This document is scheduled to be published in the
Federal Register on 03/31/2016 and available online at
http://federalregister.gov/a/2016-07204, and on FDsys.gov

8011-01p
SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77450; File No. SR-CBOE-2016-005)

March 25, 2016

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Amend Interpretation and Policy .01 to Rule 1.1(ggg) Relating to the Professional Customer Definition

I. Introduction

On January 27, 2016, Chicago Board Options Exchange, Incorporated (the "Exchange" or "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 amend the methodology for counting average daily order submissions in listed options to determine whether a person or entity meets the definition of a Professional[3] ("Professional order counting"). The Commission published the proposed rule change for comment in the Federal Register on February 10, 2016.[4] The Commission received one comment letter on the proposed rule change.[5] The Exchange filed Amendment No. 1 to the proposed rule change on March 15, 2016,[6] and submitted a response to comments on March 18,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] Under CBOE rules, the term "Professional" means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). See CBOE Rule 1.1(ggg).

[4] See Securities Exchange Act Release No. 77049 (February 4, 2016), 81 FR 7173 ("Notice").

[5] See Joint Letter from SpiderRock EXC, LLC and SpiderRock Advisors, LLC, to Brent J. Fields, Secretary, Commission, dated February 22, 2016 ("SpiderRock Letter").

[6] In Amendment No. 1, the Exchange changed how complex orders will be computed with respect to Professional order counting. Amendment No. 1 modified the proposal to

2016.[7] This order provides notice of filing of Amendment No. 1 and approves the proposal, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposal

The Exchange proposes to amend Interpretation and Policy .01 to Rule 1.1(ggg) relating to the definition of Professionals. Specifically, the Exchange proposes to delete current Interpretation and Policy .01 to Rule 1.1(ggg) and adopt new Interpretation and Policy .01 to Rule 1.1(ggg), setting forth a new methodology for calculating average daily order submissions for Professional order counting purposes.[8]

Background

Prior to 2009, the Exchange designated all orders as either customer orders or non-customer orders based solely on whether or not the order was placed for the account of a customer or for the

provide that a complex order compromised of nine legs or more will count as multiple orders with each option leg counting as its own separate order while complex orders with eight legs or less will count as a single order. The Exchange previously proposed that complex orders compromised of five legs or more would count as multiple orders while complex orders with four legs or less would count as a single order. In addition, Amendment No. 1 provided that any complex order with nine or more legs that is canceled and replaced would count as multiple new orders unless the child orders resulting from the parent order were canceled and replaced on the same side and series as the parent order. The Exchange previously proposed that complex orders with five legs or more that were canceled and replaced would count as multiple new orders. To promote transparency of its proposed amendment, when CBOE filed Amendment No. 1 with the Commission, it also submitted Amendment No. 1 as a comment letter to the file, which the Commission posted on its website and placed in the public comment file for SR-CBOE-2016-005 (available at http://www.sec.gov/comments/sr-cboe-2016-005/cboe2016005-2.pdf). The Exchange also posted a copy of its Amendment No. 1 on its website (http://www.cboe.com/aboutcboe/legal/submittedsecfilings.aspx) when it filed the amendment with the Commission.

7 See Letter from William P. Wallenstein, Senior Counsel, CBOE, to Brent J. Fields, Secretary, Commission, dated March 18, 2016 ("CBOE Response Letter").

8 See Notice, supra note 4, at 7173.

account of a registered securities broker-dealer.[9] According to CBOE, the Exchange granted public customers certain advantages, including priority to trade and reduced or no transaction fees, in order to attract public customer order flow and to account for such customers' lack of sophistication along with their lack of access to market data services, analytics technology, and other trading devices more common to broker-dealers.[10] As non-broker-dealer traders gained access to electronic trading platforms, analytics technology, and market data services previously available only to broker-dealers, the distinction between public customers and non-customers became, in CBOE's opinion, less effective in promoting the intended purposes of the Exchange's customer priority rules because certain customers increasingly were more similarly situated to broker-dealers.[11] Accordingly, in 2009, the Exchange adopted a definition of Professional under Rule 1.1(ggg) to further distinguish different types of orders placed on the Exchange.[12] In November 2014, the Exchange clarified its Professional order rule by adopting Interpretation and Policy .01 to Rule 1.1(ggg).[13]

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9 See id. at 7174.

