

Each of the proposed access fees will remain in effect until such time either that the Exchange submits a further rule filing pursuant to Section 19(b)(3)(A)(ii) of the Act⁸ to modify the applicable access fee or the applicable status (*i.e.*, the Temporary Membership status or the ITP status) is terminated.

Accordingly, the Exchange may, and likely will, further adjust the proposed access fees in the future if the Exchange determines that it would be appropriate to do so taking into consideration lease rates for transferable CBOE memberships prevailing at that time.

The procedural provisions of the CBOE Fee Schedule related to the assessment of each proposed access fee are not proposed to be changed and will remain the same as the current procedural provisions relating to the assessment of that access fee.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Section 6(b)(4) of the Act,¹⁰ in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among persons using its facilities.

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

CBOE does not believe that the proposed rule change 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 establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹¹ and subparagraph (f)(2) of Rule 19b-4¹² thereunder. At any time within 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.

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. Please include File Number SR-CBOE-2009-005 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR-CBOE-2009-005. 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 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such 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 No. SR-CBOE-2009-005 and should be submitted on or before March 4, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59359; File No. SR-CBOE-2008-123]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving Proposed Rule Change To Adopt a Trade, Flash and Cancel Order Type for CBSX

February 4, 2009.

On December 3, 2008, Chicago Board Options Exchange, Incorporated ("CBOE") 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 adopt a Trade, Flash and Cancel order type for the CBOE Stock Exchange ("CBSX"). The proposed rule change was published for comment in the **Federal Register** on January 2, 2009.³ The Commission received no comments regarding the proposal.

The Commission has carefully reviewed the proposed rule change and 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 exchange⁴ and, in particular, Section 6(b)(5) of the Act,⁵ which requires that an exchange have rules designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest. The Commission also believes that the proposed rule change furthers the objectives of Section 11A of the Act,⁶ as it helps to assure the economically efficient execution of securities transactions, fair competition among

¹³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59147 (December 22, 2008), 74 FR 150.

⁴ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁵ 15 U.S.C. 78f(b)(5).

⁶ 15 U.S.C. 78k-1.

⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4).

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(2).

brokers and dealers and among exchange markets, and the practicability of brokers executing investors' orders in the best market.

If CBSX is at quoting at the national best bid or offer ("NBBO") when a Trade, Flash and Cancel order is submitted to CBSX, CBSX will execute the incoming order automatically against the published quotation. However, if CBSX is not quoting at the NBBO, the Trade, Flash and Cancel designation initiates a process whereby the order would be electronically exposed to CBSX traders for a period of up to three seconds, rather than routed away to other markets, in accordance with Exchange Rule 52.6(a). CBSX traders will not know the identity or the account type of the party that submitted the Trade, Flash and Cancel order.⁷ CBSX traders can respond with orders that match or better the NBBO to trade with the Trade, Flash and Cancel order. If no CBSX trader matches or improves on the NBBO by the end of the exposure period, the CBSX system will cancel the Trade, Flash and Cancel order. In no event will an execution result that is inferior to the NBBO.⁸ Use of the Trade, Flash and Cancel order is strictly voluntary. The Commission believes that the Trade, Flash and Cancel order type is a potentially useful means for order senders to control where their orders are routed and to seek price improvement. Therefore, the Commission believes that the proposal is consistent with the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-CBOE-2008-123) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹

Florence E. Harmon,

Deputy Secretary.

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⁷ See e-mail from Angelo Evangelou, Assistant General Counsel, CBOE, to Michael Gaw, Assistant Director, and Andrew Madar, Special Counsel, Division of Trading and Markets, Commission, dated February 3, 2009.

⁸ The Exchange stated that, "If a flash responder attempts to trade against the order by matching the flash price (the NBBO price at the time the order was received by the CBSX System), the order will be executed unless the system determines at the point of execution that the flash price is worse than a revised NBBO in which case the order will be cancelled." See e-mail from Angelo Evangelou, Assistant General Counsel, CBOE, to Michael Gaw, Assistant Director, and Andrew Madar, Special Counsel, Division of Trading and Markets, Commission, dated December 19, 2008.

