By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 05–3901 Filed 2–25–05; 11:36 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51235; File No. SR–CBOE–2004–73]

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the Chicago Board Options Exchange, Inc. To Restrict a Designated Primary Market-Maker's Ability To Charge a Brokerage Commission

February 22, 2005.

I. Introduction

On November 12, 2004, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] to amend its rules relating to a designated primary market maker's (''DPMs'') ability to charge a brokerage commission. The proposed rule change was published for comment in the **Federal Register** on December 15, 2004.[3] The Commission received two comments on the proposal.[4] This order approves the proposed rule change.

II. Description

The CBOE proposes to clarify that DPMs cannot charge a brokerage commissions on orders for which they do not perform an agency function, by amending the CBOE's rules to specifically prohibit DPMs from charging a brokerage commission for an order, or the portion of an order, (1) for which the DPM was not the executing broker, which includes any portion of the order that is automatically executed through an Exchange system; (2) that is automatically cancelled; or (3) that is not executed, and not cancelled.

The CBOE also proposes to make a technical clarification to current CBOE Rule 8.85(b)(iv), which currently prohibits a DPM from charging a brokerage commission for an order in which the DPM acts as both principal and agent. The proposed change would clarify that a DPM can charge a brokerage commission for the part of any order for which it acts as the executing broker but not as the executing principal.

III. Summary of Comments

The Commission received two comment letters from DPMs on the Exchange regarding the proposal. One commenter, Susquehanna,[5] stated that it does not object to the proposed rule change and that it ''conceptually agree[s]'' that DPMs cannot charge a brokerage commission on orders for which they do not perform an agency function. However, Susquehanna argued that Section 6(e) of the Act[6] prohibits the CBOE from requiring a DPM to charge zero commissions on orders for which the DPM has agency or order handling responsibilities. Accordingly, in Susquehanna's view, the CBOE should be required to expressly provide that DPMs never have any agency or order handling responsibilities towards the orders for which they are prohibited from charging a commission.

The second commenter, Citadel,[7] supported the proposed rule change, stating that ''DPMs should not be free unilaterally to impose charges for their regulatorily-mandated functions'' and that ''the ability to impose non-uniform charges not reflected in market maker quotes would be destructive to best execution and the Intermarket Linkage system because quotes that appear to be the NBBO [National Best Bid or Offer] may not really be the best if one must pay an extra charge to access them.'' Citadel also suggested that the CBOE further clarify in the rule text that DPMs may not charge a brokerage commission for ''any portion of an order for which the DPM acted in its capacity as a DPM.''

In response to Citadel's comments, the CBOE noted that a DPM is a ''member organization that is approved by the Exchange to function in allocated securities as a Market-Maker * * * as a Floor Broker (as defined in Rule 6.70), and as an Order Book Official. * * * ''[8] In addition, since DPMs also may be Floor Brokers, the CBOE noted that most DPMs maintain brokerage staff who perform agency functions with respect to certain orders and thus such DPMs should be allowed to charge brokerage commissions on those orders, which they represent in an agency capacity. Further, the CBOE noted that the proposal clarifies that a DPM may not charge a commission for orders when it does not act as agent.

IV. Discussion

The Commission has carefully reviewed the proposed rule change, the comment letters received, and the CBOE's response, and finds that the proposed rule change is consistent with the requirements of Section 6 of the Act[9] and the rules and regulations thereunder applicable to a national securities exchange.[10] In particular, the Commission finds that the proposed rule change is consistent with Sections 6(b)(5) and 6(e)(1) of the Act,[11] because it is designed to promote just and equitable principles of trade, 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; and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers, or to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members. The Commission also believes that the proposed rule change is consistent with Section 11(A)(a)(1)(C) of the Act[12] which states that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 50821 (December 8, 2004), 69 FR 75092 (''Notice'').

[4] *See* letter from Todd Silverberg, General Counsel, Susquehanna Investment Group (''Susquehanna''), to Jonathan G. Katz, Secretary, Commission, dated January 5, 2005 (''Susquehanna Letter''); and letter from Matthew Hinerfeld, Managing Director and Deputy General Counsel, Citadel Investment Group, L.L.C., on behalf of Citadel Derivatives Group LLC (''Citadel''), to Jonathan G. Katz, Secretary, Commission, dated January 8, 2005 (''Citadel Letter'').

[5] *See* Susquehanna Letter, *supra* note 4.

[6] 15 U.S.C. 78f(e). Susquehanna noted that Section 6(e) of the Act requires the Commission to follow special procedures when reviewing proposals from exchanges to fix commissions. *See* Susquehanna Letter, *supra* note 4.

[7] *See* Citadel Letter, *supra* note 4.

[8] *See* letter from James M. Flynn, Attorney II, CBOE, to Jonathan G. Katz, Secretary, Commission, dated February 3, 2005 (citing CBOE Rule 8.80).

[9] 15 U.S.C. 78f.

