

proposal may be consistent with the Act, such approval will not relieve a specialist of its fiduciary obligations under the federal securities laws or agency law principles when acting as an agent.<sup>10</sup> The Commission, in approving the CBOE proposed rule change, specifically stated that its approval was based solely on its determination that the CBOE proposal was consistent with the 1934 Act and the rules and regulations thereunder applicable to a national securities exchange. Therefore, like the CBOE rule filing, approval of this proposal will not affect existing fiduciary duties.<sup>11</sup>

Accordingly, the Amex believes that the instant proposal limiting the priority of options orders to those orders of public customers entrusted to specialists for execution is consistent with the Act and Amex rules. The addition of new paragraph (q) to Amex Rule 950 will, therefore, allow specialists acting as agent to compete equally with other members and broker-dealers in the trading crowd by not being required to afford priority to such member or broker-dealer orders.

## 2. Statutory Basis

The Amex believes that the proposed rule change is consistent with section 6(b) of the Act,<sup>12</sup> in general, and furthers the objectives of section 6(b)(5) of the Act,<sup>13</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, protect investors and the public interest.

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

The Amex believes that the proposed rule change will impose no burden on competition.

<sup>10</sup> See *In re E.F. Hutton & Co.* Securities Exchange Act Release No. 25887 (July 6, 1988) ("Manning Decision"). The Amex represents that the Commission found that broker-dealers owe a fiduciary duty to their limit order customers not to trade ahead of such orders unless the customer knows of the firm's limit order policy. Furthermore, under agency law principles, a specialist acting as agent has an obligation to act solely for its customer and not compete with the customer's order unless the customer understands such specialist intends to compete.

<sup>11</sup> The Amex offers the following as an example: A specialist that acts as agent for any customer has an obligation to act solely for the benefit of the customer in all matters connected with the customer's order, and not compete with the customer concerning the order unless the customer understands its agent is to compete, and such understanding is fully disclosed.

<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

### *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. 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 Amex. All submissions should refer to File No. SR-Amex-2002-86 and should be submitted by April 9, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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**BILLING CODE 8010-01-P**

<sup>14</sup> 17 CFR 200.30-3(a)(12).

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-47492; File No. SR-CBOE-2003-09]

### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Incorporated To Expand the Order Types That Can Trade on the Exchange's Large Order Utility ("LOU")**

March 13, 2003.

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 March 10, 2003, 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 and II below, which Items have been prepared by the Exchange. The Exchange has filed the proposal as a "non-controversial" rule change pursuant to section 19(b)(3)(A)<sup>3</sup> of the Act and rule 19b-4(f)(6)<sup>4</sup> thereunder, 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 expand the order types that can trade on the Exchange's LOU system. Below is the text of the proposed rule change. Proposed new language is in italics:

\* \* \* \* \*

#### **Chicago Board Options Exchange, Incorporated Rules**

\* \* \* \* \*

#### **Rule 6.10 LOU System Operations**

This Rule governs the operation of the Large Order Utility ("LOU") system.

(a) Definitions. For purposes of this Rule, the following definitions shall apply.

(i) The term "LOU" means a facility of the Exchange that provides order routing, handling, and execution for eligible options orders routed electronically to the Exchange.

(ii) The term "In-Person Wheel" means an order allocation mechanism

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

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

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

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

whereby orders are evenly assigned to Market-Makers logged onto the In-Person Wheel for up to five contracts per Market-Maker for each order.

(iii) The term "Linkage Order" means an order routed to the Exchange through the Options Intermarket Linkage pursuant to the Plan for the Purpose of Creating and Operating an Intermarket Options Linkage.

(b) LOU Eligibility.

