

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, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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 such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR-Amex-2001-97 and should be submitted by December 26, 2001.

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

<sup>17</sup> For purposes of calculating the 60-day abrogation date, the Commission considers the 60-day period to have commenced on November 9, 2001, the date the Amex filed Amendment No. 1.

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

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45103; File No. SR-CBOE-00-42]

### Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change by the Chicago Board Options Exchange, Inc. Eliminating the Obligation of Designated Primary Market-Makers To Accord Priority to Non-Public Customer Orders

November 26, 2001.

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 August 29, 2000, 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 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 CBOE Rule 8.85 (DPM Obligations) regarding obligations of Designated Primary Market-Makers ("DPMs") such that when a DPM represents an order as agent, the DPM is required to accord priority only to those orders of public customers over the DPM's principal transactions. The text of the proposed rule change is below. Additions are in italics.

RULE 8.85. (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:

\* \* \* \* \*

(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;

\* \* \* \* \*

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

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

#### 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, 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 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

The CBOE proposes to amend CBOE Rule 8.85 regarding a DPM's obligation to represent orders. Currently, CBOE Rule 8.85(b)(iii) requires a DPM to accord priority to any 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. The CBOE proposes to amend CBOE Rule 8.85(b)(iii) to require DPMs to accord priority only to public customer orders.<sup>3</sup>

In the last few years, a number of systemic changes have occurred in the Exchange marketplace that have caused an increasing number of orders to be left for representation by DPMs. Changing economics have caused a decline in the number of independent floor brokers on the Exchange who formerly represented many orders in trading crowds. At the same time, the Exchange converted its equity option trading crowds that had been traditional competing market-maker trading crowds. As a result of these occurrences, a large percentage of all order that are traded in a particular trading crowd are first routed to the crowd Public Automated Routing ("PAR") terminal. Because DPMs must be present at all times in their particular trading location and because there is generally not an independent crowd

<sup>3</sup> According to the CBOE, it proposes to use its Retail Automatic Execution System (RAES) Rule 6.8 to define those orders to which its DPMs must give priority. Currently, CBOE Rule 6.8(b)(ii) defines orders that are not eligible for execution in RAES as those in which a member, non-member participant in a joint venture with a member or any non-member broker-dealer has an interest. Accordingly, the CBOE proposes to exclude these orders from a DPM's obligation to accord priority. Telephone call among Steve Youhn, CBOE, Kelly Riley, Senior Special Counsel, Division of Market Regulation, Commission, and Jennifer Lewis, Attorney, Division of Market Regulation, Commission, on November 21, 2001.

broker in any particular location, it has fallen to the DPM to staff the PAR terminals and to represent the orders routed to the PAR terminal. Generally, the DPM does not charge for this brokerage service and thus, receives no direct benefit from performing this function. The CBOE does not believe it is appropriate or even preferable for the marketplace for the DPM to be denied the opportunity to compete to trade against so many orders merely because it is performing a service that benefits the Exchange generally.

The CBOE believes that without the proposed amendment, it will become increasingly difficult for DPMs to compete against non-DPMs in the trading crowd. As the percentage of orders routed to the PAR terminal grows, the incentives to assume the affirmative obligations and expenses in managing a DPM operation decrease. The Exchange believes that the proposed rule change is justified in light of the particular responsibilities, burdens, and costs borne by DPMs compared to other market participants. DPMs have more market making responsibilities than non-DPMs, higher capital requirements, and other unique costs, including costs associated with staffing the brokerage function, the quote updating functions, and marketing functions.

The Exchange offers the following example to help illustrate the nature of the concern. Assume a particular DPM has an order for a broker-dealer that has been routed to the crowd PAR terminal. The broker-dealer is seeking to buy 30 contracts of XYZ at a limit of \$3 at a time when the market is 3 (bid)—3¼ 4 (offer). Now, assume a broker-dealer walks into the crowd to sell 100 contracts of XYZ at \$3. The DPM may represent the broker-dealer order and compete against other non-DPMs to trade against that 100 contract order. The DPM, however, must accord priority to that broker-dealer order and cannot compete to trade against that order. If the broker-dealer order and the other market-makers determine to trade all of the 100 contracts, the DPM will have no change to participate in the trade. If the DPM did not have to accord priority to the broker-dealer order, the DPM would be able to compete equally with the other market participants and assert its participation right if the trade occurred at the DPM's previously established principal bid or offer.

The Exchange believes that the proposal will require DPMs to accord priority to those orders for public customers that they represent as agent over the DPM's principal transactions. Moreover, in accordance with the

proposed rule change, the CBOE represents that DPMs will have the option to trade other non-public customer orders that they represent ahead of their own interest in a particular trade.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with, and furthers the objectives of, section 6(b) of the Act,<sup>4</sup> in general, and furthers the objectives of section 6(b)(5) of the Act,<sup>5</sup> in particular, because it is designated to remove impediments to a free and open market and to protect investors and the public interest.

### *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 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*

No written comments were solicited or received with respect to the proposed rule change.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

## 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. 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 such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR-CBOE-00-42 and should be submitted by December 26, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>6</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45097; File No. SR-NYSE-2001-44]

### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. To Amend NYSE Rule 407 ("Transactions—Employees of Members, Member Organizations and the Exchange")**

November 21, 2001.

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 October 22, 2001, the New York Stock Exchange, Inc. ("NYSE" 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 Exchange. 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 NYSE Rule 407 ("Transactions—Employees of Members, Member Organizations and the Exchange") and incorporate and amend an existing written interpretation into the rule in

<sup>6</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>4</sup> 15 U.S.C. 78f(b).

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