. If there are three or more Market-Makers quoting with the DPM, the DPM entitlement is 30%.

e-DPMs are quoting at the best bid/offer on CBOE, the e-DPM participation entitlement shall be one-half (50%) of the total DPM Complex entitlement and shall be divided equally by the number of e-DPMs quoting at the best bid/offer on CBOE. The DPM shall retain the other half of the entitlement. As proposed in CBOE Rule 6.45A, e-DPMs would receive allocations based on the greater of the participation entitlement or what the e-DPM would otherwise receive via CBOE's Ultimate Matching Algorithm ("UMA") (an e-DPM will never receive an allocation greater than the size of the e-DPM's quote). If, however, only the DPM and/or e-DPMs are quoting at the best bid/offer on CBOE and there are no Market-Makers quoting with them, there shall be no DPM/e-DPM participation entitlement and instead the allocation procedures under CBOE Rule 6.45A shall apply.

#### Other Considerations

CBOE proposes, as a pilot program for an 18-month period commencing on Commission approval of this proposal, that an e-DPM may choose to have up to one separate affiliated Market-Maker physically present in trading crowds where it operates as an e-DPM (such Market-Maker would be required to trade on a separate membership).<sup>9</sup> This Market-Maker will be allowed all the privileges of any other Market-Maker and will have all of the responsibilities of any other Market-Maker. Because non-DPM Market-Makers do not receive guarantees in connection with participation on orders, this in no way will impact the guaranteed participation percentages applicable to e-DPMs.

Because DPMs will receive a smaller participation entitlement (but will continue to need multiple memberships to effectively operate a DPM trading crowd and will continue to fulfill agency and other obligations), the Exchange proposes to allow DPMs that use more than one membership in any given trading crowd to increase their ability to participate via UMA. This will be effected by increasing the DPM's "A" component in the UMA calculation by one.<sup>10</sup> CBOE believes this will have no

impact on the DPM's participation guarantees.

On many exchanges the specialist receives a 40% guarantee when there are at least three other market makers present and quoting in a security. 40% appears to be the maximum guaranteed percentage allowed by the Commission at this time (provided at least three market makers are quoting). On CBOE, the DPM is only entitled to 30% in such cases. To the extent this extra "A" component could be considered a "guarantee" (and even though a DPM would not receive an allocation on any trade pursuant to both the participation entitlement and UMA), CBOE represents that it would not allow the incremental amount a DPM receives because of a second "A" component to cause the DPM to exceed a 40% "guarantee" threshold. For example: assume a DPM and three Market-Makers are each quoting the same size at the NBBO and a 100-contract order is received. The DPM participation entitlement in that case is 30% (or 30 contracts). Currently (using just one "A" component for the DPM), the "A" component would account for 12.5 contracts (half of ¼). By giving the DPM an extra "A" component, the total contracts due to the DPM as a result of the "A" component would equal 20 (half of ½). Thus, the incremental gain attributable to the second "A" component is 7.5 contracts (20 minus 12.5). The additional 7.5% plus the 30% guarantee does not exceed 40%, and the 37.5% figure can only decrease as the number of Market-Makers on the quote increases (i.e. the example given is the most drastic scenario).

#### Message Traffic

Recognizing that multiple entities remotely streaming continuous quotes to CBOE in the same products will increase message traffic, the Exchange is also adding proposed CBOE Rule 6.23A (which is based on CBOE Rule 44.6 applicable to CBOE's screen-based trading system, CBOE *direct*) providing that the Exchange may limit the number of messages sent by members accessing the Exchange electronically to ensure proper performance of the system.

#### Membership Ownership Requirement

As proposed, e-DPMs must own or lease CBOE or Chicago Board of Trade (exercised) memberships as follows. Each membership that an e-DPM owns will entitle the e-DPM to stream quotes into 30 classes. Each membership that

an e-DPM leases will entitle the e-DPM to stream quotes into 20 classes. For example, an e-DPM quoting 420 classes needs to own 14 seats, lease 21 seats, or use some combination of owned and leased seats sufficient to make the e-DPM eligible to quote 420 classes. At the end of three years, every e-DPM will be required to own seats to satisfy this requirement and thereafter the e-DPM may no longer be allowed to use leased seats for this purpose.

