

continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, for the reasons discussed below, the Commission believes that it is consistent with the Act to permit NES, in its capacity as a facility of each of the ISE Exchanges, to route options orders inbound to each of the NASDAQ Exchanges, subject to the limitations and conditions described above.<sup>30</sup>

The Commission believes that these limitations and conditions will mitigate its concerns about potential conflicts of interest and unfair competitive advantage. In particular, the Commission believes that a non-affiliated SRO's oversight of NES,<sup>31</sup> combined with a non-affiliated SRO's monitoring of NES's compliance with each of the NASDAQ Exchange's rules and quarterly reporting to each NASDAQ Exchange, will help to protect the independence of Nasdaq's, BX's, and Phlx's regulatory responsibilities with respect to NES. The Commission also believes that the Exchanges' rules are designed to ensure that NES cannot use any information advantage it may have because of its affiliation with Nasdaq, BX, or Phlx, respectively.<sup>32</sup>

Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members; 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings, Inc.); 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-Amex-2008-62 and SR-NYSE-2008-60) (order approving the combination of NYSE Euronext and the American Stock Exchange LLC); 59135 (December 22, 2008), 73 FR 79954 (December 30, 2008) (SR-ISE-2008-85) (order approving the purchase by ISE Holdings of an ownership interest in Direct Edge Holdings LLC); 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (SR-NYSE-2008-120) (order approving a joint venture between NYSE and BIDS Holdings L.P.); 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-182) (order granting the exchange registration of BATS Exchange, Inc.); 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10-194 and 10-196) (order granting the exchange registration of EDGX Exchange, Inc. and EDGA Exchange, Inc.); and 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (File No. 10-198) (order granting the exchange registration of BATS-Y Exchange, Inc.).

<sup>30</sup> The Commission notes that these limitations and conditions are consistent with those previously approved by the Commission for other exchanges. See, e.g., Securities Exchange Act Release Nos. 67256 (June 26, 2012), 77 FR 39277 (July 2, 2012) (SR-BX-2012-030) (order approving rules relating to the establishment of the BX options market) at 39281-39282; 69233, *supra* note 12; 69232, *supra* note 14; 69229, *supra* note 14; and the ISE Exchange Routing Orders, *supra* note 4.

<sup>31</sup> This oversight will be accomplished through the 17d-2 Agreement and the RSA.

<sup>32</sup> See *supra* note 27 and accompanying text.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>33</sup> that the proposed rule changes (SR-BX-2016-068; SR-NASDAQ-2016-169; SR-Phlx-2016-120), each as modified by their respective Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>34</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-80003; File No. SR-CBOE-2017-011]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule

February 9, 2017.

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 January 27, 2017, Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") filed with the Securities and Exchange Commission (the "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 its Fees Schedule. The text of the proposed rule change is also available on the Exchange's Web site (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

<sup>33</sup> 15 U.S.C. 78s(b)(2).

<sup>34</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.

## 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 Exchange 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 Exchange 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 Exchange proposes to amend its Marketing Fee program, effective February 1, 2017. By way of background the Marketing Fee is assessed on certain transactions of Market-Makers resulting from (i) customer orders from payment accepting firms, or (ii) customer orders that have designated a "Preferred Market-Maker" ("PMM") under CBOE Rule 8.13. The funds collected via this Marketing Fee are then put into pools controlled by DPMs and PMMs. The DPM or PMM controlling a certain pool of funds can then determine the order flow provider(s) to which the funds should be directed in order to encourage such order flow provider(s) to send orders to the Exchange. On each order, an order flow provider can designate the Preferred Market-Maker to which the funds generated from the order sent by the order flow provider should be allocated (a "Preferred order").

The Exchange proposes to expand the Marketing Fee program to Lead Market-Makers ("LMMs"). Under the proposed rule change, LMMs would be given access to the Marketing Fee funds generated from those orders on which the LMM was preferred (*i.e.*, designated) and those funds would be collected by CBOE and disbursed by CBOE according to the instructions of the LMM. The Exchange notes that expanding the Marketing Fee program to LMMs allows LMMs to amass a pool of funds with which to use to incent order flow providers to send order flow to the Exchange. This increased order flow would benefit all market participants on the Exchange. The Exchange also notes that as with DPMs and PMMs, an LMM may have access to the Marketing Fee funds generated from a Preferred order regardless of whether that LMM has an appointment in the class in which the

Preferred order is received and executed.

The Exchange also proposes to make certain clarifications to Footnote 6 of the Fees Schedule, which governs the Marketing Fee program. The Exchange notes that it inadvertently only references Market-Makers and DPMs as being subject to the fee, even though LMMs, like DPMs, are also Market-Makers and the fee has therefore always applied (*i.e.*, all orders with origin code “M” are subject to the fee in accordance with above). As such, the Exchange proposes to explicitly note in the first line that the Marketing Fee is assessed to transactions of “Market-Makers (including DPMs and LMMs)” and thereafter refer only to “Market-Makers” in the Footnote, instead of “Market-Makers and DPMs” since Market-Makers is defined as including DPMs and LMMs. The Exchange notes this is not a substantive change, but rather a change to make this point clear in the Fees Schedule to avoid potential confusion. The Exchange next proposes to include a reference to “DPMs under CBOE Rule 8.80” in the first sentence to explicitly note that customer orders may also have a designated DPM (*i.e.*, the DPM may be given access to Marketing Fee funds generated from a Preferred order on which it was designated). In order to avoid potential confusion, the Exchange also proposes to add a new term, “Preferred Market-Makers.” Preferred Market-Makers will refer collectively to any DPM, PMM or LMM that is designated on a Preferred order (which the Exchange also proposes to rename as a “Preferred order” for consistency).<sup>3</sup> The Exchange believes using the general term “Preferred Market-Maker” for designated DPMs, PMMs or LMMs can be confused with PMMs under CBOE Rule 8.13. The Exchange believes the proposed change therefore, provides clarity in the rules and makes the Fees Schedule easier to read.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of

