SECURITIES AND EXCHANGE COMMISSION

[[Release No. 34–50214; File No. SR-Amex-2004–49]

Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval to Proposed Rule Change To Allow Amex Hearing Officers To Preside Over Default and Settlement Proceedings Without Empanelling Members of the Hearing Board To Serve on an Amex Disciplinary Panel

August 18, 2004.

On June 28, 2004, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Section 1(b)9 of article V of the Amex Constitution, and Rule 2(b) of the Amex Rules of Procedure in Disciplinary Matters, to allow Amex hearing officers to preside over default and settlement proceedings without empanelling members of the Hearing Board to serve on an Amex Disciplinary Panel. The proposed rule change was published for comment in the **Federal Register** on July 15, 2004.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

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 [4] and, in particular, the requirements of Section 6(b) of the Act,[5] and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with Section 6(b)(7) of the Act,[6] in that it is designed to provide a fair and efficient procedure for the disciplining of members and persons associated with members. Moreover, the Commission finds the proposed rule change furthers the objectives of Section 6(b)(5) of the Act [7] in that it is 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 facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to protect investors and the public interest, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (SR-Amex-2004–49) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E4–1893 Filed 8–23–04; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 49991 (July 9, 2004), 69 FR 42472.

[4] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(7).

[7] 15 U.S.C. 78f(b)(5).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50212; File No. SR–CBOE–2004–55]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Inc. To Incorporate Electronic DPMs

August 18, 2004.

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 August 3, 2004, the Chicago Board Options Exchange, Inc. (''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. The CBOE has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the CBOE under Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. 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 CBOE proposes to amend its marketing fee to incorporate newly established electronic DPMs (''e-DPMs'') as part of the existing marketing fee.[5] Below is the text of the proposed rule change. Proposed new language is *italicized.*

CHICAGO BOARD OPTIONS EXCHANGE, INC. FEE SCHEDULE

1. No Change.

2. MARKET MAKER*, e-DPM* & DPM MARKETING FEE (in option classes in which a DPM has been appointed) (6) $.40

3.–4. No Change.

Notes:

(1)–(5) No Change.

(6) The Marketing Fee will be assessed only on transactions of Market-Makers*, e-DPMs* and DPMs resulting from customer orders from payment accepting firms with which the DPM has agreed to pay for that firm's order flow, and with respect to orders from customers that are for 200 contracts or less.

(7)–(13) 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 CBOE included statements concerning the purpose of and basis for its proposal and discussed any comments it had received regarding the proposal. 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

Effective June 1, 2003, the Exchange reinstated its marketing fee program in order for the CBOE to compete with other markets in attracting options order flow in multiply traded options from firms that include payment as a factor in their order routing decisions in designated classes of options.[6] The Exchange proposes to incorporate e-DPMs in the existing marketing fee program. The CBOE states that, in all other respects, the marketing fee

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] On July 12, 2004, the Commission approved the establishment of e-DPMs. *See* Securities Exchange Act Release No. 50003 (July 12, 2004), 69 FR 43028 (July 19, 2004) (SR–CBOE–2004–24).

[6] *See* Securities Exchange Act Release No. 47948 (May 30, 2003), 68 FR 33749 (June 5, 2003) (SR–CBOE–2003–19).

program would continue to function and operate in the same manner as the existing marketing fee program.[7]

The Exchange would impose the fee at a rate of $.40 per contract on Market-Maker transactions, including DPMs and e-DPMs, in all classes of options in which a DPM has been appointed, as described below. According to the CBOE, this program, like the CBOE's prior marketing fee program, provides for the equitable allocation of a reasonable fee among the CBOE's members and is designed to enable the CBOE to compete with other markets in attracting options order flow in multiply traded options from firms that include payment as a factor in their order routing decisions in designated classes of options. The CBOE proposes that the marketing fee be assessed only on those Market-Maker, DPM, and e-DPM transactions resulting from orders from customers of payment accepting firms (''payment accepting firms'') with which the DPM has agreed to pay for that firm's order flow.

The Exchange states that it would not have any role with respect to the negotiations between DPMs and payment accepting firms on the amount of the payment, including which payment accepting firms DPMs negotiate with to send their order flow to CBOE and the amount of the payment. Rather, the Exchange proposes to facilitate payment to payment accepting firms from fees collected from Market-Makers, e-DPMs, and DPMs. In those classes for which a DPM has advised the Exchange that it has negotiated with a payment accepting firm to pay for that firm's order flow, the Exchange would provide administrative support for the program. Specifically, the Exchange would keep track of the number of qualified orders each payment accepting firm directs to the Exchange, and would make the necessary debits and credits to the accounts of the DPMs, e-DPMs, Market-Makers, and the payment accepting firms to reflect the payments that are to be made. The Exchange represents that all of the funds generated by the fee would be used only to pay the firms for the order flow sent to the Exchange.

The Exchange believes that the $.40 per contract is an equitable allocation of a reasonable fee among the CBOE's members. The CBOE states that it has designed this program to enable it to compete with other markets in attracting options order flow in multiply traded options. If a DPM advises the Exchange that it has negotiated a lower amount, the Exchange would refund to Market-Makers, e-DPMs, and DPMs the excess fee collected.

The CBOE proposes that the marketing fee be assessed only on transactions of Market-Makers (including e-DPMs and DPMs) resulting from orders for 200 contracts or less from customers of payment accepting firms. In the CBOE's view, because the marketing fee will be passed through to only those Market-Makers' transactions resulting from orders from customers of a payment accepting firm that the DPM has independently negotiated with to pay for that firm's order flow, there will be a direct and fair correlation between those members who pay the costs of the marketing program funded by the fee and those who receive the benefits of the program.

