SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-75632; File No. SR-ISE-2014-24)

August 6, 2015

Self-Regulatory Organizations; International Securities Exchange, LLC; Order Disapproving a Proposed Rule Change to Modify ISE's Opening Process

I. Introduction

On November 19, 2014, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission (the "SEC" or the "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to modify the opening process of the Exchange. The proposed rule change was published for comment in the Federal Register on December 10, 2014.[3] On January 23, 2015, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change to March 10, 2015.[4] On March 10, 2015, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act[5] to determine whether to approve or disapprove the proposed rule change.[6] On May 13, 2015, the Commission received a letter from the Exchange responding to the Order Instituting

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

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 73736 (December 4, 2014), 79 FR 73354 ("Notice").

4 See Securities Exchange Act Release No. 74126 (January 23, 2015), 80 FR 4953 (January 29, 2015).

5 15 U.S.C. 78s(b)(2)(B).

6 See Securities Exchange Act Release No. 74465 (March 10, 2015), 80 FR 13660 (March 16, 2015) ("Order Instituting Proceedings"). On June 4, 2015, the Commission designated a longer period for Commission action the proposed rule change to August 7, 2015. See Securities Exchange Act Release No. 75104 (June 4, 2015), 80 FR 33001 (June 10, 2015).

Proceedings.[7] The Commission received one other comment on the proposed rule change.[8] This Order disapproves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to modify the process by which the Exchange's trading system opens trading at the beginning of the day and after trading halts.[9] Specifically, ISE proposes to "modify the opening process by moving from a single price opening" to an iterative opening process, which could result in four separate opening prices for a single option series.[10]

As is the case today, under the proposal, if there is executable interest prior to the opening, ISE's trading system would first calculate a range of prices within which to open the options series ("Boundary Prices"). To determine the Boundary Prices, the trading system would use ISE market makers' quotes. Specifically, the trading system would use the quotes of ISE's Primary Market Maker ("PMM") quotes, or in their absence, the best quotes of ISE's

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7 See Letter to Brent J. Fields, Secretary, Commission, from Mike Simon, Secretary and General Counsel, dated May 13, 2015 ("ISE Letter").

8 See Letter to Brent J. Fields, Secretary, Commission, from Benjamin Londergan, Head of Options Trading and Technology, Convergex Execution Solutions LLC, dated June 1, 2015 ("Convergex Letter"). In its letter, Convergex stated that it supported the proposal because it believed the "inherent protections and improved pricing will be of significant benefit to customers and outweigh any perceived advantages of the current single-priced opening process." See Convergex Letter at 1. The Convergex Letter noted that ISE's current opening process did not provide away market price protection, but the proposed rule change would introduce an iterative opening process where priority customer orders would be eligible for away market routing under certain circumstances. As a consequence of this change, Convergex believed its customers would "obtain better execution quality in an increasingly fair and orderly market than they enjoy currently under the ISE's present opening process."

9 The Exchange also proposes to codify certain existing functionality within the trading system (regarding the procedures to initiate the opening rotation at the Exchange's opening and reopening after a trading halt) that was not previously described in the Exchange's rules. A more detailed description of the initiation procedure is available in the Notice. See Notice, supra note 3 at 73355.

10 See id. at 73356.

Competitive Market Makers ("CMMs") on the corresponding side (PMMs, together with CMMs, "ISE Market Makers").[11] If there are no PMM or CMM quotes on the bid side, the lowest minimum trading increment for the option class would be used. If there are no PMM or CMM quotes on the offer side, however, "the options class would not open because in the absence of an offer there would be no limit as to the price at which an opening trade could occur."[12] Under ISE's proposal, each iteration of the opening process would widen the Boundary Prices, except for the last iteration which would have no Boundary Prices. Each iteration as proposed is described below.

As explained in the Notice, in the first iteration, the trading system would attempt to derive the opening price to be at or better than either: the PMM's best bid and offer, or in the absence of a PMM quote, the best bid and offer of CMMs ("ISE Market Maker Quotes");[13] or the away best bid and offer ("ABBO"), whichever is better. Accordingly, if the options class is open on another exchange, the Boundary Prices would be determined to be the higher of the ISE Market Maker's bid or the away best bid and the lower of the ISE Market Maker's offer or the away best offer. If the options class is not yet open on another exchange, the Boundary Prices would be determined by the PMM or CMM quotes, as described above. Once the trading system has determined the Boundary Prices, it then would determine the price at which the maximum number of contracts could trade at or within the Boundary Prices (the "execution price")[14] and process orders and quotes at the execution price as follows—market orders would be given

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11 ISE has two categories of market makers: PMMs and CMMs. A PMM is appointed to each options class traded on the Exchange but a CMM may or may not be appointed to each such options class. See ISE Rule 802.