⁹ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59358; File No. SR-FINRA-2008-051]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change Relating to Amendments to the Codes of Arbitration Procedure To Require Arbitrators To Provide an Explained Decision Upon the Joint Request of the Parties

February 4, 2009.

I. Introduction

The Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") on October 14, 2008 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 amend Rules 12214, 12514 and 12904 of the Code of Arbitration Procedure for Customer Disputes ("Customer Code") and Rules 13214, 13514 and 13904 of the Code of Arbitration Procedure for Industry Disputes ("Industry Code," and together with the Customer Code, the "Codes")³ to require arbitrators to provide an explained decision upon the joint request of the parties. The proposed rule change was published for comment in the **Federal Register** on October 31, 2008.⁴ The Commission received five comments in response to the proposed rule change.⁵ This order approves the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The former NASD Rule 12000 Series (Customer Code) and 13000 Series (Industry Code) have been adopted as the FINRA 12000 Series (Customer Code) and 13000 Series (Industry Code) in the new consolidated rulebook pursuant to SR-FINRA-2008-021, which was approved by the Commission. See Securities Exchange Act Release No. 58643 (September 25, 2008), 73 FR 57174 (October 1, 2008) (SR-FINRA-2008-021) (approval order). The FINRA Rule 12000 Series (Customer Code) and 13000 Series (Industry Code), as set forth in SR-FINRA-2008-021, became effective on December 15, 2008. See FINRA Regulatory Notice 08-57 (SEC Approves New Consolidated FINRA Rules) (October 2008).

⁴ See Securities Exchange Act Release No. 58862 (October 27, 2008), 73 FR 64995 (October 31, 2008), (SR-FINRA-2008-051) (notice).

⁵ See letter from Kevin Thomas Hoffman, dated November 10, 2008 ("Hoffman letter"); letter from Barbara Black, Director, Corporate Law Center, University of Cincinnati College of Law, Jill I. Gross, Director, Pace Investor Rights Clinic, Pace University School of Law, and Deborah Sommers, Student Intern, submitted November 20, 2008 ("Black and Gross letter"); letter from Barry D. Estell, dated November 20, 2008 ("Estell letter");

II. Description of the Proposed Rule Change

FINRA proposed to amend its Customer Code and Industry Code to require arbitrators to provide an explained decision upon the joint request of the parties. The explained decision would be a fact-based award stating the general reason(s) for the arbitrators' decision; it would not be required to include legal authorities and/or damage calculations. Under the proposed rule change, parties would be required to submit any joint request for an explained decision at least 20 days before the first scheduled hearing date.⁶ The chairperson would: (1) Be required to write the explained decision; and (2) receive an additional honorarium of \$400 for writing the decision. The panel would allocate the cost of the additional honorarium to the parties as part of the final award.

The arbitrators would not be required to provide an explained decision in cases resolved without a hearing under simplified arbitration Rules 12800 and 13800 or in default cases conducted under Rules 12801 and 13801.

FINRA did not propose to amend Rules 12904(f) and 13904(f), which provide that an award may contain an underlying rationale. This means that arbitrators would continue to be permitted to decide, on their own, to write an explained decision. Thus, as is currently the case, if the panel decides on its own to write an explained decision, FINRA would not pay an additional honorarium to any panel member.

Background

The absence of explanations in awards is a common complaint of non-prevailing parties in the FINRA forum, especially customers and associated persons. In order to address these complaints and increase investor confidence in the fairness of the arbitration process, in March 2005, FINRA filed a proposed rule change with the SEC that would have required arbitrators to provide explained decisions upon the request of customers, or of associated persons in industry controversies. The SEC published the original proposed rule

letter from Scott R. Shewan, Vice-President, Public Investors Arbitration Bar Association, dated November 21, 2008 ("PIABA letter"); and letter from Theodore M. Davis, submitted November 21, 2008 ("Davis letter").

⁶ The term "hearing" means the hearing of an arbitration under Rules 12600 and 13600 (see Rules 12100(m) and 13100(m)).