

change.<sup>3</sup> The proposed rule change, as amended, was published for comment in the **Federal Register** on November 22, 2004.<sup>4</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

Trigger allows orders resting in CBOE's electronic book to automatically execute in the limited situation where the bid or offer for a series of options generated by the Exchange's AutoQuote system (or any Exchange approved proprietary quote generation system used in lieu of the Exchange's Autoquote system) crosses or locks the Exchange's best bid or offer for that series as established by a booked order. Currently, Trigger provides for automatic executions of orders resting in the book<sup>5</sup> up to the maximum number of contracts permitted to be entered into RAES for that series ("Trigger Volume"). The trading crowd has the ability, but not the obligation, to execute manually the remaining contracts in the book that exceed the Trigger Volume. Any unexecuted contracts in the booked order in excess of the Trigger Volume remain in the book, and the bid or offer generated by Autoquote is one tick inferior to the price of the booked order, so that the disseminated quote does not cross or lock the Autoquote bid or offer.

The Exchange proposes to amend CBOE Rule 6.8(d)(v) to provide that where contracts remain in the book after an execution (or partial execution), or for any series where Trigger has not yet been implemented, orders in RAES for options of that series may, as determined by the appropriate FPC on a class by class basis, be (1) Automatically executed; or (2) rerouted on the Exchange's Order Routing System to the crowd PAR terminal (or to another location in the event of system problems or contrary firm routing instructions).

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 specifically that the proposed rule change is consistent with section 6(b)(5) of the Act,<sup>8</sup> because, in the Commission's view, the proposed rule change should help facilitate the execution of incoming RAES orders submitted during the Trigger process by making such orders eligible for automatic execution against the book orders that are crossed or locked by the Exchange's Autoquote system (or any Exchange approved proprietary quote generation system used in lieu of the Exchange's Autoquote system). The Commission notes that the proposed rule change would not change the existing execution process for incoming RAES orders that are submitted prior to a locked or crossed market.<sup>9</sup>

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (SR-CBOE-2004-52) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50903; File No. SR-CBOE-2004-84]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Exchange Fees

December 21, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

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

<sup>8</sup> 15 U.S.C. 78f(b)(5). Section 6(b)(5) of the Act requires that the rules of a national securities exchange be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers."

<sup>9</sup> These orders would continue to be executed in accordance with the RAES procedures set forth in CBOE Rule 6.8.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 13, 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 CBOE. The proposed rule change has been filed by CBOE as establishing or changing a due, fee, or other charge under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing. 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 amend its Fee Schedule to (i) make certain fee changes, and (ii) adopt a communication review fee. The text of the proposed rule change is available at the Office of the Secretary, CBOE, and at the Commission.

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

In its filing with the Commission, 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. 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, Proposed Rule Change

##### 1. Purpose

CBOE proposes to: (i) Amend its Annual FOCUS Report Filing Fee, Firm FOCUS Minimum Monthly Fee, Order Routing System ("ORS") Order Cancellation Fee and Floor Broker Workstation ("FBW") Fees; and (ii) adopt a Communication Review Fee. The Exchange also proposes to delete from its Fee Schedule certain fees that it represents are now outdated. The Exchange proposes to amend the following fees:

<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)(ii).

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

<sup>3</sup> See letter from David Doherty, CBOE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated September 22, 2004, and accompanying Form 19b-4 ("Amendment No. 1"). Amendment No. 1 replaced and superseded the original filing in its entirety.

<sup>4</sup> See Securities Exchange Act Release No. 50673 (November 16, 2004), 69 FR 67971.

<sup>5</sup> Such orders are executed against market makers participating in the Exchange's Retail Automated Execution System ("RAES"). CBOE Rule 6.8(d).

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

(i) *Annual FOCUS Report Filing Fee.* CBOE market-makers are required to file annual financial statements with the Exchange pursuant to Rule 17a-5(d) under the Act and CBOE Rule 15.5. Currently, the Exchange charges an annual filing fee of \$100 to CBOE market-makers who make their annual filing by paper copy and \$25 to CBOE market-makers who submit their annual filing electronically.<sup>5</sup> The Exchange proposes to increase the fee for a paper filing to \$150 and increase the fee for an electronic filing to \$50. The Exchange represents that these increased fees will assist it in offsetting increased costs of staff review of these filings.