12 See Notice, supra note 3, at 73356.

13 See id.

14 See id. for an example showing the calculation of the execution price following the first iteration.

priority before limit orders and quotes, then limit orders and quotes would be given priority by price. For limit orders and quotes with the same price, priority would be accorded first to Priority Customer Orders[15] over Professional Orders[16] and quotes. Priority Customer Orders with the same limit price would be executed on a random basis[17] while Professional Orders and quotes with the same limit price would be executed pro-rata based on size. If the Boundary Prices were calculated using the ABBO, any remaining Public Customer Orders,[18] but not Non-Customer[19] Orders, that would lock or cross an ABBO would be processed in accordance with Supplementary Material .02 to ISE Rule 1901.[20]

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15 Pursuant to ISE Rules 100(a)(37A) and 100(a)(37B), a "Priority Customer Order" is an order for the account of a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

16 Pursuant to ISE Rule 100(a)(37C), a "Professional Order" is an order that is for the account of a person or entity that is not a Priority Customer.

17 Priority Customer Orders with the same limit price in the regular order book are currently executed in time priority during the opening. The Exchange states in the Notice that it believes executing these orders on a random basis is a fairer approach because the current time priority is dependent on when such orders are communicated to the Exchange by a Priority Customer's broker, not the time the Priority Customer expressed interest in doing the trade. See Notice, supra note 3, at 73356.

18 Pursuant to ISE Rules 100(a)(38) and 100(a)(39), a "Public Customer" means a person or entity that is not a broker or dealer in securities and a "Public Customer Order" means an order for the account of a Public Customer.

19 Pursuant to ISE Rule 100(a)(27), a "Non-Customer" means a persons or entity that is a broker or dealer in securities.

20 As stated in the Notice, under the Options Order Protection and Locked/Crossed Market Plan ("Options Linkage Plan" or "Linkage Plan"), the Exchange cannot execute orders at a price that is inferior to the national best bid or offer ("NBBO"), absent an applicable exception, nor can the Exchange place an order on its book that would cause the ISE best bid or offer to lock or cross another exchange's quote. See Notice, supra note 3, at 73356. ISE's rule requires that, before orders are rejected or routed to an away market, an order that would otherwise lock or cross another exchange's bid or offer be exposed to all ISE members for up to one second to give the members an opportunity to execute against the order at the NBBO or better. See Supplementary Material .02 to Rule 1901**.** If after an order is exposed, the order cannot be executed in full on the Exchange at the

According to the Exchange, if after the first iteration there remained unexecuted orders and quotes that would lock or cross each other, the trading system would initiate a second iteration.[21] In the second iteration, the trading system would use either the ISE Market Maker Quotes or the ABBO,[22] whichever was not used in the first iteration, to establish the Boundary Prices. For example, if the ISE Market Maker Quotes were used in the first iteration, the second iteration would use the ABBO and vice versa. If, during the first iteration, there were no ABBO, then the second iteration would not occur, and the trading system would initiate the third iteration as described below.

In the second iteration, the trading system would again determine the execution price at which the maximum number of contracts could trade at or within the widened Boundary Prices. Once the trading system determines the second execution price, orders and quotes would be processed as follows—market orders would be given priority before limit orders and quotes, then limit orders and quotes would be given priority by price. For limit orders and quotes with the same price, priority would be accorded first to Priority Customer Orders over Professional Orders and quotes. Priority Customer Orders with the same limit price would be executed in random order while Professional Orders and quotes with the same limit price would be executed pro-rata based on size. If the Boundary Prices in the second iteration were calculated using the

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then-current NBBO or better, and it is marketable, the lesser of the full displayed size of the Protected Bid(s) or Protected Offer(s) that are priced better than the ISE's quote or the balance of the order will be sent to the linkage handler and any additional balance of the order will be executed on the ISE if it is marketable. Any additional balance of the order that is not marketable against the then-current NBBO will be placed on the ISE book. Id.

21 See Notice, supra note 3, at 73357, for an example showing the calculation of the execution price following the second iteration.