The following criteria must be met for an order to be eligible for LOU:

(i) The order must be a market order or marketable limit order that is not for an account in which a member, or any non-member broker-dealer (including foreign broker-dealer) has an interest *except as provided under Interpretation .02 of this Rule*;

(ii) The order must be of a size greater than the RAES eligibility limit for the subject option series as established pursuant to Rule 6.8(c);

(iii) the order may not be a Linkage Order;

(iv) at the time the order is received, the Exchange must be disseminating a quote at the national best bid or offer (NBBO) for the appropriate side of the market;

(v) at the time the order is received, the Exchange's disseminated quote may not be a manual quote;

(vi) the order must be in an option class which is designated as subject to the terms of Rule 6.8.B concerning booked orders; and,

(vii) the order must be in an option class designated by the appropriate FPC as subject to this Rule 6.10.

The senior person then in charge of the Exchange's Control Room shall have the authority to turn off LOU with respect to a class of options if there is a system malfunction that affects the Exchange's ability to disseminate or update market quotes.

(c) Order Receipt.

(i) Orders Equal to or Smaller than the Exchange's Disseminated Quotation Size. When LOU receives an order smaller than the Exchange's disseminated quotation size, the system will automatically stop the order against the Exchange's disseminated market. The order will then be automatically routed for representation in the crowd to allow for price improvement and to allocate the order to members of the trading crowd pursuant to paragraph (d) below.

(ii) Orders Larger than the Exchange's Disseminated Quotation Size. When LOU receives an order larger than the Exchange's disseminated quotation size, the system will automatically stop a portion of the order against the Exchange's disseminated market up to

the Exchange's disseminated size. The stopped portion of the order will then be automatically routed for representation in the crowd to allow for price improvement and to allocate the order to members of the trading crowd pursuant to paragraph (d) below. Simultaneously, the balance of the order that was not stopped at the Exchange's disseminated price will be routed for normal order handling.

(d) Execution and Allocation. Upon receipt, the LOU order (or the stopped portion of the LOU order) shall be announced and exposed to the crowd to allow for price improvement. Any portion of a LOU order that does not receive price improvement will be allocated as follows:

(i) The LOU order will be assigned in open outcry consistent with Rule 6.45 and Rule 8.87. To the extent an order is not fully assigned in open outcry, the remaining portion of the order will be assigned to Market-Makers via the In-Person Wheel. If a portion of the LOU order still remains after the In-Person Wheel allocations are exhausted, the balance of the order shall be assigned in accordance with the RAES trade allocation methodology in effect for the subject option class pursuant to Rule 6.8, Interpretation and Policy .06.

(e) Obligations of Participating Market-Makers. Any Market-Maker who is present in the trading crowd and who makes markets in a particular security traded in that crowd, must be logged onto the In-Person Wheel for that security.

**. . . Interpretations and Policies**

.01 The provisions of Rule 8.17 regarding stopping of option orders shall not apply to orders received pursuant to this Rule 6.10.

.02 *Broker-Dealer Access to LOU. The appropriate FPC may determine, by class and/or series to allow the following broker-dealer orders to be eligible for LOU, provided that such broker-dealer orders will not be stopped pursuant to this Rule against orders in the limit order book:*

(a) *broker-dealer orders, or*

(b) *broker-dealer orders that are not for the accounts of market-makers or specialists on an exchange who are exempt from the provisions of Regulation T of the Federal Reserve Board pursuant to Section 7(c)(2) of the Securities Exchange Act of 1934.*

\* \* \* \* \*

**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

On July 11, 2002, the Securities and Exchange Commission ("Commission") approved a CBOE rule change to establish the Large Order Utility ("LOU").<sup>5</sup> Through LOU, eligible orders larger than CBOE's maximum RAES limit for the relevant option are stopped at the Exchange's disseminated price up to the size of the Exchange's disseminated quote, and are subsequently routed to the trading crowd for allocation and possible price improvement in open outcry. Because CBOE has recently expanded the RAES system (Rule 6.8) to allow broker-dealer orders to trade on RAES,<sup>6</sup> the Exchange now seeks to similarly expand Rule 6.10 to allow LOU to handle broker-dealer orders.

