

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50130; File No. SR-CBOE-2004-47)

July 30, 2004

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change by the Chicago Board Options Exchange, Incorporated Relating to Marketing Fee Voting Procedures

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 19, 2004, the Chicago Board Options Exchange, Incorporated (“CBOE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) the proposed rule change as described in Items I and II below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and at the same time is granting accelerated approval of the proposed rule change on a six-month pilot basis.

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

The Exchange proposes to reinstate its Marketing Fee Voting Procedures,³ which previously were set forth in Interpretation and Policy .12 to CBOE Rule 8.7. Under those procedures, a trading crowd could determine whether or not to participate in the CBOE’s marketing fee program. Under the procedures, as proposed to be reinstated, electronic

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The voting procedures previously were described in SR-CBOE-2003-20. See Securities Exchange Act Release No. 47957 (May 30, 2003), 68 FR 35035 (June 11, 2003) (“Marketing Fee Voting Procedures Approval Order”).

DPMs (“e-DPMs”)⁴ would be incorporated into the Marketing Fee Voting Procedures.⁵

Below is the text of the proposed rule change. Proposed new language is italicized.

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RULE 8.7 Obligations of Market-Makers

(a)-(c) No change.

Interpretations and Policies

.01-.11 No change.

.12 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

⁴ On July 12, 2004, the SEC approved a proposed rule change, SR-CBOE-2004-24, which pertains to the establishment of e-DPMs. See Securities Exchange Act Release No. 50003 (July 12, 2004), 69 FR 43028 (July 19, 2004).

⁵ Upon approval of this proposed rule change, the CBOE intends to file a proposed rule change, pursuant to Section 19(b)(3)(A)(ii) of the Act and subparagraph (f)(2) of Rule 19b-4 thereunder, incorporating e-DPMs into the CBOE’s existing marketing fee program.

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.

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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 its proposal and discussed any comments it received on the proposal. The text of these statements may be examined at the places specified in Item III 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

On May 30, 2003, the Commission approved a proposed rule change that adopted Interpretation and Policy .12 to CBOE Rule 8.7, setting forth voting procedures that specify how a trading crowd, including the DPM, determines whether or not to

participate in the CBOE's marketing fee program.⁶ The Marketing Fee Voting Procedures were implemented as a one-year pilot program and expired on May 30, 2004. Although the CBOE has been evaluating whether to make modifications to its marketing fee program, in the interim, the CBOE proposes to re-institute these voting procedures on a pilot basis to expire six months after Commission approval of the proposed rule change. The Exchange represents that these procedures are substantially similar to those previously approved by the Commission before the pilot expired,⁷ except that the CBOE proposes that the Marketing Fee Voting Procedures be amended to include e-DPMs in the category of trading crowd members who are eligible to participate in a marketing fee vote, on an option-by-option class basis, and only for those option classes to which they have been appointed.

Eligible Voters in a Trading Crowd

Proposed Interpretation and Policy .12 of CBOE Rule 8.7 provides that eligible trading crowd members 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;⁸

⁶ See Securities Exchange Act Release No. 47948 (June 1, 2003), 68 FR 33749 (June 5, 2003) (SR-CBOE-2003-19).

⁷ See Marketing Fee Voting Procedures Approval Order, supra note 3.

⁸ The CBOE states that it routinely monitors Market-Maker trading activity for purposes of determining compliance with Interpretation and Policy .03 of CBOE Rule 8.7, relating to appointment and in-person trading requirements. Additionally, the Exchange has committed to monitor Market-Maker trading

- (2) the DPM; and
- (3) any e-DPM, for those option classes to which the e-DPM has been appointed.

Process to Request a Vote

The CBOE proposes that the DPM, e-DPM or any other eligible trading crowd member may request that a vote be held by submitting a written request to that effect to the Secretary of the CBOE. The CBOE will provide at least ten calendar days posted notice to the trading crowd and will provide written notice to the e-DPM of the time and date of the vote. The Secretary of the CBOE will verify that the member requesting a vote is an eligible trading crowd member and will keep the identity of such individual confidential.

Trading Crowd Participating in Marketing Fee Program

Proposed Interpretation and Policy .12 to CBOE Rule 8.7 provides that a trading crowd will be deemed to have indicated that it does not wish to continue participating in the marketing fee program for one or more of the option classes located at that station only if: (i) the question is put to a vote of the eligible trading crowd members;⁹ (ii) a

activity for purposes of determining compliance with the electronic quoting requirements adopted in SR-CBOE-2002-05 (the Hybrid Trading System). See Securities Exchange Act Release No. 47959 (May 30, 2003), 68 FR 34441 (June 9, 2003). As such, the CBOE believes that it has the capability to determine who constitutes an “eligible trading crowd member” for purposes of the proposed Marketing Fee Voting Procedures. Furthermore, the CBOE believes that the trading activity and in-person requirements of Interpretation and Policy .12 of CBOE Rule 8.7 ensure that only those members who are currently engaged as Market-Makers in that trading crowd, and who have concentrated their activity in that trading crowd over the last three months, may participate in the vote.