22 The ABBO prices considered in the first iteration are also used during the second iteration.

ABBO, any remaining Public Customer Orders, but not Non-Customer Orders, that would lock or cross a bid or offer from another exchange would be processed in accordance with Supplementary Material .02 to ISE Rule 1901.

If after the second iteration there remained unexecuted orders and quotes that lock or cross each other, the trading system would initiate a third iteration.[23] In the third iteration, the prior Boundary Prices (i.e., the prices used in the second iteration and, in the case where the second iteration did not occur, the prices used in the first iteration) would be widened by two trading increments. The trading system would then again determine the price at which the maximum number of contracts could trade at or within the widened Boundary Prices. Once the trading system determines the third execution price, orders and quotes would be processed as follows—market orders would be given priority before limit orders and quotes, then limit orders and quotes would be given priority by price. For limit orders and quotes with the same price, priority would be accorded first to Priority Customer Orders over Professional Orders and quotes. Priority Customer Orders with the same limit price would be executed in random order while Professional Orders and quotes with the same limit price would be executed pro-rata based on size. Thereafter, any unexecuted Priority Customer Orders that lock or cross the Boundary Prices would be handled by the PMM[24] and any unexecuted Professional Orders and Non-Customer Orders that lock or cross the Boundary Prices would be canceled.

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23 See Notice, supra note 3, at 73357, for an example showing the calculation of the execution price following the third iteration.

24 The PMM has the obligation under existing Exchange rules to engage in dealings for its own account when, among other things, there is a temporary disparity between the supply of and demand for a particular options contract, and to act with due diligence in handling orders. See ISE Rule 803(c).

If after the third iteration there remained unexecuted orders and quotes that lock or cross each other, the trading system would initiate the fourth and final iteration.[25] In the fourth iteration, the trading system would not calculate new Boundary Prices. The trading system would simply trade any remaining interest. Thereafter, the trading system would open the options series by disseminating the Exchange's best bid and offer derived from the remaining orders and quotes.[26]

III. Discussion and Commission Findings

Under Section 19(b)(2)(C) of the Act,[27] the Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to such organization.[28] The Commission shall disapprove a proposed rule change if it does not make such a finding.[29] Rule 700(b)(3) of the Commission's Rules of Practice state that the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder … is on the self-regulatory organization that proposed the rule change" and that a "mere assertion that the proposed rule change is consistent with those requirements … is not sufficient."[30]

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25 See Notice, supra note 3, at 73357-8, for an example showing the calculation of the execution price following the fourth and final iteration.

26 See Notice, supra note 3, for a more complete description of the proposed rule change.

27 15 U.S.C. 78s(b)(2)(C).

28 See 15 U.S.C. 78s(b)(2)(C)(i).

29 See 15 U.S.C. 78s(b)(2)(C)(ii); see also 17 CFR 201.700(b)(3).

30 See 17 CFR 201.700(b)(3). "The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. Any failure of a self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an

After careful consideration, the Commission does not find 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. In particular, the Commission does not find that the proposed rule change is consistent with Section 6(b)(5) of the Act,[31] which, among other things, requires 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. For reasons more fully discussed below, because the Commission cannot find that the Exchange's proposed iterative opening process would comply with Section 5 of the Options Linkage Plan,[32] the Commission does not find that the proposed rule change is consistent with the Act and, in particular, with Section 6(b)(5) of the Act.[33]

On July 30, 2009, pursuant to Section 11(A)(a)(3)(B) of the Act[34] and Rule 608 thereunder,[35] the Commission approved,[36] as a national market system plan, the Options Linkage

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affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization." Id.

31 15 U.S.C. 78f(b)(5).

32 See Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) ("Options Linkage Plan Approval Order").

33 The Commission notes that ISE Rule 1901 implements Section 5 of the Options Linkage Plan by incorporating as rules of ISE the provisions of Section 5. Accordingly, because the Commission cannot find the Exchange's proposal consistent with Section 5 of the Options Linkage Plan, the Commission also notes that the Exchange's proposal may not be consistent with its own rule.