(ii) *Firm FOCUS Minimum Monthly Fee.* CBOE charges member organizations and Designated Primary Market-Makers ("DPMs") that are subject to Rule 15c3-1 under the Act, and for which the Exchange is the Designated Examining Authority ("DEA"), an annual fee of \$.40 per \$1,000 of gross revenue as reported on the member organization's FOCUS report (excluding commodity commission revenue) ("DPM & Firm DEA Fee"). The DPM & Firm DEA Fee is currently subject to a monthly minimum fee of \$1,000 for clearing firms and \$250 for non-clearing member firms ("Firm FOCUS Minimum Monthly Fee").<sup>6</sup> The Exchange proposes to increase the Firm FOCUS Minimum Monthly Fee assessed to non-clearing member firms to \$275 to help the Exchange more closely cover the costs of regulating these member firms.

(iii) *ORS Order Cancellation Fee.* CBOE currently assesses an executing clearing firm \$1 per cancelled ORS order if the number of cancelled ORS orders exceeds the number of executed ORS orders in the same month ("ORS Order Cancellation Fee").<sup>7</sup> The ORS Order Cancellation Fee is not charged if fewer than 500 ORS orders are cancelled in the month. The Exchange proposes to revise the methodology used to assess the ORS Order Cancellation Fee. Specifically, the Exchange proposes to assess \$1 for each cancelled ORS order in excess of the number of orders that the executing clearing member executes in a month. As is presently the case, the ORS Order Cancellation Fee will not be

assessed if fewer than 500 orders are cancelled in a month.

The proposed ORS Order Cancellation Fee is similar to cancellation fees adopted by other exchanges.<sup>8</sup> The Exchange believes that this revised fee will result in increased order flow to CBOE.

(iv) *FBW Fee.* FBW terminals were initially rolled out to equity option trading crowds. CBOE currently assesses a fee of \$425 per month for FBW functionality that is placed on a desktop terminal. CBOE assesses an additional \$100 per month if the FBW application resides on a workstation that includes ILX and TNT functionalities. No fee is assessed for use of a mobile FBW.<sup>9</sup>

The Exchange represents that it plans to roll out FBW terminals to index options trading crowds. Only mobile FBWs will be used in index option trading crowds due to lack of space for desktop FBW applications. The Exchange proposes to assess a fee of \$100 per month per login ID for mobile FBWs used in index option trading crowds. Additionally, the Exchange proposes to assess DPMs \$100 per month per login ID for use of an FBW, whether it is the desktop application or mobile. The Exchange represents that these FBW fees will assist the Exchange in offsetting the cost of rolling out FBWs to its index options trading crowds.

(v) *Communication Review Fee.* CBOE represents that its Department of Financial and Sales Practice Compliance reviews a member firm's options-related advertisements, educational material and sales literature for compliance with applicable rules of the CBOE, Commission, and the Securities Investor Protection Corporation.<sup>10</sup> These public communications include, for example, print, television and radio advertisements, or electronic communications, such as Web sites.

CBOE proposes to implement a fee for this service ("Communication Review Fee") as follows: *Regular review*—(1) for printed material reviewed, \$75 per submission, plus \$10 for each page reviewed in excess of 10 pages; and (2) for video and audio media reviewed,

\$75 per submission, plus \$10 per minute for each minute of tape reviewed in excess of 10 minutes; *Expedited review*—(1) for printed material reviewed, \$500 per submission, plus \$25 for each page reviewed in excess of 10 pages; and (2) for video and audio media reviewed, \$500 per submission, plus \$25 per minute for each minute of tape reviewed in excess of 10 minutes.

CBOE represents that expedited review will be completed within three business days, not including the date the item is received by the Department of Financial and Sales Practice Compliance, unless a shorter or longer period is agreed to by the Department of Financial and Sales Practice Compliance. The Department of Financial and Sales Practice Compliance may, in its sole discretion, refuse requests for expedited review. The proposed Communication Review Fee is similar to the communication review charge of the National Association of Securities Dealers, Inc. (NASD).<sup>11</sup>

The Exchange intends to implement the fee changes discussed above and the new Communication Review Fee on January 1, 2005.

