

statement concerning the matter. The Commission also notes that any person economically aggrieved by a decision made under Interpretation .01 to CBOE Rule 8.84 has the right to a formal hearing, with the assistance of counsel, before CBOE's Appeals Committee. Moreover, decisions of the Appeals Committee may be appealed to the CBOE's Board of Directors.<sup>9</sup>

The Commission notes that CBOE believes that MTS Committee determinations to consolidate DPM trading locations should have a positive impact on the DPM trading those options classes, the trading crowds, and other market participants. In addition, CBOE has represented that CBOE trading crowd members, including market makers, should continue to be able to move freely among the trading crowds to which they are appointed on the CBOE trading floor. Therefore, members of the trading crowd should continue to be able to trade their assigned option classes even if those options classes are moved to another trading station due to the consolidation of a DPM's options classes.<sup>10</sup> Further, the Commission notes that the trading crowd would retain appeal rights under Chapter XIX of the CBOE Rules if they were economically aggrieved by an MTS Committee decision.

The Commission finds good cause for accelerating approval of the proposed rule change and Amendment Nos. 1, 2, and 3 thereto prior to the thirtieth day after publication in the **Federal Register**. The Commission notes that the proposed rule change and Amendment Nos. 1 and 2 thereto were noticed for the full comment period and that no comments were received. The Commission also notes that the amendments merely provided additional description and detail to the proposed rule change. The Commission believes that accelerated approval will permit the MTS Committee to begin to consider pending requests to relocate an entire trading station's securities to another trading station that is operated by the same DPM organization in a timelier manner. For these reasons, the Commission finds good cause exists, consistent with sections 6(b)(5)<sup>11</sup> and 19(b)(2) of the Act,<sup>12</sup> to approve the proposed rule change and Amendment

Nos. 1, 2, and 3 thereto on an accelerated basis.

## V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and rules and regulations thereunder.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>13</sup> that the proposed rule change (SR-CBOE-2004-05) and Amendment Nos. 1, 2, and 3 thereto are approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49880; File No. SR-CBOE-2004-15]

### Self-Regulatory Organizations; Order Granting Approval of a Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Inc. Relating to Automatic Executions for Underlying Specialists

June 17, 2004.

On March 2, 2004, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with Securities and Exchange Commission ("Commission") the proposed rule change, 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> to amend CBOE Rule 6.13 relating to access to the automatic execution feature of its Hybrid System. On April 28, 2004, the CBOE submitted 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 May 13, 2004.<sup>4</sup> The Commission received no comment letters on the proposal. This order

<sup>13</sup> 15 U.S.C. 78s(b)(2).

<sup>14</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> See letter from Steve Youhn, Counsel, CBOE, to Deborah Flynn, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 27, 2004 ("Amendment No. 1"). Amendment No. 1 clarified the access to the Exchange's automated execution system for stock exchange specialists' orders in options classes overlying stocks in which they are not specialists.

<sup>4</sup> See Securities Exchange Act Release No. 49659 (May 6, 2004), 69 FR 26627.

approves the proposed rule change, as amended.

The Exchange currently trades equity options, as well as index and ETF options on the CBOE Hybrid System ("Hybrid").<sup>5</sup> Hybrid merges the electronic and open outcry trading models, offering CBOE market makers the ability to stream electronically their own market quotes.

CBOE Rule 6.13 governs Hybrid's automatic execution ("auto-ex") feature. Currently, CBOE Rule 6.13(b)(i)(C)(ii) allows the appropriate floor procedure committee ("FPC") to determine whether to provide all market makers and specialists, whether on an options or stock exchange, with auto-ex access to CBOE's markets. The Exchange proposes to amend CBOE Rule 6.13 to allow the FPC to provide different levels of auto-ex access to: (i) Options exchange market makers and specialists (collectively, "options market makers"); and (ii) stock exchange specialists.

The appropriate FPC would have the ability to allow options exchange market makers to have auto-ex access while stock exchange specialists would not have auto-ex access. Alternatively, the appropriate FPC may determine to set the auto-ex eligible order size level higher for options market makers than the corresponding order size level for stock exchange specialists. The proposal applies only to stock exchange specialists with respect to their options transactions in classes overlying stocks in which they are specialists. Further, the Exchange states that proposed CBOE Rule 6.13(b)(i)(C)(ii)(A) and (B) would enable the appropriate FPC to make the access determinations on a class-by-class basis.

Moreover, specialists' orders in their non-specialty stocks would be treated in the same manner as orders of broker-dealers that are not market makers or specialists on an options exchange and thus would be eligible for automatic execution in accordance with CBOE Rule 6.13(b)(i)(C)(i).<sup>6</sup> The proposed rule change would not affect a responsible broker-dealer's firm quote obligations to broker-dealer orders (which includes options market makers and stock specialists), which will remain at one contract. Similarly, the proposal does not affect the auto-ex access currently available to public customer and non-market-maker/specialist broker-dealer

<sup>5</sup> See Securities Exchange Act Release Nos. 47959 (May 30, 2003), 68 FR 34441 (June 9, 2003) ("Hybrid Release"), and 48953 (December 18, 2003), 68 FR 75004 (December 29, 2003).

