

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59700; File No. SR-CBOE-2009-009)

April 2, 2009

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving a Proposed Rule Change to Amend its Rules Prohibiting Members from Functioning as Market Makers

I. Introduction

On February 18, 2009, 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 revise CBOE Rule 6.8C to eliminate certain restrictions prohibiting members from functioning as market makers. The proposed rule change was published for comment in the Federal Register on February 26, 2009.³ The Commission received no comments on the proposal. This order approves the proposal.

II. Description of the Proposal

The Exchange proposes to amend Rule 6.8C, Prohibition Against Members Functioning as Market Makers, to eliminate certain of its restrictions. Rule 6.8C currently provides that a member, acting either as principal or agent, may neither enter nor permit the entry of orders into the Exchange's electronic order routing system if (i) the orders are limit orders for the account or accounts of the same beneficial owner(s); and (ii) the limit orders are entered in such a manner that the beneficial owner(s) effectively is operating as a market maker by holding itself out as willing to buy and sell such securities on a regular or

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59425 (February 19, 2009), 74 FR 8829.

continuous basis. The Exchange proposes that these restrictions be amended to apply only to customer orders (i.e., non-broker-dealer orders) that are not Voluntary Professional orders.⁴

The restrictions would no longer be applicable to instances where a member is acting as principal on its own behalf or is acting as agent on behalf of other broker-dealer orders or Voluntary Professional orders. The Exchange noted that it is retaining the restriction for customers who are not Voluntary Professionals because such customers have priority at any price over the bids and offers of market makers, other broker-dealers, and Voluntary Professionals.

In addition, in those instances where its restrictions are applicable, Rule 6.8C currently provides that, in determining whether a beneficial owner effectively is operating as a market maker, the Exchange will consider, among other things, the simultaneous or near simultaneous entry of limit orders to buy and sell the same security, the entry of multiple limit orders at different prices in the same security, and the multiple acquisition and liquidation of positions in the security during the same day. The Exchange proposes to remove the last condition pertaining to the multiple acquisition and liquidation of positions from its list of factors used for determining whether a beneficial owner is operating as a market maker. The Exchange noted that this activity no longer should be considered as a

⁴ The term “Voluntary Professional” is defined in CBOE’s rules as any person or entity that is not a broker or dealer in securities that elects, in writing, to be treated in the same manner as a broker or dealer in securities for purposes of specified rules relating to priority in the execution of orders, and for cancellation fee calculation purposes. See Rule 1.1(fff) and Securities Exchange Act Release No. 58327 (August 7, 2008), 73 FR 47988 (August 15, 2008)(SR-CBOE-2008-09). As part of this proposed rule change, the Exchange is proposing to amend Rule 1.1(fff) to provide that a Voluntary Professional will be treated in the same manner as a broker or dealer in securities for purposes of Rule 6.8C.

factor in determining whether a beneficial owner is effectively acting as a market maker.

III. Discussion

After careful review, 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 exchange⁵ and, in particular, the requirements of Section 6 of the Act.⁶ Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,⁷ in that the proposal has been designed to promote just and equitable principles of trade, and to protect investors and the public interest.

The Commission believes that it is consistent with the Act for an options exchange not to prohibit a user of its market from operating as a market maker without registering as such. The Commission previously approved rules at other options exchanges that do not impose such a prohibition,⁸ or impose such a prohibition on customers only.⁹ The

⁵ The Commission has considered the proposed rule change's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(5).

⁸ See Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (approving rules governing the trading of options on the NASDAQ Options Market).

⁹ See Securities Exchange Act Release No. 59472 (February 27, 2009), 74 FR 9843 (March 6, 2009) (approval of rules for the trading of listed options on NYSEAlternext).

The Commission notes that any entity that acts as "dealer," as defined in Section 3(a)(5) of the Act, 15 U.S.C. 78c(a)(5), would be required to register with the Commission under Section 15 of the Act, 15 U.S.C. 78o, and the rules and regulations thereunder, or qualify for any exception or exemption from registration. Activity that may cause a person to be deemed a dealer includes "quoting a market in or publishing quotes for securities (other than quotes on one side of the market on a quotations system generally available to non-broker-dealers, such as a retail screen broker for government securities)." See Definitions of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections

Commission notes that while the Exchange will continue to prohibit customers who are not Voluntary Professionals from operating as market makers, those customers will continue to have priority over the bids and offers of market makers, other broker-dealers, and Voluntary Professionals.

The Commission also believes that the Exchange's proposal to remove the condition pertaining to the multiple acquisition and liquidation of positions from its list of factors used for determining whether a beneficial owner is operating as a market maker is consistent with the Act. The Commission believes that the remaining factors are sufficient to enable the Exchange to determine whether a user of its market is operating as a market maker.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-CBOE-2009-09) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Florence E. Harmon
Deputy Secretary

3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Securities Exchange Act Release No. 47364, 68 FR 8686, 8689, note 26 (February 24, 2003) (quoting OTC Derivatives Dealers, Securities Exchange Act Release No. 40594 (October 23, 1998), 63 FR 59362, 59370, note 61 (November 3, 1998)).

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).