10 See id.

11 See id.

12 According to CBOE, its Professional customer rule originally was based upon a similar rule from the International Securities Exchange, LLC ("ISE"). See Securities Exchange Release 59287 (January 23, 2009), 74 FR 5694 (January 30, 2009) (SR-ISE-2006-26) ("ISE Approval Order"); see also Notice, supra note 4, at 7174, n.8.

13 See CBOE Regulatory Circular RG09-148 (Professional Orders). Specifically, the Exchange codified its interpretation that, for Professional order counting purposes, "parent" orders that are placed on a single ticket and entered for the beneficial account(s) of a person or entity that is not a broker or dealer in securities and that are broken into multiple parts by a broker or dealer, or by an algorithm housed at a broker or dealer, or by an algorithm licensed from a broker or dealer that is housed with the customer in order to achieve a specific execution strategy, including, but not limited to basket trades, program trades, portfolio trades, basis trades, and benchmark hedges, should count as one single order for Professional order counting purposes.

According to the Exchange, the advent of new multi-leg spread products and the proliferation of the use of complex orders and algorithmic execution strategies by both institutional and retail market participants raise questions as to what should be counted as an "order" for Professional order counting purposes.[14] In light of this, the Exchange now proposes to adopt an amended interpretation to specifically address the counting of multi-leg spread products, algorithm generated orders, and complex orders for purposes of determining Professional customer status.[15]

Proposal

The Exchange's proposal deletes current Interpretation and Policy .01 to Rule 1.1(ggg) and replaces it with a new Interpretation and Policy that sets forth a new methodology for counting complex orders, parent/child orders, and cancel/replace orders for Professional order counting purposes.[16] Pursuant to Rule 1.1(ggg), all orders will count as one single order for Professional customer counting purposes, unless one of the exceptions enumerated in the new Interpretation and Policy stipulates otherwise.[17]

Paragraph (a) of proposed new Interpretation and Policy .01 will govern the computation rules for complex orders. Under subparagraph (a)(1), a complex order of eight legs or less will count as one order.[18] In contrast, under subparagraph (a)(2), a complex order of nine legs or

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14 See Notice, supra note 4, at 7175.

15 See id.

16 See id. at 7176.

17 See id. Under current Exchange Rule 1.1(ggg), Trading Permit Holders are required to indicate whether their public customer orders are Professional orders. This existing requirement remains unchanged under this proposed rule change. See id. at 7178. According to the Exchange, a Trading Permit Holder must conduct a review of all orders received from non-broker-dealers on at least a quarterly basis in order to make the appropriate designation. See id.

18 See Notice, supra note 4, at 7176; see also Amendment No. 1, supra note 6.

more will count as multiple orders with each option leg counting as its own separate order.[19] The Exchange stated that this dividing line is appropriate because complex orders with eight or fewer legs are more often associated with retail strategies such as strangles, straddles, butterflies, collars, and condor strategies.[20] In contrast, the Exchange believes that Professionals may be more likely than retail customers to use complex orders of nine legs or more, as CBOE believes that such orders are demonstrative of sophisticated trading activity.[21]

Paragraph (b) of proposed new Interpretation and Policy .01 will govern the calculations for parent/child orders.[22] Under subparagraph (b)(1), if a parent order submitted for the beneficial account(s) of a person or entity other than a broker or dealer is subsequently broken up into multiple child orders on the same side (buy/sell) and series by a broker or dealer, or by an algorithm housed at the broker or dealer, or by an algorithm licensed from the broker or dealer but housed with the customer, then the order will count as one order even if the child orders are routed across several exchanges.[23] According to the Exchange, this subparagraph is designed to allow the orders of public customers to be "worked" by a broker (or a broker's algorithm) in order to achieve best execution without counting the activity as multiple child orders for Professional order counting purposes.[24] Conversely, under subparagraph (b)(2), if a parent order, including a strategy order,[25] is broken into multiple child orders on both sides (buy/sell) of a