34 See 15 U.S.C. 78k–1(a)(3)(B).

35 See 17 CFR 242.608.

36 See Options Linkage Plan Approval Order, supra note 32. Section 11A(a)(3)(B) of the Act authorizes the Commission ‘‘by rule or order, to authorize or require self-regulatory

Plan, which was submitted to the Commission by all seven options exchanges then operating ("Original Participant Exchanges").[37] As proposed and approved, Section 5(a) of the Options Linkage Plan requires each participant exchange to "establish, maintain and enforce written policies and procedures [as approved by the SEC] that are reasonably designed to prevent Trade-Throughs in that Participant's market in Eligible Options Classes that do not fall within an exception set forth in [Section 5(b) of the Options Linkage Plan]…"[38] Among others exceptions, the Options Linkage Plan excepts from the trade-through prohibition transactions that "traded

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organizations to act jointly with respect to matters as to which they share authority under this title in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities." The Commission's approval of a national market system plan is conditioned upon a finding that the proposed plan is "necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of, a national market system, or otherwise in furtherance of the purposes of the Act." See 17 CFR 242.608(b)(2).

[37] The seven options exchanges were Chicago Board Options Exchange, Inc.; ISE; The NASDAQ Stock Market LLC, NYSE Amex LLC (n/k/a NYSE MKT LLC); NYSE Arca Inc.; NASDAQ OMX PHLX, Inc., and NASDAQ OMX BX, Inc.

[38] See Section 5(a)(i) of the Options Linkage Plan. The Options Linkage Plan defines "Trade-Throughs" to mean a "transaction in an options series, either as principal or agent, at a price that is lower than a Protected Bid or higher than a Protected Offer." Section 2(21) of the Options Linkage Plan. "Participant" means "an Eligible Exchange whose participation in the Plan has become effective pursuant to Section 3(c) of the Plan." Section 2(15) of the Options Linkage Plan. "Eligible Options Classes" mean "all option series overlying a security (as that term is defined in Section 3(a)(10) of the Exchange Act) or group of securities, including both put options and call options, which class is available for trading on two or more Eligible Exchanges." Section 2(7) of the Options Linkage Plan. A "Protected Bid" or a "Protected Offer" means a "Bid or Offer in an options series, respectively, that: a. Is displayed by an Eligible Exchange; b. Is disseminated pursuant to the OPRA Plan; and c. Is the Best Bid or Best Offer, respectively, of an Eligible Exchange." Section 2(17) of the Options Linkage Plan. "Eligible Exchange" means "a national securities exchange registered with the SEC in accordance with Section 6(a) of the Exchange Act that: (a) As a Participant Exchange in OCC (as that term is defined in Section VII of the OCC by-laws); (b) is a party to the OPRA Plan (as that term is described in Section I of the OPRA Plan); and (c) if the national securities exchange chooses not to become a party to this Plan, is a participant in another plan approved by the Commission providing for comparable Trade-Through and Locked and Crossed Market protection." Section 2(6) of the Options Linkage Plan.

through a Protected Quotation being disseminated by an Eligible Exchange during a trading rotation" (the "trading rotation exception").[39]

According to the Exchange, with respect to the operation of the second, third, and fourth iterations of its proposed opening process, it is relying on the trading rotation exception. Specifically, if the second iteration utilizes the ISE Market Maker Quotes, to the extent the iteration results in any trade-throughs, the Exchange represents that "such trade-throughs are permissible pursuant to Section 5(b)(ii) of the Linkage Plan, the Trading Rotation exception, which permits a participant exchange to trade through a Protected Quotation disseminated by an Eligible Exchange during a trading rotation."[40] Likewise, the Exchange states that any trade-throughs during the third and fourth iterations are also permissible under the Linkage Plan because Section 5(b)(ii) "permits a participant exchange to trade through a Protected Quotation disseminated by an Eligible Exchange during a trading rotation."[41]

In the Order Instituting Proceedings, the Commission noted that it intended to further assess whether the Exchange's proposed iterative opening process complies with the Options Linkage Plan and the statutory requirements applicable to a national securities exchange under the Act.[42] The Commission invited interested persons to submit written views with respect to these concerns. As mentioned above, ISE submitted a letter in response to the Order Instituting Proceedings providing additional justification for its proposal.

In its letter, ISE argues that, unlike the trade-through exception for equities under

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[39] Section 5(b)(ii) of the Options Linkage Plan. The Options Linkage Plan defines "Protected Quotation" to mean a Protected Bid or Protected Offer. Section 2(18) of the Options Linkage Plan.

[40] See Notice, supra note 3, at 73358. See supra note 39 for the definition of Protected Quotation and supra note 38 for the definition of Eligible Exchange.

[41] See Notice, supra note 3, at 73358-9.

