

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50735; File No. SR-CBOE-2004-69]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Incorporated to Eliminate the Exchange's Marketing Fee Voting Procedures

November 24, 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 October 29, 2004, the Chicago Board Options Exchange, Incorporated ("CBOE" 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 prepared by the Exchange. The Exchange filed the proposal pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission.<sup>5</sup> The Commission is publishing this notice to solicit comments on the proposed rule change.

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

The CBOE proposes to eliminate its Marketing Fee Voting Procedures, previously set forth in Interpretation and Policy .12 to CBOE Rule 8.7. Proposed new language is *italicized*; proposed deletions are in [brackets].

Rule 8.7 Obligations of Market-Makers

\* \* \* \* \*

#### Interpretations and Policies

.01-.11 No change.

.12 *Reserved.* [Marketing Fee Voting Procedures: The following procedures specify how a trading crowd determines whether to participate or not to participate in the Exchange's marketing fee program. These procedures expire six months from the date of SEC approval, or such earlier time as the Commission has approved them on a permanent basis.

(a) Eligible Voters.

(i) The term "trading crowd" is synonymous with the term "station," which is defined in Interpretation and Policy .01 to Rule 8.8.

(ii) Eligible Trading Crowd Members: Members of a trading crowd that will be eligible to participate in the vote ("eligible trading crowd members") shall include (1) those Market-Makers who have transacted at least 80% of their Market-Maker contracts and transactions in each of the three immediately preceding calendar months in option classes traded in the trading crowd, and who continue to be present in the trading crowd in the capacity of a Market-Maker at the time of the vote; (2) the DPM for a trading crowd; and (3) any e-DPM, and shall each have one vote. Any e-DPM appointed to one or more option classes shall be eligible to vote on marketing fees for those option classes.

(b) Requesting a Trading Crowd Vote. Any eligible trading crowd member (including the DPM and any e-DPM) can request that a vote be held to determine whether or not the trading crowd should continue to participate in the marketing fee program for one or more of the option classes located at that station by submitting a written request to that effect to the Secretary of the Exchange. The Exchange shall post a notice at the station and provide written notice to the e-DPM of the time and date of any vote to be taken at least 10 calendar days prior to the time of the vote. The marketing fee oversight committee shall determine all other administrative procedures pertaining to the vote.

(c) Participation in the Marketing Fee Program. A trading crowd shall be deemed to have indicated that it desires to participate in the Exchange's marketing fee program for one or more of the option classes located at that station if a majority of those eligible trading crowd members participate in the vote and if a majority of the total votes cast are in favor of participating in the marketing fee program for those option classes. Conversely, a trading crowd shall be deemed to have indicated that it does not desire to participate in the Exchange's marketing fee program for one or more of the option classes located at that station if a majority of those eligible trading crowd members participate in the vote and if a majority of the total votes cast are against participating in the marketing fee program for those option classes.

(i) Frequency of Vote: Once a crowd votes to participate in the marketing fee program, subsequent votes to determine whether to continue its participation may be held only once every three

calendar months. Once a crowd votes not to participate in the marketing fee program, subsequent votes to determine whether to participate in the marketing fee program may be held only once every thirty days.

(ii) Tie Votes: If a vote conducted in accordance with this rule results in a tie, the status quo for that trading crowd shall remain in effect. Accordingly, if the trading crowd currently participates in the marketing fee program and a tie vote occurs, the marketing fee program will remain in effect in that trading crowd. If the trading crowd does not participate in the marketing fee at the time the tie vote occurs, the marketing fee will not be implemented in the trading crowd at that time.]

.13 No Change.

#### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

On July 30, 2004,<sup>6</sup> the CBOE amended Interpretation and Policy .12 to CBOE Rule 8.7, setting forth voting procedures specifying how a trading crowd, including the DPM and e-DPM, determines whether or not to participate in the Exchange's marketing fee program.<sup>7</sup> The marketing fee voting procedures were adopted as a six-month pilot. The CBOE has determined to replace its current marketing fee program that is assessed on DPM, e-DPM, and Market-Maker transactions in all equity option classes in which a DPM has been appointed. The marketing fee is assessed only on those Market-Maker, DPM, and e-DPM transactions resulting from orders from customers of payment accepting firms with which the DPM has agreed to pay for that firm's order flow, and only with respect to orders from customers that are for 200 contracts or less. According to the Exchange, on October 28, 2004, it held a special meeting of its membership for the purpose of holding a membership vote on its proposed new marketing fee program. The Exchange states that CBOE membership voted in favor of approving the new marketing fee program, which does not include a marketing fee voting procedure. In conjunction with this filing, the CBOE has filed a rule change incorporating the

<sup>6</sup> Telephone conversation between Andrew Spiwak, Director Legal Division and Chief Enforcement Attorney, CBOE, and David Liu, Attorney, Division of Market Regulation, Commission, on November 2, 2004.

<sup>7</sup> The marketing fee voting procedures were described in SR-CBOE-2004-47 (see Securities Exchange Act Release 50130 (July 30, 2004) 69 FR 47965 (August 6, 2004).)

<sup>1</sup> 15 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)(iii).

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

<sup>5</sup> The Exchange has asked the Commission to waive the 30-day operative delay. See Rule 19b-4(f)(6)(iii).

new marketing fee program pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>8</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder.<sup>9</sup>

## 2. Statutory Basis

The CBOE believes that the elimination of Interpretation and Policy .12 to Rule 8.7 is consistent with and in furtherance of the objectives of Section 6(b)(5) of the Act<sup>10</sup> in that it is designed to enhance competition to promote just and equitable principles of trade and to remove impediments to and perfect the mechanisms of a free and open market.

### 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 foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder<sup>12</sup> because the proposal: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative prior to 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).

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange satisfied the five-day pre-filing requirement. The Exchange requests that the Commission waive the

30-day operative delay, as specified in Rule 19b-4(f)(6)(iii),<sup>13</sup> and designate the proposed rule change to become operative immediately.

The CBOE has requested that the Commission waive the 30-day operative delay and to designate the proposed rule change as operative on November 1, 2004, to facilitate the implementation of the new marketing fee program that became effective on November 1, 2004. The Commission believes that waiving the 30-day operative period is consistent with the protection of investors and the public interest.<sup>14</sup> The Commission believes that waiving the 30-day operative delay would permit the Exchange to eliminate the Marketing Fee Voting Procedures at the same time that it implements its revised marketing fee program. Under the Exchange's revised marketing fee program, which applies to all classes of equity options, voting procedures would not be a part of the program.<sup>15</sup> Accordingly, the Commission, consistent with the protection of investors and the public interest, has waived the 30-day operative date requirement for this proposed rule change, and has determined to designate the proposed rule change as operative on November 1, 2004, to facilitate the implementation of the new marketing fee program that became effective on November 1, 2004.<sup>16</sup>

At any time within 60 days of the filing of such 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 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

<sup>13</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>14</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>15</sup> See *supra* note 9.

<sup>16</sup> *Id.*

Number SR-CBOE-2004-69 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-2004-69. 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-2004-69 and should be submitted on or before December 22, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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

<sup>9</sup> 17 CFR 240.19b-4(f)(2). The CBOE filed a rule change to adopt a new marketing fee to be imposed on transactions of Market-Makers (including Designated Primary Market-Makers, or DPMs, and electronic Designated Primary Market-Makers, or e-DPMs) pursuant to Section 19(b)(3)(A)(ii) of the Act and subparagraph (f)(2) of Rule 19b-4 thereunder (see SR-CBOE-2004-68).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

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