Section 6(b) of the Act.<sup>4</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>5</sup> requirements that the rules of an 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. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>6</sup> which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange believes expanding the Marketing Fee program to LMMs is reasonable, equitable and not unfairly discriminatory because it will allow LMMs to amass a pool of funds with which to use to incent order flow providers to send order flow to the Exchange. This increased order flow would benefit all market participants on the Exchange. Additionally, the Exchange believes it is equitable and not unfairly discriminatory to expand the Marketing Fee program to LMMs because, like PMMs under CBOE Rule 8.13, LMMs have increased obligations that other market participants do not such as a heightened quoting standards.<sup>7</sup>

The Exchange also believes that clarifying that the reference to “Market-Makers” in Footnote 6 actually includes both DPMs and LMMs maintains clarity in the Fees Schedule and avoids potential confusion. Similarly, the Exchange believes that clarifying that customer orders may also designate a DPM (who would then have access to the Marketing Fees generated from that Preferred order) alleviates potential confusion. Lastly, the Exchange believes introducing the term “Preferred Market-Maker” to denote any DPM, PMM or LMM that is designated on a Preferred (or as proposed, “Preferred”) order alleviates potential confusion and makes the Fees Schedule easier to read. The alleviation of confusion removes impediments to and perfects the mechanism of a free and open market and a national market

system, and, in general, to protect investors and the public interest.

## B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition that are not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because, while the proposed change allows LMMs to also amass a pool of funds with which to use to incent order flow providers to send order flow to the Exchange, LMMs, like PMMs, have heightened quoting standards. Moreover, the proposed change provides LMMs an opportunity to incent order flow providers to send order flow to the Exchange, which benefits all market participants.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed change only affects trading on CBOE. To the extent that the proposed changes make CBOE a more attractive marketplace for market participants at other exchanges, such market participants are welcome to become CBOE market participants.

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

The Exchange neither solicited nor received comments on the proposed rule change.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>8</sup> and paragraph (f) of Rule 19b-4<sup>9</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule

<sup>3</sup> The Commission notes that the Exchange’s new text in footnote 6 of the Fees Schedule refers in several places to “DPM or Preferred Market-Maker.” Though the term “Preferred Market-Maker” includes DPMs (as well as LMMs and PMMs), use of the phrase “DPM or Preferred Market-Maker” recognizes that DPMs also may be given access to marketing fee funds collected on orders preferenced to them in any class in addition to funds collected from non-preferenced orders in the DPM’s assigned classes.

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

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

<sup>6</sup> 15 U.S.C. 78f(b)(4).

<sup>7</sup> See CBOE Rule 8.15 (Lead Market-Makers).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f).

change should be approved or 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. 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2017-011 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-CBOE-2017-011. This file number should be included on the subject line if email 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-2017-011 and should be submitted on or before March 8, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34-79999; File No. SR-ICEEU-2017-002]**

#### **Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change To Revise the ICE Clear Europe Clearing Rules Relating to the Application of Default Provisions in the Event of a Resolution Proceeding**

February 9, 2017.

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 January 25, 2017, ICE Clear Europe Limited ("ICE Clear Europe" or "Clearing House") 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 primarily prepared by ICE Clear Europe. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change**

The principal purpose of the proposed rule change is to modify the ICE Clear Europe Clearing Rules ("Clearing Rules") to clarify the application of certain default provisions in the event of a resolution proceeding with respect to the Clearing House or a Clearing Member.

#### **II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, ICE Clear Europe 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. ICE Clear Europe has prepared summaries, set forth in sections A, B and C below,

of the most significant aspects of such statements.

#### *A. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

##### **1. Purpose**

The purpose of the rule amendments is to modify the ICE Clear Europe Clearing Rules to clarify the application of certain default-related provisions in the context of resolution proceedings with respect to the Clearing House or a Clearing Member. Such proceedings can arise under so-called special resolution regimes that may apply under applicable law to the Clearing House or a Clearing Member in the event of either's failure or insolvency, as an alternative to traditional bankruptcy or insolvency proceedings in the relevant jurisdiction. Such regimes include the UK Banking Act 2009 and the EU Bank Recovery and Resolution Directive (the "BRRD").<sup>3</sup>

In Rule 101, ICE Clear Europe proposes amendments to the definition of "Insolvency" and addition of new defined terms "Resolution Step" and "Unprotected Resolution Step." These amendments are designed to distinguish between insolvency and resolution proceedings, and reflect and incorporate certain limitations on the termination of Contracts and exercise of default remedies that apply under the terms of an applicable special resolution regime. (Under the current Rules, an Insolvency in turn constitutes an Event of Default that permits the exercise of the default rights and remedies specified in the Rules.)

The definition of Insolvency has been amended to exclude certain resolution proceedings. Specifically, the amendment removes the existing provision that a Governmental Authority exercising one or more of its stabilization powers under the UK Banking Act 2009 will constitute an Insolvency. In addition, the appointment of an Insolvency Practitioner, which normally is an Insolvency, will not constitute an Insolvency if it is made in connection with a Resolution Step that is not an Unprotected Resolution Step, as defined below. A Resolution Step involving a Governmental Authority making an order to transfer a person's securities, property, rights or liabilities (which may be a feature of a resolution proceeding) will also not constitute an Insolvency.

<sup>3</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

<sup>10</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.