19 See Notice, supra note 4, at 7176; see also Amendment No. 1, supra note 6.

20 See Notice, supra note 4, at 7176.

21 See id.

22 See id.

23 See id.

24 See id.

25 In its filing, CBOE noted that the term "strategy order" is intended to mean an execution strategy, trading instruction, or algorithm whereby multiple "child" orders on both sides of a series and/or multiple series are generated prior to being sent to an options

series and/or multiple series, then each child order will count as a separate new order.[26] The Exchange believes that strategy orders are most often utilized by Professionals and therefore are appropriately counted as multiple orders for Professional order counting purposes.[27] The Exchange further noted that paragraph (b) is not designed to capture larger-size orders that are broken into multiple orders to achieve an execution consistent with the principles of best execution.[28] Instead, the Exchange stated that paragraph (b) is aimed at capturing orders generated by an algorithm operated by a Professional that continuously updates its orders in tandem with market changes.[29] According to the Exchange, these orders are most appropriately counted as multiple orders for Professional order counting purposes.[30]

Paragraph (c) of new Interpretation and Policy .01 will govern the counting methodology for cancel/replace orders.[31] Subparagraph (c)(1) states, as a general rule that any order that cancels and replaces an existing order will count as a separate order (or multiple orders in the case of complex orders of nine legs or more).[32] Subparagraph (c)(2) contains an exception from this general rule. Under subparagraph (c)(2), an order to cancel and replace a child order would not count as a new order if the parent order that was placed for the beneficial account(s) of a

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exchange(s). See id. at 7176, n.17.

26 See id. at 7176. The Exchange noted that non-professional customers that simultaneously or nearly simultaneously enter multiple limit orders to buy and sell the same security may violate CBOE Rule 6.8C, the prohibition against acting as a Market Maker. See id. at 7176, n.18; see also Exchange Rule 6.8C.

27 See Notice, supra note 4, at 7176 (containing examples of types of strategy orders including vega and volatility orders).

28 See id. at 7177.

29 See id.

30 See id.

31 See id.

32 See id.; see also Amendment No. 1, supra note 6.

non-broker or dealer had been subsequently broken into multiple child orders on the same side and series as the parent order by a broker or dealer, algorithm at a broker or dealer, or algorithm licensed from a broker or dealer but housed at the customer.[33] By contrast, subparagraph (c)(3) provides that an order that cancels and replaces a child order resulting from a parent order, including a strategy order, that generated child orders on both sides (buy/sell) of a series and/or in multiple series would count as a new order per side and series.[34] Finally, subparagraph (c)(4) states that, notwithstanding subparagraph (c)(2), an order that cancels and replaces any child order resulting from a parent order being pegged to the Exchange's best bid or offer ("BBO") or the national best bid or offer ("NBBO") or that cancels and replaces any child order pursuant to an algorithm that uses the BBO or NBBO in the calculation of child orders and attempts to move with or follow the BBO or NBBO of a particular options series would count as a new order each time the order cancels and replaces in order to attempt to move with or follow the BBO or NBBO.[35]

Implementation

The Exchange has proposed an effective date of April 1, 2016 for this proposed rule change.[36] The proposal would not be applied retroactively.[37]

III. Comment Summary and CBOE's Response

The Commission received one comment letter regarding the proposed rule change, which opposed the proposal.[38] Among other things, the commenter expressed concern that the proposal

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33 See Notice, supra note 4, at 7177.

34 See id.

35 See id.

36 See id.

37 See id. at 7178.

would "unfairly require the professional categorization of certain other customers that do not otherwise seem to be market professionals and are not systematically attempting to compete with market makers…."[39] Specifically, the commenter believed that the proposal would classify as Professionals, persons or entities that increasingly use complex orders and other multi-legged orders or who have "hired a more market savvy and technologically sophisticated firm to handle their interactions with the market."[40] In response, CBOE stated that customers trading with a frequency sufficient to meet the Professional customer definition, as modified by the current proposal, evidence a level of sophistication similar to that of broker-dealers and Market-Makers and therefore do compete with those market participants.[41] The Exchange asserted that many of those customers include hedge funds, proprietary trading firms, large bank trading desks, and wealth management firms who employ sophisticated algorithms to execute more than the Professional customer threshold, which is equivalent to one order per minute.[42] Therefore, CBOE believes that it is not unfair or anti-competitive to designate as Professionals those participants who, when executing the requisite number of orders, share similar levels of