<sup>6</sup> See Amendment No. 1, *supra* note 3.

<sup>9</sup> See Chapter XIX of the CBOE's Rules.

<sup>10</sup> Specifically, CBOE market makers are able to move freely around the trading floor, if the market makers execute at least 75% of their total contract volume in their appointed classes. See Interpretation .03A to CBOE Rule 8.7.

<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> 15 U.S.C. 78s(b)(2).

orders, which is governed by CBOE Rule 6.13(b)(i)(C)(i).<sup>7</sup>

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of section 6 of the Act,<sup>8</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>9</sup> In particular, the Commission finds that the proposed rule change, which would allow the appropriate FPC to provide different levels of access to auto-ex to options market makers and to stock exchange specialists, is consistent with section 6(b)(5) of the Act,<sup>10</sup> which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

The Commission believes that providing different levels of access to options market makers and stock specialists is not unreasonable. Specifically, providing no access or less access to stock specialists in stocks in which they are specialists is not inappropriate, given the superior market information available to stock specialists in the stocks in which they act as specialists.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>11</sup> that the proposed rule change (SR-CBOE-2004-15), as amended, is approved.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49853; File No. SR-ISE-2004-15]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the International Securities Exchange, Inc., Relating to Fee Changes

June 14, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 18, 2004, the International Securities Exchange, Inc. (the "Exchange" or the "ISE") 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 ISE. On June 4, 2004, the ISE submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the amended proposed rule change from interested persons.

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

The ISE is proposing to amend its Schedule of Fees to extend waiver reductions on certain fees, and to amend the fee for use of the Facilitation Mechanism. The text of the amended proposed rule change is available at the Commission and the ISE.

#### 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 ISE 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 self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

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

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

<sup>3</sup> See letter from Michael Simon, Senior Vice President and General Counsel, ISE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated June 3, 2004 ("Amendment No. 1"). Amendment No. 1 replaces and supersedes the Exchange's original filing in its entirety. For purposes of calculating the 60-day abrogation period, the Commission considers the period to have commenced on June 4, 2004, the date the ISE filed Amendment No. 1.

#### 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 ISE Schedule of Fees as follows, as well as to remove references to fee waivers that have expired:

- **Waiver of Customer Transaction and Comparison Fees:** The Exchange currently waives customer transaction and comparison fees, with such waivers scheduled to expire on June 30, 2004.<sup>4</sup> In order to remain competitive in the market place, the ISE proposes to extend these waivers through June 30, 2005.

- **Waiver of the CLICK Terminal and Session Fees:** "CLICK" is the front-end order-entry terminal the ISE provides to members. Currently, the Exchange waives software license and maintenance fees, as well as API/Session fees (based on member log-ins), for a member's second and subsequent CLICK terminals. These waivers also are scheduled to expire on June 30, 2004.<sup>5</sup> The Exchange believes that these waiver programs encourage firms to install and use multiple CLICKs and thus the Exchange proposes to extend these waivers for an additional year through June 30, 2005.

- **Discount on QQQ Fees:** In November of 2003, the ISE instituted a six-month discount program in order to attract order flow in the Nasdaq 100 Tracking Stock ("QQQ"), according to the Exchange, the most actively-traded equity option.<sup>6</sup> The Exchange triggers the discount based on two progressive milestones for firms entering non customer orders (since customer orders already are fee-exempt). Attaining the first milestone, a monthly average daily trading volume ("ADV") of 8,000, enables the firm to receive a \$0.10 reduction in transaction fees for contracts traded above this amount and up to the next target ADV. Surpassing the second milestone, a monthly ADV of 10,000, entitles the market makers to trade all additional volume with no transaction or comparison fee. In order to continue the marketing efforts to attract order flow in the QQQ's, the ISE

<sup>7</sup> At the request of the Exchange staff, the citation of CBOE Rule 6.13(b)(i)(B)(i) was amended to refer to CBOE Rule 6.13(b)(i)(C)(i). Telephone conversation between Steve Youhn, Counsel, CBOE, and Hong-Anh Tran, Special Counsel, Division, Commission, on April 28, 2004.

<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

<sup>11</sup> 15 U.S.C. 78s(b)(2).

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

<sup>4</sup> See Securities Exchange Act Release Nos. 42473 (February 29, 2000), 65 FR 11818 (March 6, 2000), and 48129 (July 3, 2003), 68 FR 41409 (July 11, 2003).

<sup>5</sup> See Securities Exchange Act Release Nos. 45840 (April 29, 2002), 67 FR 30408 (May 6, 2002), and 48129 (July 3, 2003), 68 FR 41409 (July 11, 2003).

<sup>6</sup> See Securities Exchange Act Release No. 49147 (January 29, 2004), 69 FR 5629 (February 5, 2004).