[42] See Order Instituting Proceedings, supra note 6, at 13662.

Regulation NMS, the Options Linkage Plan does not state that the trade-through exception for opening transactions is limited to "single price auctions."[43] Further, ISE argues that its proposal is consistent with the plain language of Section 5(b)(ii) because, although the Linkage Plan does not define the term "trading rotation," at the inception of the Plan, "that term already had a meaningful and well understood securities law definition."[44] ISE cites to Rule 600(a)(79) of Regulation NMS, which defines "trading rotation" to mean "with respect to an options class, the time period on a national securities exchange during which… [o]pening, re-opening, or closing transactions in options series in such options class are not yet completed; and… [c]ontinuous trading has not yet commenced or has not yet ended for the day in options series in such options class."[45] ISE also suggests that if its proposal is inconsistent with the Linkage Plan, then other options exchanges would have negatively commented on it.[46] ISE states that "it is highly suggestive that none of our competitors submitted any contrary interpretation of the Linkage Plan."[47]

In the ISE Letter, the Exchange also disputes the Commission's interpretation in the Options Linkage Approval Order that the trade-through exception in Section 5(b)(ii) of the Plan is for a trading rotation that is "effectively a single price auction to price the option."[48] The Exchange concedes that "this language is itself copied from identical language submitted in comment letters by ISE and other options exchanges that was intended to be a non-comprehensive description of how our markets have traditionally operated" but that "they did not

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43 See ISE Letter, supra note 7, at 3.

44 See id.

45 See id. See also 17 CFR 242.600(b)(79).

46 See ISE Letter, supra note 7, at 3.

47 See id.

48 See id. at 2.

purport to be a binding legal interpretation of how the Commission should interpret the term ‘trading rotation.’”[49]

ISE argues, moreover, that the rationale for the Linkage Plan’s trading rotation exception applies equally to single price auctions and iterative openings.[50] Namely, the rationale behind Section 5(b)(ii) was to allow options exchanges to ignore away markets during the opening when “there are no practical means to include prices on other exchanges.”[51] Accordingly, ISE claims that the basis for the Section 5(b)(ii) exception applies to the iterative opening process that it proposes to adopt.

Finally, ISE contends that it would be inappropriate for the Commission to disapprove its proposed rule change because the new process is designed to provide away market protection to Public Customer Orders.[52] According to ISE, if the Commission disapproves the proposed rule change, the Commission’s action would result in less, not more protection for investors.[53]

After thoroughly reviewing the Exchange’s assertions in the Notice and the ISE Letter, including the one comment received,[54] the Commission cannot find that the iterative opening process proposed by the Exchange is consistent with the Options Linkage Plan and therefore with the Act. Specifically, the Commission cannot find that each iteration of the amended process would qualify as an exception under Section 5(b)(ii) of the Linkage Plan. The Commission notes that when the Original Participant Exchanges proposed the Options Linkage Plan, all seven exchanges represented to the Commission that:

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49 See id.

50 See id. at 4.

51 See id.

52 See id.

53 See id.

54 See Convergex Letter, supra note 8.

> "Section 5(b)(ii) of the Plan carries forward the current Trade-Through exception in the old plan and is the options equivalent to the single price opening exception in Regulation NMS for equity securities. Options exchanges use a trading rotation to open an option for trading, or to reopen an option after a trading halt. The rotation is effectively a single price auction to price the option and there are no practical means to include prices on other exchanges in that auction."

(emphasis added).[55] Relying on this unanimous representation from all exchanges who jointly proposed the Options Linkage Plan, the Commission stated in the Options Linkage Plan Approval Order that the language used in the Section 5(b)(ii) is "similar to an exception available for NMS stocks under Regulation NMS,"[56] and "[a]s noted by the Participants, the