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38 See SpiderRock Letter, supra note 5, at 3-4. The commenter made several recommendations to the Commission, and expressed concern over the concept of customer priority, Market Maker payment for order flow, order routing, and Market Maker preferencing. The Commission notes that these issues are beyond the scope of CBOE's present proposal, which applies to a modified calculation of order activity for Professional order counting purposes.

39 See id. at 8. The Commenter argued that a "new generation" of customer is increasingly using more sophisticated trading techniques. See id. at 4.

40 See id. at 4.

41 See CBOE Response Letter, supra note 7, at 4.

42 See id.

sophistication with broker-dealers or Market-Makers while maintaining customer priority for true traditional retail investors.[43]

The commenter also expressed a concern that the proposed rule change "would effectively ban" the use of certain multi-part orders in priority customer accounts.[44] In response, CBOE stated that it is not banning any order type that is permitted under its rules, including the order types referenced by the commenter.[45] More specifically, the Exchange noted that "[p]ublic customers and Professionals alike are free to employ these strategies on the Exchange as they see fit, the only difference being that, unlike a public customer, a Professional may not receive execution priority over broker-dealer orders and Market-Maker quotes at the same price and may incur transaction fees."[46] Therefore, CBOE asserted that the choice whether to use any particular strategy is within the business judgment of the particular customer and not the result of an Exchange-imposed restriction.[47]

The commenter next noted that customers are becoming "increasingly sophisticated and technology enabled."[48] The commenter stated that there are varying types of investors with different levels of sophistication using multi-part orders to trade on their own behalf or hire firms to carry out such trading strategies on their behalf.[49] Therefore, the commenter asserted that the

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43 See id. The Exchange further noted that, subject to applicable regulatory requirements, it has discretion to decide the best way to encourage competitive markets and how best to attract retail order flow to the exchange, and its proposed rule change seeks to accomplish those business objectives. See id.

44 See SpiderRock Letter, supra note 5, at 7.

45 See CBOE Response Letter, supra note 7, at 2-3.

46 See id. at 3.

47 See id.

48 See SpiderRock Letter, supra note 5, at 9.

49 See id. at 7-8.

assumption that only "true" Professionals have access to more sophisticated trading techniques is misguided.[50] The commenter believed that "there is no agreed definition of retail customer, rather, there is a complex collection of accounts that can be categorized along a number of not-mutually-exclusive dimensions."[51] In response, CBOE noted that it does not seek to dissuade the use of technology by any investor, nor use technology as the benchmark for deciding whether an investor who uses it crosses the threshold of public customer to Professional.[52] Rather, the Exchange noted that its proposal will look to the number of orders produced through that technology and if the number of orders is fewer than 390 average orders per day on average over the applicable period then that investor will not be a Professional despite the use of the technology-enabled strategies.[53] The Exchange further emphasized that it is the number of orders that determines whether a trader is a Professional and not the technology to which a trader has access.[54]

IV. Discussion and Commission Findings

After careful review of the proposed rule change, as well as the comment letter and the CBOE response, 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 exchange.[55] In particular, the Commission finds that the proposed rule change is

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50 See id.

51 See id. at 8.

52 See CBOE Response Letter, supra note 7, at 3.

53 See id.

54 See id. at 3-4.

55 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).

consistent with Section 6(b)(5) of the Act,[56] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, 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 not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(8) of the Act, which requires the rules of the exchange not to impose any burden on competition not necessary or appropriate in furtherance of the Act.[57]

The Commission previously has articulated its position regarding the application of Section 6 of the Act in evaluating distinctions among market participants proposed by exchanges and the discretion available to an exchange to set an appropriate level of advantages and responsibilities of persons trading on its market.[58] In particular, the Commission previously indicated that it does not believe that priority for public customer orders is a statutorily-required attribute of an exchange and therefore the grant of such priority is within an exchange's prerogative and business judgement, as long as such provision is otherwise consistent with the requirements of the Act.[59]

The Commission notes that the Exchange is not amending the threshold of 390 orders in listed options per day but is revising the method for counting Professional orders in the context of multi-part orders and cancel/replace activity. The Exchange noted that it has received

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56 15 U.S.C. 78f(b)(5).