[10] 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). The Commission notes that it previously approved a similar proposed rule change, filed by the New York Stock Exchange, Inc. (''NYSE'') to prohibit a specialist on the NYSE from charging ''floor brokerage'' (*i.e.,* a commission imposed on exchange floor brokers) for the execution of an order received by the specialist via the NYSE's automated order routing system, known as SuperDot. *See* Securities Exchange Act Release No. 42727 (April 27, 2000), 65 FR 26258 (May 5, 2000) (Approval of amendments to NYSE Rule 123B); 42694 (April 17, 2000), 65 FR 24245 (April 25, 2000) (Approval of extension of pilot program relating to NYSE Rule 123B); and 42184 (November 30, 1999), 64 FR 68710 (December 8, 1999) (Approval of pilot program relating to amendments to NYSE Rule 123B).

[11] 15 U.S.C. 78f(b)(5) and 78f(e)(1).

[12] 15 U.S.C. 78k–1(a)(1)(C).

to assure, among other things, economically efficient execution of securities transactions, and fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets.

The Commission believes that CBOE's proposal is reasonable because it prohibits a DPM from charging a customer a commission for an order executed without assistance or handling by the DPM or that is not executed at all. The Commission notes that Susquehanna suggested that Section 6(e)(1) of the Act [13] prohibits the Commission from approving a rule that limits the fees charged by DPMs with respect to orders for which DPMs have agency or order handling responsibilities. The Commission disagrees with this commenter and notes that the Commission has not viewed an SRO's limits on fees that its members may charge, even when the member is acting as agent, as inconsistent with Section 6(e) of the Act.[14]

Section 6(e) of the Act [15] was adopted by Congress in 1975 to statutorily prohibit the fixed minimum commission rate system. As noted in a report of the House of Representatives, one of the purposes of the legislation was to ''reverse the industry practice of charging fixed rates of commissions for transactions on the securities exchanges.'' [16] The fixed minimum commission rate system allowed exchanges to set minimum commission rates that their members had to charge their customers, but allowed members to charge more. CBOE's proposal, by contrast, does not establish a minimum commission rate, but instead prohibits commissions in circumstances in which the DPM is not handling the order or in which the order is not executed. Accordingly, the Commission does not believe that the CBOE's proposal to limit the fees charged by DPMs constitutes fixing commissions, allowances, discounts, or other fees for purposes of Section 6(e)(1) of the Act.[17]

In addition, CBOE's limits on fees that DPMs may charge applies only to members who choose to be DPMs on CBOE. Therefore, CBOE is not fixing fees generally; it is merely imposing a condition, which is consistent with the Act, on a member's appointment as a DPM. Finally, the Commission does not agree with Susquehanna that the CBOE must expressly provide that DPMs never have any agency obligations towards orders for which they are prohibited from charging a commission.

V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Sections 6(b)(5) and 6(e)(1) of the Act.[18]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[19] that the proposed rule change (SR–CBOE–2004–73) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[20]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–786 Filed 2–25–05; 8:45 am]

BILLING CODE 8010–01–P

[13] 15 U.S.C. 78f(e)(1).

[14] *See* Securities Exchange Act Release No. 49220 (February 11, 2004), 69 FR 7836 (February 19, 2004) (Order approving File No. SR–NASD–2003–128).

[15] 15 U.S.C. 78f(e).

[16] H.R. Rep. No. 94–123, 94th Cong., 1st Sess. 42 (1975).

[17] 15 U.S.C. 78f(e)(1).

[18] 15 U.S.C. 78f(b)(5) and 78f(e)(1).

[19] 15 U.S.C. 78s(b)(2).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51217; File No. SR–NYSE–2004–54]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Amendments to the NYSE Constitution and the Adoption of an Independence Policy of the NYSE Board of Directors

February 16, 2005.

I. Introduction

On September 17, 2004, the New York Stock Exchange, Inc. (''NYSE'' 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 implement certain amendments to its Constitution. The proposed rule was published for comment in the **Federal Register** on January 14, 2005.[3] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange has proposed amendments to its Constitution with respect to the new governance architecture that was approved by the Commission and implemented by the Exchange in December 2003.[4] The Exchange also has proposed an Independence Policy for its Board of Directors (''Board''), which contains standards that NYSE directors must meet to be considered independent.

The proposed changes to the NYSE Constitution are summarized below:

- The Board would have the flexibility to move up its annual meeting of members to make it closer to the end of the Exchange's fiscal year, which coincides with the calendar year, and also to give the Board more flexibility with respect to the timing necessary to report its director nominations to the Exchange's membership, but without reducing the current time period for members to propose nominations by petition.
- The Chief Executive Officer (''CEO'') would be recused from participating in any Board review of decisions made by Exchange staff, officers or committees.
- The CEO would be prohibited from requiring reviews of disciplinary decisions and would be recused from participating in Board reviews of any disciplinary decisions.
- In the event the Chairman of the Board is also not the CEO, the CEO would be permitted to serve as Chairman of the Board of Executives, to call meetings of the Board of Executives, and to determine when circumstances require shorter notice of meetings of the Board of Executives than otherwise provided for that group.
- Members of the Board of Executives would be barred from serving on the Hearing Board in light of their participation on the Regulation, Enforcement & Listing Standards Committee.
- The qualifications of the floor member representatives on the Board of Executives would be revised to include any individual, other than a specialist, who spends a substantial amount of time on the Exchange floor, in order to reflect the Exchange's entire non-specialist floor member constituency as it currently exists.
- The current requirement that the Board and the Board of Executives have

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 51015 (January 11, 2005), 70 FR 2688.

[4] *See* Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678 (December 24, 2003).