

orders for automatic execution. As a result of that rule change, Market-Makers, DPMs, eDPMs and RMMs (collectively, "CBOE Market-Makers") for the first time have the ability to submit orders that are eligible to execute automatically against resting orders in the electronic book in hybrid options classes (*i.e.*, all equity options classes, the CBOE Mini-NDX index option classes ("MNX"), the option classes based on the Nasdaq-100's Depository Receipts ("QQQQ"), the Reduced Value Russell 2000 index option classes,<sup>9</sup> and the option classes based on Standard & Poor's Depository Receipts ("SPDRs options"). An order submitted for automatic execution by a CBOE Market-Maker is marked with an "M" origin code.

As part of a marketing campaign to make CBOE Market-Makers aware of the benefits of this improved access to orders in the book, the Exchange proposes to waive May 2005 member dues for CBOE Market-Makers who automatically execute 2000 contracts or more (through the use of "M" orders) during May 2005 in hybrid options classes. Qualifying members would receive a rebate of member dues. The rebate will be processed in June as a credit on billing statements produced at month-end.

The Exchange believes that the proposed dues waiver will be successful in attracting additional liquidity to the CBOE.

## 2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,<sup>10</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>11</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE's members.

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

The CBOE does not believe that the proposed rule change, as amended, will impose any burden on competition that is 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**

Because the foregoing rule change, as amended, establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>12</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder.<sup>13</sup> Accordingly, the proposal will take effect upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, as amended, 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>14</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 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2005-36 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-CBOE-2005-36. This file number should be included on the subject line if e-mail 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, as amended, 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 the filing also will be available for inspection and copying at the principal office of the CBOE. 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-2005-36 and should be submitted on or before June 9, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-51692; File No. SR-CHX-2005-04]

### **Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Order Granting Approval of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto, To Clarify That Specialists May Not Charge Commissions With Respect to the Execution of CHXpress Orders**

May 12, 2005.

On March 1, 2005, the Chicago Stock Exchange, Inc. ("CHX" or "Exchange"), filed with the Securities and Exchange Commission ("Commission") a proposed rule change 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> to amend its rules to clarify that a CHX specialist is not permitted to charge a commission for the execution of CHXpress(tm) orders.

<sup>15</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.

Remote Market-Maker and a floor broker representing orders in the trading crowd.

<sup>9</sup> See Amendment No. 1, *Supra* note 3.

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(4).

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>13</sup> 17 CFR 240.19b-4(f)(2).

<sup>14</sup> For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, as amended, under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on May 5, 2005, the date on which the Exchange submitted Amendment No. 2. See 15 U.S.C. 78s(b)(3)(C).

On March 21, 2005 and March 30, 2005, the Exchange filed Amendment Nos. 1 and 2, respectively, to the proposal. The proposed rule change, as amended, was published for comment in the **Federal Register** on April 7, 2005.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

The Exchange is rolling out a new, automated functionality, CHXpress, which, according to the Exchange, is designed to provide additional opportunities for the Exchange's participants to seek and receive liquidity through automated executions of orders at the Exchange.<sup>4</sup> With a few exceptions, CHXpress orders will be executed immediately and automatically against same or better-priced orders in the specialist's book, or against the specialist's quote (when CHXpress is available).<sup>5</sup> If a CHXpress order cannot be immediately executed, it will be placed in the specialist's book for display or later execution.<sup>6</sup> The handling of CHXpress orders within the Exchange's systems is entirely automatic. CHX specialists do not provide CHXpress orders with the execution guarantees that might otherwise be available to agency limit orders,<sup>7</sup> and CHX specialists also would not be required to seek liquidity for CHXpress orders in other markets. This proposal clarifies that a CHX specialist would not be permitted to charge a commission in connection with the execution of a CHXpress order.

The Commission has reviewed carefully the proposed rule change, as amended, and finds that it is consistent with the requirements of Section 6 of the Act<sup>8</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>9</sup> In particular, the

Commission finds that the proposed rule change is consistent with sections 6(b)(5) and 6(e)(1) of the Act,<sup>10</sup> 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 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,<sup>11</sup> which states that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets 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 the Exchange's proposal is consistent with section 6(e) of the Act.<sup>12</sup> Section 6(e) of the Act<sup>13</sup> 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."<sup>14</sup> 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. CHX's proposal, by contrast, does not establish a minimum commission rate, but instead prohibits commissions in circumstances in which the CHX specialist does not handle the order. Accordingly, the Commission does not believe that the Exchange's proposal to

limit the fees charged by CHX specialists constitutes fixing commissions, allowances, discounts, or other fees for purposes of Section 6(e)(1) of the Act.<sup>15</sup> In addition, the Commission believes that the Exchange's proposal is reasonable because it prohibits a CHX specialist from charging a commission for an order executed without assistance or handling by the CHX specialist. In this regard, the Commission notes that it has not viewed a self-regulatory organization's limits on fees that its members may charge, even when a member acts as agent, as inconsistent with section 6(e) of the Act.<sup>16</sup> In addition, the Exchange's limits on fees that CHX specialists may charge applies only to members who choose to be specialists on the Exchange. Therefore, CHX is not fixing fees generally; it is merely imposing a condition, which is consistent with the Act, on a member's appointment as a specialist.

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.<sup>17</sup> It is therefore ordered, pursuant to section 19(b)(2) of the Act,<sup>18</sup> that the proposed rule change (SR-CHX-2005-04), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>19</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51688; File No. SR-NASD-2005-053]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delay Implementation Date of Revisions to the Series 4 Examination Program

May 12, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934

<sup>3</sup> See Securities Exchange Act Release No. 51465 (April 1, 2005), 70 FR 17743.

<sup>4</sup> See Securities Exchange Act Release No. 50481 (September 30, 2004); 69 FR 60197 (October 7, 2004) (SR-CHX-2004-12).

<sup>5</sup> See CHX Article XX, Rule 37(b)(11)(C).

<sup>6</sup> A CHXpress order will be instantaneously and automatically displayed when it constitutes the best bid or offer in the CHX book. See CHX Article XX, Rule 37(b)(11)(D).

<sup>7</sup> See CHX Article XX, Rule 37(b)(11)(E)-(F).

<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 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 similar proposed rule changes 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 Nos. 42727 (April 27, 2000), 65 FR 26258 (May 5, 2000); 42694 (April 17, 2000), 65 FR 24245 (April

25, 2000); and 42184 (November 30, 1999), 64 FR 68710 (December 8, 1999). In addition, the Commission recently approved a proposed rule change submitted by the Chicago Board Options Exchange ("CBOE") to prohibit Designated Primary Market Makers ("DPMs") from charging a brokerage commission for an order, or the portion of an order: (i) For which the DPM was not the executing broker, which includes any portion of the order that is automatically executed through a CBOE system; (ii) that is automatically cancelled; or (iii) that is not executed, and not cancelled. See Securities Exchange Act Release No. 51235 (February 22, 2005), 70 FR 9687 (February 28, 2005).

<sup>10</sup> 15 U.S.C. 78f(b)(5) and 78f(e)(1).

<sup>11</sup> 15 U.S.C. 78k-1(a)(1)(C).

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

<sup>13</sup> *Id.*

<sup>14</sup> H.R. Rep. No. 94-123, 94th Cong., 1st Sess. 42 (1975).

<sup>15</sup> 15 U.S.C. 78f(e)(1).

<sup>16</sup> 15 U.S.C. 78f(e)(1).

<sup>17</sup> 15 U.S.C. 78f(b)(5) and 78f(e)(1).

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> 17 CFR 200.30-3(a)(12).