57 15 U.S.C. 78f(b)(8).

58 See ISE Approval Order, supra note 12, at 5699, n.59.

59 See id. at 5700.

questions regarding the classification of these types of orders when calculating Professional customer activity.[60] The Commission believes that the proposal is designed to set forth a reasonable and objective approach to determine Professional customer status.

Specifically, the proposal addresses how to account for complex orders, parent/child orders, and cancel/replace orders. The Commission believes that distinguishing between complex orders with 9 or more options legs and those orders with 8 or fewer options legs is a reasonable and objective approach. The Commission notes that, in Amendment No. 1, the Exchange increased the number of complex order legs considered for multiple order counting purposes from five or more legs to nine or more legs in response to the concerns of the commenter, who noted that some retail customers are increasingly using trading techniques with multi-part orders.

In addition, the Commission believes that CBOE's proposal appropriately distinguishes between parent/child orders that are generated by a broker's efforts to obtain an execution on a larger size order while minimizing market impact and multi-part orders that used by more sophisticated market participants. Similarly, the Commission believes that the proposed guidance that cancel/replace orders will count as separate orders with limited exceptions is a reasonable and objective approach to distinguish the orders of retail customers that are "worked" by a broker from orders generated by algorithms used by more sophisticated market participants. Similar to what it has noted in past Professional customer filings, the Commission believes that the line that CBOE now seeks to draw between "priority" customers and Professional customers reflects CBOE's belief that the orders of a person who submits, on average, more than one order

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60 See Notice supra note 4, at 7175.

every minute of the trading day need not (or should not) be granted the same benefit or incentive that is granted to customers who do not trade on such a scale.[61]

The Commission believes that the grant of priority to certain participants over others in a manner that is consistent with the Act is most reasonably viewed as within the discretion of the Exchange.[62] Thus, the Commission believes that CBOE's proposal, which establishes an objective methodology for counting average daily order submissions for Professional order counting purposes, is consistent with the Act.

V. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 to 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 No. SR-CBOE-2016-005 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 No. SR-CBOE-2016-005. 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

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61 See ISE Approval Order, supra note 12, at 5701.

62 See id. at 5700.

comments on the Commission's Internet website (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 website 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 such filing will also 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-2016-005 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the amended proposal in the Federal Register. The revisions made to the proposal in Amendment No. 1[63] changed how complex orders will be counted with respect to Professional order counting. Amendment No. 1 modified the proposal to provide that a complex order compromised of nine legs or more will count as multiple orders with each option leg counting as its own separate order instead of five legs or more as previously proposed by the Exchange.[64] The Commission believes that this modification responds to one of the primary concerns raised by the commenter

63 See Amendment No. 1, supra note 6.

64 See id.

on the proposal that increasingly sophisticated customers would be adversely affected by the proposal, causing them to become Professionals and lose their priority customer status. Amendment No. 1 effectively allows retail customers to use more advanced trading strategies (i.e., complex orders with up to eight legs) without having that activity counted as multiple orders for purposes of Professional order counting. Thus, the Commission believes that the changes in Amendment No. 1 respond to one of the concerns raised by the commenter by adopting a more permissive threshold for complex orders, and ultimately could decrease the number of persons or entities that will meet the definition of Professional under the new Interpretation and Guidance. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[65] to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

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[65] 15 U.S.C. 78s(b)(2)

VII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[66] that the proposed rule change (SR-CBOE-2016-005), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[67]

Robert W. Errett
Deputy Secretary

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66 See id.

67 17 CFR 200.30-3(a)(12).

[FR Doc. 2016-07204 Filed: 3/30/2016 8:45 am; Publication Date: 3/31/2016]