(vi) *Expired Fees.* The Exchange proposes to delete the paragraph relating to the Booth Rental Incentive Program from its Fee Schedule. The Program is due to expire on December 31, 2004, and the Exchange has determined not to extend the Program. Also, the Exchange proposes to delete the Option Trading Permit Lease Pool Bid Fee as these permits expired.<sup>12</sup>

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>13</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>14</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*

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of 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>11</sup> See NASD By-Laws, Schedule A, Section 13.

<sup>12</sup> See Securities Exchange Act Release No. 49723 (May 18, 2004), 69 FR 29591 (May 24, 2004).

<sup>5</sup> See Securities Exchange Act Release No. 40566 (October 19, 1998), 63 FR 57339 (October 27, 1998).

<sup>6</sup> See Securities Exchange Act Release No. 43144 (August 10, 2000), 65 FR 50258 (August 17, 2000). The Firm FOCUS Minimum Monthly Fee applies to those clearing member firms and non-clearing member firms whose DPM & Firm DEA Fee would not otherwise exceed the thresholds of \$1,000 and \$250.

<sup>7</sup> See Securities Exchange Act Release No. 44607 (July 27, 2001), 66 FR 40757 (August 3, 2001).

<sup>8</sup> See Securities Exchange Act Release No. 46189 (July 11, 2002), 67 FR 47587 (July 19, 2002).

<sup>9</sup> See Securities Exchange Act Release No. 48223 (July 24, 2003), 68 FR 44978 (July 31, 2003).

<sup>10</sup> Under CBOE Rule 9.21(c), CBOE members and member organizations are required to submit to the Exchange's Department of Financial and Sales Practice Compliance for approval every advertisement and all educational materials pertaining to options at least ten days prior to use. Telephone conversation between Jaime Galvan, Senior Attorney, CBOE, and Natasha Cowen, Attorney, Division of Market Regulation ("Division"), Commission, on December 15, 2004.

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

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>15</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder.<sup>16</sup> 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>17</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 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-2004-84 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-2004-84. 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-2004-84 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50909; File No. SR-CBOE-2004-85]

#### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Incorporated Regarding Designated Primary Market-Makers' Handling of Non-Public Customer Orders**

December 22, 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 December 15, 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 December 21, 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 modify CBOE Rule 8.85(b)(iii) regarding Designated Primary Market-Makers' ("DPMs") handling of non-public customer orders. Below is the text of the proposed rule change, as amended. Proposed deletions are in [brackets].

\* \* \* \* \*

<sup>18</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> Amendment No. 1 made technical corrections to the propose rule text of the proposed rule change.

### **Rule 8.85 DPMs Obligations**

(a) No change.  
(b) Agency Transactions. Each DPM shall fulfill all of the obligations of a Floor Broker (to the extent that the DPM acts as a Floor Broker) and of an Order Book Official under the Rules, and shall satisfy each of the following requirements, in respect of each of the securities allocated to the DPM:

- (i)-(ii) No change.
- (iii) accord priority to any [public] customer order which the DPM represents as agent over the DPM's principal transactions, unless the customer who placed the order has consented to not being accorded such priority;
- (iv)-(vii) No change.
- (c)-(e) No change.

#### **\* \* \* Interpretations and Policies:**

.01-.04 No change.

\* \* \* \* \*

#### **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, as amended. 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**

On January 25, 2002 the Commission approved a CBOE rule change filing eliminating the obligation of DPMs to accord priority to non-public customer orders.<sup>4</sup> In approving the filing, the Commission expressly stated that it was making no determination as to whether a DPM's failure to accord priority to non-public customer orders, when the DPM is acting as an agent, is consistent with the federal securities laws or any other applicable law. The Commission further stated that the approval does not affect a DPM's fiduciary obligations under federal securities laws or agency law principles when it acts as agent.

The Exchange now proposes to change the rule in question, CBOE Rule

<sup>4</sup> Securities Exchange Act Release No. 45341 (January 25, 2002), 67 FR 5016 (February 1, 2002) (approving SR-CBOE-00-42).