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55 See Letter from Michael Simon, Secretary, ISE, dated November 7, 2008, and available at http://www.sec.gov/rules/sro/nms/2008/4-546-ise-amend3.pdf. See also Letters from Peter G. Armstrong, Managing Director, Options, NYSE Arca, dated October 30, 2008, available at https://www.sec.gov/rules/sro/nms/2008/4-546-nysearca-amend3.pdf; Edward J. Joyce, President & Chief Operating Officer, Chicago Board Options Exchange, dated November 21, 2008, available at http://www.sec.gov/rules/sro/nms/2008/4-546-cboe-amend1.pdf; Jeffrey P. Burns, Managing Director, NYSE Alternext US LLC, dated November 25, 2008, available at https://www.sec.gov/rules/sro/nms/2008/4-546-nysealtr-amend1.pdf; John Katovich, Vice President, BSE, dated December 1, 2008, available at https://www.sec.gov/rules/sro/nms/2008/4-546-bse-amend1.pdf; Richard S. Rudolph, Counsel, Nasdaq OMX Phlx, dated December 3, 2008, available at https://www.sec.gov/rules/sro/nms/2008/4-546-phlx-amend1.pdf; and Jeffrey S. Davis, Vice President & Deputy General Counsel, Nasdaq Stock Market LLC, dated December 4, 2008, available at https://www.sec.gov/rules/sro/nms/2008/4-546-nasdaq-amend1.pdf.

56 See Options Linkage Plan Approval Order, supra note 32, at 39366. See also Rule 611(b)(3) of Regulation NMS under the Act (17 CFR 242.611(b)(3)) which provides that "the transaction that constituted the trade-through was a single-priced opening, reopening, or closing transaction by the trading center."

trading rotation is effectively a single price auction to price the option."[57]

The Commission acknowledges that the text of Section 5(b)(ii) of the Options Linkage Plan refers to the trade-through exception during a "trading rotation," not a "single price auction." But as even the Exchange notes in the ISE Letter, the Options Linkage Plan also does not define the term "trading rotation" nor provide additional clarification to what the trading rotation exception under Section 5(b)(ii) means.[58] In addition, as noted above, all seven exchanges that jointly proposed the Linkage Plan explicitly represented to the Commission that the trading rotation exception is "similar to an exception available for NMS stocks under Regulation NMS" and is "effectively a single price auction to price the option."[59] Accordingly, in the absence of any basis in the Options Linkage Plan itself for the Commission to determine otherwise, and in light of prior, explicit representations by the Original Participant Exchanges that the trading rotation exception applies to a "single price auction," the Commission cannot find that the Exchange's proposal is consistent with the Linkage Plan and thereby the Act.

The Commission acknowledges that the ISE's proposed iterative opening process, unlike its current process, would provide away market protection for Public Customer Orders. For the reasons discussed above, however, the Commission cannot find that the proposed rule change is consistent with the Options Linkage Plan or the Act. Further, the Commission does not agree with the Exchange that the decision of other options exchanges not to comment on the proposed rule change equates to agreement with ISE's interpretation of the trading rotation exception. It would be inappropriate for the Commission to draw any such conclusion unless explicitly stated

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57 See Options Linkage Plan Approval Order, supra note 32, at 39366.

58 Further, the Commission notes that the Linkage Plan refers to a singular "trading rotation" not, as ISE implies, multiple "trading rotations."

59 See supra note 55.

by a commenter. As ISE itself noted, "exchanges may have several reasons for not commenting on a proposed rule change."[60]

Finally, in analyzing the proposed rule change, and in making its determination to disapprove the rule change, the Commission has considered whether the action will promote efficiency, competition, and capital formation,[61] but, as discussed above, the Commission cannot find that the proposed rule change is consistent with the Options Linkage Plan or Section 6(b)(5) of the Act.

IV. Conclusion

For the foregoing reasons, the Commission does not find 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 Section 6(b)(5) of the Act.

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60 See ISE Letter, supra note 7, at 3. ISE also provides as an exhibit to its response letter data purporting to show trade-throughs from all options exchanges during the first minute of trading on April 29, 2015, and April 30, 2015. According to ISE, the data shows trade-throughs from every exchange, with the total number of contracts trading through being 9,316 on April 29, and 48,269 contracts on April 30. See Exhibit to ISE Letter, supra note 7. The Commission cannot surmise from the data whether the trade-throughs are occurring without an exception or whether the exchanges are not complying with the Linkage Plan or their own rules. The Commission notes that the Options Linkage Plan provides that if a participant exchange relies on a trade-through exception, it would be required to establish, maintain, and enforce written policies and procedures reasonably designed to assure compliance with the terms of the exception.

61 Whenever pursuant to the Act the Commission is engaged in rulemaking or the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

IT IS THEREFORE ORDERED, pursuant to section 19(b)(2) of the Act, that the proposed rule change (SR-ISE-2014-24), be, and hereby is, disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[62]

Robert W. Errett
Deputy Secretary

[62] 17 CFR 200.30-3(a)(12).