As proposed, Rule 6.10 would be modified to provide that the appropriate Floor Procedure Committee may allow the following two broker-dealer order categories to be eligible for LOU on a class or series basis: (1) All broker-dealer orders, and (2) all broker-dealer orders except orders for the accounts of market makers or specialists. These orders would receive full LOU treatment except that they would not receive LOU treatment when CBOE's NBBO quote is represented by an order on CBOE's limit order book. Currently, broker-dealer orders eligible for RAES do not automatically execute against the limit order book. Therefore, the Exchange does not believe it is appropriate, at this time, to allow broker-dealer orders such capability through LOU.

2. Statutory Basis

The Exchange believes that the proposed rule change will help a

<sup>5</sup> See Securities Exchange Act Release No. 46185 (July 11, 2002), 67 FR 47585 (July 19, 2002).

<sup>6</sup> See Securities Exchange Act Release No. 46598 (October 3, 2002), 67 FR 63478 (October 11, 2002).

broader range of orders to automatically secure disseminated prices. The Exchange therefore believes the proposal is consistent with section 6(b) <sup>7</sup> of the Act in general and furthers the objectives of section 6(b)(5) <sup>8</sup> in particular in that it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and 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**

The foregoing proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act <sup>9</sup> and rule 19b-4(f)(6) thereunder <sup>10</sup> because the proposed rule change (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative until more than 30 days from the date on which it was filed, and the CBOE provided the Commission with written notice of its intent to file the proposed rule change at least five days prior to the filing date. <sup>11</sup> At any time within 60 days of the filing of such 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.

The CBOE has requested that the Commission waive the five-day pre-filing notice requirement and the 30-day operative delay. The Commission believes that waiving the five-day pre-filing notice requirement and the 30-day operative delay is consistent with the protection of investors and the public interest in that it will enable the CBOE to guarantee execution of broker-dealer orders at the disseminated price at the full disseminated size (except in the case where CBOE's NBBO quote is represented by an order on the Exchange's limit order book). For this reason, the Commission designates the proposal to be effective and operative immediately. <sup>12</sup>

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether it 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-2003-09, and should be submitted by April 9, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. <sup>13</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>12</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>13</sup> 17 CFR 200.30-3(a)(12).

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-47483; File No. SR-ISE-2003-04]

### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the International Securities Exchange, Inc. To Amend the Price Criteria for Securities That Underlie Options Traded on the Exchange**

March 11, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), <sup>1</sup> and rule 19b-4 <sup>2</sup> thereunder, notice is hereby given that on February 27, 2002, the International Securities Exchange LLC ("ISE" 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 its initial listing standards to allow options to be listed on "covered securities" when, among other things, the trading price of the underlying security was at least \$3 for the five business days prior to certification with The Options Clearing Corporation.

The text of the proposed rule change appears below. New text is in italics. Deleted text is in brackets.

#### **Rule 502. Criteria for Underlying Securities**

\* \* \* \* \*

(b) No change.

(1)-(4) No change.

(5) Either:

*(i) If the underlying security is a "covered security" as defined under Section 18(b)(1)(A) of the Securities Act of 1933, the market price per share of the underlying security has been at least \$3.00 for the previous five consecutive business days preceding the date on which the Exchange submits a certificate to the Clearing Corporation for listing and trading, as measured by the closing price reported in the primary market in which the underlying security is traded; or*

*[(i)] (ii) If the underlying security is not a "covered security," [T]he market*

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

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

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

<sup>11</sup> The Exchange submitted a letter to the Division of Market Regulation ("Division") of the Commission stating its belief that the proposal is consistent with Section 11(a) of the Act, 15 U.S.C. 78k(a), and Rule 11a2-2(T) under the Act, 17 CFR 240.11a2-2(T), and requesting interpretive guidance. See letter to Catherine McGuire, Chief Counsel, Division, Commission, from Stephen M. Youhn, Senior Attorney, CBOE, dated March 12, 2003. In response to the Exchange's request, Commission staff has provided interpretive guidance to the Exchange under Section 11(a) of the Act. See letter from Paula R. Jenson, Deputy Chief Counsel, Division, Commission, to Stephen M. Youhn, CBOE, dated March 12, 2003.