⁹ The DPM and any e-DPM appointed to the option class are considered to be eligible trading crowd members and, as such, may (but are not required to)

majority of the eligible trading crowd members participate in the vote;¹⁰ and (iii) a majority of the votes cast are in favor of not participating in the marketing fee program. In the event the vote of the members of the trading crowd is tied, the marketing fee program will remain in effect in the option class or classes in that trading crowd for the next three consecutive months.

Trading Crowd Not Participating in Marketing Fee Program

According to the CBOE, twenty days after a trading crowd votes not to participate in the marketing fee program, any eligible trading crowd member may then request that another vote be held to determine whether the trading crowd should participate in the marketing fee program.¹¹ In this case, if a majority of the votes cast are in favor of participating in the marketing fee program, the trading crowd will be deemed to have indicated that it wishes to participate in the marketing fee program and the marketing fee program will be in effect in that trading crowd for the next three consecutive months. In the event the vote of the members of the trading crowd is tied, the trading crowd will be deemed to have indicated that it does not wish to participate in the marketing fee program.

participate in the vote. The DPM and any e-DPM are each entitled to only one vote.

¹⁰ To the extent the CBOE’s rules permit a Market-Maker affiliated with an e-DPM to trade in a station, that Market-Maker is eligible to vote pursuant to CBOE Rule 8.7, Interpretation and Policy .12(a)(ii).

¹¹ The CBOE notes that actual votes may only be held once every thirty days. Because there is a ten calendar day notice period prior to a vote, however, an eligible trading crowd member may request a vote twenty days after the preceding vote.

The CBOE further states that these Marketing Fee Voting Procedures are substantially similar to procedures adopted by the American Stock Exchange (“Amex”).¹²

Moreover, the CBOE proposes that a marketing fee oversight committee of the CBOE shall determine administrative procedures for conducting the vote. If a payment accepting firm materially changes its execution status or a DPM transfers its DPM appointment to a separate organization pursuant to CBOE Rule 8.89, any eligible trading crowd member may then request that a vote be held to determine whether or not the trading crowd should participate in the marketing fee program by conducting a vote pursuant to the above procedures.

2. Statutory Basis

The CBOE believes that, because the reinstated Interpretation and Policy .12 to CBOE Rule 8.7 will provide fair and orderly procedures for the administration of any marketing fee program, the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act,¹³ which requires, among other things, that the rules of the exchange are designed 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 CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

¹² See Amex Rule 958.11. See Securities Exchange Act Release Nos. 48577 (September 30, 2003), 68 FR 57943 (October 7, 2003) (File No. SR-AMEX-2003-80); and 49488 (March 26, 2004), 69 FR 17460 (April 2, 2004) (File No. SR-AMEX-2004-18).

¹³ 15 U.S.C. 78f(b)(5).

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

The CBOE states that no written comments were solicited or received with respect to the proposed rule change.

III. 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. Please include File Number SR-CBOE-2004-47 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-2004-47. 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 Room. Copies of the 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-2004-47 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change as a Pilot Program

After careful consideration, 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.¹⁴ Specifically, the Commission believes the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁵ which requires, among other things, that the rules of the 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 mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

¹⁴ The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹⁵ 15 U.S.C. 78f(b)(5).

The Commission believes that this proposal, which allows the appropriate eligible trading crowd members to determine whether to participate in the CBOE's marketing fee program, promotes member participation in the procedures of the CBOE. Further, the Commission notes that the proposed Marketing Fee Voting Procedures are substantially similar to the voting procedures previously in place at the Exchange on a pilot basis and to those procedures of another self-regulatory organization, which have previously been approved by the Commission.¹⁶

The Commission finds good cause for approving the proposed rule change prior to the 30th day of the date of publication of notice of filing thereof in the Federal Register. The Commission notes that the proposed Marketing Fee Voting Procedures correspond to the voting procedures that had been in place at the Exchange until recently. Moreover, the CBOE is proposing to institute these procedures as a pilot program that will expire six months from the date of this order. Therefore, the Commission finds that there is good cause, consistent with Section 19(b)(2) of the Act,¹⁷ to approve the proposed rule change on an accelerated basis.

¹⁶ See Amex Rule 958.11, supra note 12.

¹⁷ 15 U.S.C. 78s(b)(2).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule change (File No. SR-CBOE-2004-47) be approved until January 30, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Margaret H. McFarland
Deputy Secretary

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).