According to the CBOE, it is important to note that although Market-Maker, DPM, and e-DPM transactions resulting from customer orders from firms that do not accept payment for their orders are not subject to the fee, Exchange Market-Makers, DPMs, and e-DPMs will have no way of identifying prior to execution whether a particular order is from a payment-accepting firm, or from a firm that does not accept payment for their order flow.[8]

2. Statutory Basis

The CBOE believes that because this marketing fee will serve to enhance the competitiveness of the Exchange and its members, this proposal is consistent with and furthers the objectives of the Act, including specifically Section 6(b)(5) thereof,[9] which requires the rules of exchanges to be designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and Section 11A(a)(1) thereof,[10] which reflects the finding of Congress that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure fair competition among brokers and dealers and among exchange markets. The Exchange also believes that the proposed rule change is consistent with Section 6(b) of the Act,[11] and furthers the objectives of Section 6(b)(4) of the Act[12] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among the CBOE's members.

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 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

The CBOE neither solicited nor received written comments with respect to the proposed rule change.

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[13] and subparagraph (f) of Rule 19b-4 thereunder.[14] At any time within 60 days after the filing of the proposed rule change, the Commission may summarily abrogate the 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.* Please include File Number SR–CBOE–2004–55 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–2004–55. This file

[7] *Id.*

[8] The Exchange has reinstated, in Interpretation and Policy .12 to CBOE Rule 8.7, the Marketing Fee Voting Procedures as a six-month pilot program by which a trading crowd may determine whether or not to participate in the Exchange's marketing fee program and to include e-DPMs into the Marketing Fee Voting Procedures. *See* Securities Exchange Act Release No. 50130 (July 30, 2004), 69 FR 47965 (August 6, 2004) (SR–CBOE–2004–47).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78k–1(a)(1).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4).

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

[14] 17 CFR 240.19b–4(f).

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–2004–55 and should be submitted on or before September 14, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E4–1890 Filed 8–23–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXHANGE COMMISSION

[Release No. 34–50209; File No. SR–CBOE–2004–43]

Self Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto To Amend the Exchange's Membership Rules To Accommodate e-DPMs

August 18, 2004.

On July 12, 2004, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its Chapter III membership rules to accommodate a new category of CBOE market-making participant—electronic Designated Primary Market-Makers (''e-DPMs''). On July 12, 2004, the CBOE filed Amendment No. 1 to the proposed rule change.[3]

The proposed rule change, as amended, was published for comment in the **Federal Register** on July 19, 2004.[4] The Commission received no comments on the proposal.

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 exchange[5] and, in particular, the requirements of Section 6 of the Act[6] and the rules and regulations thereunder. The Commission specifically finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act[7] in that it is designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Commission believes that the CBOE's proposed amendment to CBOE Rule 3.8(a)(ii) to allow a member organization acting as an e-DPM to have one individual be the nominee for multiple memberships that are designated for use in an e-DPM capacity would not be inappropriate given that e-DPMs operate from locations outside of the trading crowds for their applicable option classes, thereby making it possible for a member to act as an nominee on more than one membership.[8] The Commission notes, however, that such individual cannot be the designated nominee for any of the organization's other memberships in any other market making capacity other than that of an e-DPM.

The Commission further believes that the CBOE's proposal to change the reference to ''floor functions'' in CBOE Rules 3.2, 3.8, and 3.9 to ''trading functions'' should help to clarify the applicability of these rules to e-DPMs, who would not necessarily have a floor presence.[9] In addition, Commission believes that the proposed amendment to CBOE Rule 3.2 to clarify that a member is deemed to have an authorized ''trading function'' if the member is approved by the CBOE's Membership Committee to act as a nominee or person registered for an e-DPM organization should help to ensure that e-DPMs, like other Market-Makers and CBOE Floor Brokers, would be required to comply with the CBOE Rule 3.9(g) member orientation and qualification exam requirements. Lastly, the Commission notes that the CBOE's proposed Rule 3.28 requirement that e-DPMs provide the Exchange with a letter of guarantee from a clearing member is similar to ISE Rule 808 and PCX Rule 6.36(a) requirements, previously approved by the Commission.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–CBOE–2004–43) and Amendment No. 1 thereto be approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–1892 Filed 8–23–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50215; File No. SR–CHX–2004–14]

Self-Regulatory Organizations; The Chicago Stock Exchange, Incorporated; Order Granting Approval to Proposed Rule Change Relating to the Handling of Preopening Orders in Nasdaq/NM Securities

August 18, 2004.

On May 19, 2004, The Chicago Stock Exchange, Incorporated (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from David Doherty, Attorney, Legal Division, CBOE, to Deborah Flynn, Assistant Director, Division of Market Regulation, Commission, dated July 12, 2004 (''Amendment No. 1'').

[4] *See* Securities Exchange Act Release No. 50007 (July 13, 2004), 69 FR 43034.

[5] In approving this proposed rule change, as amended, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[6] 6 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(5).

[8] The Commission notes that it would not be possible for an in-crowd market participant to act as nominee on more than one membership because such participant would be unable to physically be present in more than one trading crowd.

[9] The Commission notes that it is possible for e-DPMs to stream quotes into the Exchange from locations on the trading floor other than the trading crowds where their allocated option classes are traded. In addition, for an 18-month period, e-DPMs are permitted to have no more than one Market-Maker affiliated with the e-DPM to trade on the trading floor in any specific options classes allocated to the e-DPM. CBOE Rule 8.93(vii).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).