#### Review of Operations and Performance

Reviews of e-DPM performance would be conducted under proposed CBOE Rule 8.94. Furthermore, proposed CBOE Rule 8.94 would provide that the Exchange may, pursuant to a rule change filed with the Commission under section 19(b) of the Exchange Act, adopt rules detailing objective criteria upon which e-DPMs' fee rates shall be reviewed. The criteria may include average quote size, average quote width, the percentage of time an e-DPM is quoting at the NBBO, and other objective performance related measurements. e-DPMs that fail to meet the objective standards could be summarily required to adhere to fee rates applicable to certain non-e-DPM Market-Makers.

Lastly, proposed CBOE Rule 8.94 provides that the Exchange may terminate, place conditions upon, or otherwise limit a member organization's approval to act as an e-DPM on the same basis that DPM privileges may be terminated and/or conditioned under CBOE Rules 8.60 and 8.90, and that if a member organization's approval to act as an e-DPM is terminated, conditioned, or otherwise limited by the Exchange pursuant to this Rule, the member organization may seek review of that decision under Chapter XIX of the Rules.

#### 2. Statutory Basis

By expanding CBOE's liquidity base and market making possibilities on the Exchange to include remote market making by e-DPMs, the Exchange believes 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 sections 6(b)(5)<sup>12</sup> of the Act in particular in that that it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest.

<sup>9</sup> As part of the pilot program, CBOE will confidentially provide the Commission with data on (1) the size or orders that 3-DPMs and affiliated Market-Makers both trade with electronically; (2) the price and size of the e-DPM's and the affiliated Market-Maker's respective quotes; (3) the price and size of quotes of other participants in classes where an e-DPM and an affiliate are quoting; and, (4) a breakdown of how orders are allocated to the e-DPM, the affiliated Market-Maker, and any other participants.

<sup>10</sup> The "A" component of UMA represents 1 over the total number of market participants on the market. UMA currently gives weighting to the "A"

and "B" components. When the DPM is given credit for the additional seat both the numerator and the denominator are increased (e.g., ¼ becomes ⅓).

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

<sup>12</sup> 15 U.S.C. 78f(b)(5).

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

The CBOE believes that the proposed rule change does not impose any 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

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 Exchange consents, the Commission will:

- (A) By order approve such proposed rule change, or
- (B) Institute proceedings to determine whether the proposed rule change 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, 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](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2004-24 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-2004-24. 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-2004-24 and should be submitted on or before May 28, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

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

[FR Doc. 04-10466 Filed 5-6-04; 8:45 am]  
BILLING CODE 8010-01-P

### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49628; File No. SR-NASD-2004-023]

#### Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. To Amend the Order Audit Trail System Rules Relating to Execution Reports

April 29, 2004.

On February 5, 2004, the National Association of Securities Dealers, Inc. ("NASD") 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 to amend NASD Rule 6954(d) to require that members record and report the execution price and firm capacity (e.g., agency, principal or riskless principal) in Order Audit Trail System ("OATS") Execution Reports. On March 11, 2004, NASD 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 24, 2004.<sup>4</sup> The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.<sup>5</sup> In particular, the Commission believes that the proposal is consistent with section 15A(b)(6) of the Act<sup>6</sup> which requires, among other things, that the rules of an association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest.

The Commission believes that NASD's proposal to require its members to record and report the execution price and firm capacity as part of the OATS Execution Report should allow NASD to address potential gaps in the audit trail information currently collected by NASD. Consequently, the Commission believes that the proposed rule change should enhance OATS information and improve NASD's ability to conduct surveillance and investigations relating to compliance with NASD and other applicable rules.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act<sup>7</sup>, that the proposed rule change, as amended, (SR-NASD-2004-023) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

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

[FR Doc. 04-10397 Filed 5-6-04; 8:45 am]  
BILLING CODE 8010-01-P

Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated March 10, 2004 ("Amendment No. 1"). Amendment No. 1 replaced the proposed rule change in its entirety.

<sup>4</sup> See Securities Exchange Act Release No. 49439 (March 17, 2004), 69 FR 13927.

<sup>5</sup> In approving this proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>6</sup> 15 U.S.C. 78o-3(b)(6).

<sup>7</sup> 15 U.S.C. 78s(b)(2).

<sup>8</sup> 17 CFR 200.30-3(a)(12).

<sup>13</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 Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD to