SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60551; File No. SR-CBOE-2009-040)

August 20, 2009

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval of a Proposed Rule Change to Adopt Rules Implementing the Options Order Protection and Locked/Crossed Market Plan

I. Introduction

On June 24, 2009, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") 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 and adopt rules to implement the Options Order Protection and Locked/Crossed Market Plan. The proposed rule change was published for comment in the Federal Register on July 8, 2009.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend and adopt new CBOE rules to implement the Options Order Protection and Locked/Crossed Market Plan ("Plan").[4] Specifically, the Exchange

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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. 60187 (June 29, 2009), 74 FR 32664 ("Notice").

4 The Plan is a national market system plan proposed by the seven existing options exchanges and approved by the Commission. See Securities Exchange Act Release No. 59647 (March 30, 2009), 74 FR 15010 (April 2, 2009) (File No. 4-546) ("Plan Notice") and 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4-546) ("Plan Approval"). The seven options exchanges are: International Securities Exchange LLC ("ISE"); The NASDAQ Stock Market LLC ("NASDAQ"); NASDAQ OMX BX, Inc. ("BOX"); NASDAQ OMX PHLX, Inc. ("Phlx"); NYSE Amex LLC ("NYSE Amex"); NYSE Arca, Inc. ("NYSE Arca"); and CBOE (each exchange individually a "Participant" and, together, the "Participating Options Exchanges").

proposes to completely replace its current Intermarket Linkage Rules (Rules 6.80 - 6.85) with new rules implementing the Plan, amend other Exchange rules to reflect the Plan, and delete rules rendered unnecessary by the Plan.

The Old Plan

Each of the Participating Options Exchanges are signatories to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Old Plan").[5] In pertinent part, the Old Plan generally requires its participants to avoid trading at a price inferior to the national best bid or offer ("trade-through"), although it provides for a number of exceptions to trade-through liability.[6] The Participating Options Exchanges comply with this requirement of the Old Plan by utilizing a stand alone system ("Linkage Hub") to send and receive specific order types,[7] namely Principal Acting as Agent Orders ("P/A Orders"), Principal Orders, and Satisfaction Orders.[8] The Old Plan also provided that dissemination of "locked" or "crossed" markets should be avoided, and remedial actions that should be taken to unlock or uncross such market.[9] Each of the Participating Options Exchanges, including the Exchange, has submitted an amendment to

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5 On July 28, 2000, the Commission approved the Old Plan as a national market system plan for the purpose of creating and operating an intermarket options market linkage proposed by the American Stock Exchange LLC (n/k/a NYSE Amex), CBOE, and ISE. See Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000). Subsequently, Philadelphia Stock Exchange, Inc. (n/k/a Phlx), Pacific Exchange, Inc. (n/k/a NYSE Arca), Boston Stock Exchange, Inc. (n/k/a BOX), and Nasdaq joined the Linkage Plan. See Securities Exchange Act Release Nos. 43573 (November 16, 2000), 65 FR 70851 (November 28, 2000); 43574 (November 16, 2000), 65 FR 70850 (November 28, 2000); 49198 (February 5, 2004), 69 FR 7029 (February 12, 2004); and 57545 (March 21, 2008), 73 FR 16394 (March 27, 2008).

6 Section 8(c) of the Old Plan.

7 The Linkage Hub is a centralized data communications network that electronically links the Participating Options Exchanges to one another. The Options Clearing Corporation ("OCC") operates the Linkage Hub.

8 Section 2(16) of the Old Plan.

9 Section 7(a)(i)(C) of the Old Plan.

the Old Plan to withdraw from such Plan.[10] The withdrawals will be effective upon approval by the Commission of such amendments pursuant to Rule 608 of Regulation NMS under the Act ("Regulation NMS").[11]

The Plan

The Plan does not require a central linkage mechanism akin to the Old Plan's Linkage Hub. Instead, the Plan includes the framework for routing orders via private linkages that exist for NMS stocks under Regulation NMS.[12] The Plan requires the Participating Options Exchanges to adopt rules "reasonably designed to prevent Trade-Throughs."[13] Participating Options Exchanges are also required to conduct surveillance of their respective markets on a regular basis to ascertain the effectiveness of the policies and procedures to prevent Trade-Throughs and to take prompt action to remedy deficiencies in such policies and procedures.[14] As further described below, the Plan incorporates a number of exceptions to trade-through

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10 See Securities Exchange Act Release No. 60360 (July 21, 2009) 74 FR 37265 (July 28, 2009) (File No. 4-429).

11 17 CFR 242.608.

12 See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (File No. S7-10-04); 17 CFR 242.600 et seq. For discussions of the similarities between the provisions of Regulation NMS and the provisions in the Plan, see the Plan Notice and Plan Approval, supra note 4.

13 Under the Plan, a "Trade-Through" is generally defined as a transaction in an option series, either as principal or agent, at a price that is lower than a Protected Bid or higher than a Protected Offer." See Section 2(21) of the Plan. A "Protected Bid" and "Protected Offer" generally means a bid or offer in an option series, respectively, that is displayed by a Participant, is disseminated pursuant to the Options Price Reporting Authority ("OPRA") Plan, and is the Best Bid or Best Offer. See Section 2(17) of the Plan. A "Best Bid" or "Best Offer" means the highest bid price and the lowest offer price. Section (2)(1) of the Plan. "Protected Bid" and "Protected Offer," together are referred to herein as "Protected Quotation." See Section 2(18) of the Plan.

14 Section 5(a)(ii) of the Plan.

liability.[15] Some of these exceptions are carried over from the Old Plan, including exceptions for trading rotations, non-firm quotes, and complex trades.[16] Others are substantially similar to exceptions available for NMS stocks under Regulation NMS, such as exceptions for systems issues, crossed markets, quote flickering, customer stopped orders, benchmark trades and, notably, intermarket sweep orders ("ISOs").[17] In addition, the Plan contains a new exception for stopped orders and price improvement.[18]

The Plan also requires each Participant to establish, maintain, and enforce written rules that: require its members reasonably to avoid displaying locked and crossed markets; assure the reconciliation of locked and crossed markets; and prohibit its members from engaging in a pattern or practice of displaying locked and crossed markets; subject to exceptions as may be contained in the rules of the Participant, as approved by the Commission.[19]

The Exchange's Proposal

To implement the Plan, the Exchange proposes to replace its current rules relating to the Old Plan with new rules relating to the Plan, and makes amendments to other rules as necessary to conform to the requirements of the Plan.[20] As such, the Exchange proposes to adopt all applicable definitions from the Plan into the Exchange's rules.[21]

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15 Section 5(b) of the Plan.

16 Subparagraphs (ii), (vii), and (viii), respectively, of Section 5(b) of the Plan.

17 Subparagraphs (i), (iii), (vi), (ix), (xi), and (iv)-(v), respectively, of Section 5(b) of the Plan.

18 Subparagraph (x) of Section 5(b) of the Plan.

19 Section 6 of the Plan. The Plan also contains provisions relating to the operation of the Plan including, for example, provisions relating to the entry of new parties to the Plan; withdrawal from the Plan; and amendments to the Plan.

20 A more detailed description of the Exchange's proposed rule change may be found in the Notice, supra, note 3.

21 Proposed CBOE Rule 6.80.

In addition, the Exchange proposes to prohibit its members from effecting Trade-Throughs, unless an exception applies.[22] Consistent with the Plan, the Exchange also proposes exceptions to the prohibition on trade throughs relating to: system issues; trading rotations; crossed markets; intermarket sweep orders; quote flickering; non-firm quotes; complex trades; customer stopped orders; stopped orders and price improvement; and benchmark trades.[23]

The Exchange also proposes a rule to address locked and crossed markets, as required by the Plan.[24] Specifically, the Exchange proposes that, except for quotations that fall within a stated exception, members shall reasonably avoid displaying, and shall not engage in a pattern or practice of displaying, any quotations that lock or cross a Protected Quote.[25]

The Exchange proposes four exceptions to the prohibition against locked and crossed markets: when the Exchange is experiencing a failure, material delay, or malfunction of its systems or equipment; when the locking or crossing quotation was displayed at a time where there is a crossed market; when an Exchange member simultaneously routes an ISO to execute against the full displayed size of any locked or crossed Protected Bid or Protected Offer; and, when the locking quotation is otherwise permissible pursuant to Rules CBOE 6.45A(d) and 6.45B(d).

The Exchange also proposes rules that would permit it to continue to send and accept P/A Orders and Principal Orders from Participating Options Exchanges.[26] The Exchange noted that,

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22 Proposed CBOE Rule 6.81(a).

23 Proposed CBOE Rule 6.81(b)(1)-(10). In addition, the Exchange proposes to add ISOs as a new type of order under proposed CBOE Rule 6.53(p).

24 A “locked market” is defined as a quoted market in which a Protected Bid is equal to a Protected Offer. Proposed CBOE Rule 6.80(9). A “crossed market” is defined as a quoted market in which a Protected Bid is higher than a Protected Offer. Proposed CBOE Rule 6.80(5).

25 Proposed CBOE Rule 6.82(a).

26 Proposed CBOE Temporary Rule 6.83.

during the transition to operation under the Plan, it will continue to receive and execute P/A and Principal Orders if the Exchange is the NBBO. Thus, the Exchange has proposed to retain certain rules governing the receipt of P/A Orders and Principal Orders until such time that all Participating Options Exchanges are operating pursuant to the Plan. Further, the Exchange intends to access other Participants using P/A Orders and Principal Orders on a temporary basis and proposes to retain rules governing the transmission of P/A Orders and Principal Orders.[27]

The Exchange has also proposed to amend to its rules relating to its Hybrid Agency Liaison System and Price Check Parameters.[28] First, the Exchange proposes to adopt rules governing a new Hybrid Agency Liaison System ("HAL2"). Under these proposed rules, the Exchange would determine the eligible order size, eligible order type, eligible order origin code (i.e., public customer orders, non-Market Maker broker-dealer orders, and Market Maker broker-dealer orders), and classes for HAL2. When the Exchange receives a qualifying order that is marketable against the NBBO and/or the Exchange's BBO,[29] HAL2 would expose the order at the NBBO price to allow CBOE Market-Makers appointed in that class as well as all members acting as agent for orders at the top of the Exchange's book in the relevant series to step-up to the NBBO price.[30] The duration of the exposure period would not exceed one second. The first responder to indicate an interest to trade at the NBBO price would trade against the exposed order up to the size of the response (the exposure period would continue for any unexecuted

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27 The Exchange has stated that it intends to request exemptive relief from the Plan for a temporary period to accommodate the use of P/A Orders and P Orders until the Exchange's roll-out of its ISO functionality is complete.

28 See CBOE Rules 6.14A and 6.13.

29 Unless the Exchange's quotation contains resting orders and does not contain sufficient Market-Maker quotation interest to satisfy the entire order.

30 The qualifying order may also be exposed to other members, if permitted by the Exchange.

balance). Responders would also be allowed to respond at prices worse than the NBBO but equal to or better than the Exchange's BBO. At the end of the response period (if no responders have matched the NBBO price or if there is a remainder on the exposed order) the HAL2 system would ascertain the best available price(s) between all pending responses and the best disseminated prices on other exchanges, and then execute the exposed order at the best price(s) by trading it against exposed responses first and transmitting ISOs to other exchanges second. All resulting executions would be in compliance with the prohibition against trade-throughs.

If any portion of an order that is routed away returns unfilled, the Exchange would deem it a "new" order for processing purposes and trade it against the best bid or offer on the Exchange unless another exchange is quoting a better price in which case the Exchange would attempt to access such better price with a new ISO order. Any executions at the Exchange's best bid or offer would be handled in two batches: first against all interest resting at that price at the time the exposed order was received; and second against any interest that joined at that price after the exposure process commenced (in both cases the matching algorithm in effect for that class will be used). Order senders could bypass HAL2 processing by submitting Immediate or Cancel Orders.

Paragraph (d) of proposed Rule 6.14A lists the circumstances in which an exposure period would terminate early. Those are: (1) if the Exchange receives an unrelated order on the same side of the market as the exposed order that is priced equal to or better than the exposed order; (2) if, in the case of an exposed order that is marketable against the Exchange's BBO, Market-Maker interest at the BBO decrements to a size that would be equal to or smaller than the size of the exposed order; and (3) if an unrelated order or quote on the opposite side of the market from the exposed order is received that could trade against the exposed order at the prevailing NBBO or better in which case the orders would trade at the NBBO unless the unrelated order is a customer order, in which case the orders would trade at the midpoint of the unrelated order's limit price and the NBBO.[31] Lastly, Interpretation and Policy .01 to CBOE Rule 6.14A provides that the Exchange would limit redistribution of exposed order messages to third parties.

The Exchange has also proposed a new price check parameter in connection with the new HAL2 process.[32] For classes in which HAL2 is activated, the Exchange would not automatically execute orders that are marketable if the NBBO width is not within an acceptable price range established by the Exchange ("APR"), or if an execution would follow an initial partial execution and occur at a price that is not within an acceptable tick distance from the initial execution as established by the Exchange ("ATD"). If an execution is suspended because of the APR, the order would route to PAR for handling. If an execution is suspended because of the ATD, the order would be exposed pursuant to the HAL2 process using the ATD as the exposure price. If a quantity remains after the HAL2 process, the balance would route to PAR.[33] Users could bypass this processing by submitting orders with an immediate or cancel designation.

The Exchange has also proposed to adopt new CBOE Rule 6.14B which would govern the Exchange's process for routing sweep orders to other markets. The Exchange has represented that it intends to contract with one or more routing brokers that are not affiliated with

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31 E.g., the NBBO/exposure price for a buy order is 1.15, during the exposure period a customer limit order to sell at 1.13 is received, the orders would be matched to the greatest extent possible at 1.14 providing price improvement to both orders. If the unrelated order was smaller than the exposed order, then the exposure period would continue for the unexecuted balance of the exposed order.

32 Proposed CBOE Rule 6.13(b)(vi).

33 In this regard, the HAL2 processing for these orders would be different that normal HAL2 processing.

the Exchange to route sweep orders to other exchanges. Any such contract would restrict the use of any confidential and proprietary information that the routing broker receives to legitimate business purposes necessary for routing orders at the direction of the Exchange. Routing services would be available to members only and are optional. Members that do not want orders routed could use the Immediate or Cancel designation to avoid routing.

The proposed rule also provides that: (1) the Exchange shall establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Exchange and the routing broker, and any other entity, including any affiliate of the routing broker, and, if the routing broker or any of its affiliates engages in any other business activities other than providing routing services to the Exchange, between the segment of the routing broker or affiliate that provides the other business activities and the segment of the routing broker that provides the routing services; (2) the Exchange may not use a routing broker for which the Exchange or any affiliate of the Exchange is the designated examining authority; (3) the Exchange will provide its routing services in compliance with the provisions of the Act and the rules thereunder, including, but not limited to, the requirements in Section 6(b)(4) and (5) of the Act that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; (4) the Exchange will determine the logic that provides when, how, and where orders are routed away to other exchanges; (5) the routing broker cannot change the terms of an order or the routing instructions, nor does the routing broker have any discretion about where to route an order; and (6) any bid or offer entered on the Exchange routed to another exchange via a routing broker that results in an execution shall be binding on the member that entered such bid/offer.

The Exchange has also proposed to adopt several new order types that would be added to CBOE Rule 6.53 in addition to the ISO. The first is the AIM sweep order ("AIM ISO"). The AIM ISO would require the transmission of two orders for crossing pursuant to CBOE Rule 6.74A without regard for better priced Protected Bids or Protected Offers because the member transmitting the AIM ISO to the Exchange has, simultaneously with the routing of the AIM ISO, routed one or more ISOs, as necessary, to execute against the full displayed size of any Protected Bid/Offer that is superior to the starting AIM auction price and has swept all interest in the Exchange's book priced better than the proposed auction starting price (with any execution(s) resulting from such sweeps shall accrue to the AIM Agency Order). The second proposed order type is the Sweep and AIM Order. A sweep and AIM order would require the transmission of two orders for crossing pursuant to CBOE Rule 6.74A with an auction starting price that does not need to be within the Exchange's best bid and offer and where the Exchange will "sweep" all Protected Bids and Protected Offers by routing one or more ISOs, as necessary, to execute against the full displayed size of any Protected Bid or Protected Offer that is superior to the starting AIM auction price, as well as sweep all interest in the Exchange's book priced better than the proposed auction starting price concurrent with the commencement of the AIM auction with any execution(s) resulting from such sweeps accruing to the AIM Agency Order. The final proposed order type is the CBOE-Only Order. A CBOE-only order would be an order to buy or sell that is to be executed in whole or in part on the Exchange without routing the order to another market center. A CBOE-only order would be cancelled if routing would be required under the Exchange's rules.

Finally, the Exchange proposes to amend certain other rules to reflect the Plan and changes to other Exchange rules as described above. In particular, the Exchange proposes to add a reference to HAL2 to CBOE Rule 6.2B, eliminate the "Removal of Unreliable Quotes" provision of CBOE Rule 6.13, eliminate references in the Exchange's crossing mechanisms to the block trade exemption of the Old Plan,[34] and delete CBOE Rule 8.52 relating to the now defunct Pilot Program for Away Market Maker Access.

The Exchange also represented that the proposed rules would not become operative until the Exchange has withdrawn from the Old Plan.

II. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[35] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act[36] which requires, among other things, that the rules of a national securities exchange be 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. The Commission also finds that the proposal is consistent with Rule 608(c) of Regulation NMS under the Act, which requires that each exchange comply with the terms of any effective national market system plan

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34 Exchange Rules 6.74A and 6.74B.

35 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).

36 15 U.S.C. 78f(b)(5).

of which it is a participant.[37] Finally, the Commission finds that the proposed rule change is consistent with the requirements of the Plan.[38]

Proposed CBOE Rule 6.80 would define applicable terms in a manner that are substantively identical to the defined terms of the Plan. As such, the Commission finds that proposed CBOE Rule 6.80 is consistent with the Act and the Plan.

Proposed CBOE Rule 6.81(a) would prohibit members from effecting Trade-Throughs unless an exception applies. Proposed CBOE Rule 6.81(b) would provide for ten exceptions to the general Trade-Through prohibition, relating to systems issues, trading rotations, crossed markets, ISOs, quote flickering, non-firm quotes, complex trades, customer stopped orders, stopped orders and price improvement, and benchmark trades.[39] Aside from the proposed exception relating to systems issues, each proposed exception would be substantively identical to the parallel exception under Section 5(b) of the Plan.

The systems issues exception under proposed CBOE Rule 6.81(b)(1) would implement the parallel exception available under Section 5(b)(i) of the Plan and would permit the Exchange to bypass the Protected Quotation of another Participant if such other Participant repeatedly fails to respond within one second to incoming orders attempting to access its Protected Quotations. The Exchange's rule would require the Exchange to notify such non-responding Participant immediately after (or at the same time as) electing self-help, and assess whether the cause of the problem lies with the Exchange's own systems and, if so, take immediate steps to resolve the problem. Finally, the Exchange would be required to promptly document its reasons supporting

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37 17 CFR 242.608(c). Section 1 of the Plan provides in pertinent part that, "The Participants will submit to the [Commission] for approval their respective rules that will implement the framework of the Plan."

38 See supra note 5.

39 Proposed CBOE Rule 6.81(b)(1)-(10).

any such determination to bypass a Protected Quotation. The Commission believes that this exception should provide the Exchange with the necessary flexibility for dealing with problems that occur on an away market during the trading day. At the same time, the exception's requirements to immediately notify such away market of its determination and also assess its own system should help prevent the use of this exception when there in fact is a problem with the Exchange's own systems, rather than those of an away market.

The Commission notes that included among the exception in proposed CBOE Rule 1901(b) would be an exception for certain transactions involving ISOs.[40] An order identified as an ISO would be immediately executable by the Exchange (or any other Plan Participant that received such an order) based on the premise that the market participant sending the ISO has already attempted to access all better-priced Protected Quotations up to their displayed size. The Commission believes that this exception should help ensure more efficient and faster executions in the options markets.

The Commission notes that, in addition to these rules regarding Trade-Throughs, the Plan requires that each Participant establish, maintain and enforce written policies and procedures that are reasonably designed to prevent Trade-Throughs in that Participant's market that do not fall within an applicable exception and, if relying on such exception, that are reasonably designed to assure compliance with the terms of the exception. In addition, the Commission notes that the Plan requires each Participant to conduct surveillance of its market on a regular basis to ascertain the effectiveness of such policies and procedures and to take prompt action to remedy any deficiencies in such policies and procedures.

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[40] Proposed CBOE Rule 6.81(b)(4).

Accordingly, the Commission finds that proposed CBOE Rule 6.81 is consistent with Section 5 of the Plan and Section 6(b)(5) of the Act[41] which requires, among other things, that the rules of a national securities exchange be 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.

Proposed CBOE Rule 6.82(a) would require Exchange members to reasonably avoid displaying, and not engage in a pattern or practice of displaying, any quotation that lock or cross a Protected Quotation, subject to certain exceptions delineated in proposed CBOE Rule 6.82(b). The Commission recognizes that locked and crossed markets may occur accidentally and cannot always be avoided. However, the Commission believes that giving priority to the first-displayed Protected Bid or Protected Offer, particularly when it includes a public customer's order, will encourage price discovery and contribute to fair and orderly markets. Therefore, the Commission believes that the proposed rule, which corresponds to the Plan's language, to require members to reasonably avoid displaying, and not engaging in a pattern or practice of, locks and crosses is appropriate.

Proposed CBOE Rule 6.82(b) would permit four exceptions to the Exchange's general rule relating to locked and crossed markets.[42] The first three would be similar to analogous trade-through exceptions under proposed CBOE Rule 6.81(b), and relate to when the Exchange is experiencing systems issues, when there is exists a crossed market, and when a member simultaneously routes ISOs against the full displayed size of any locked or crossed Protected Bid

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41 15 U.S.C. 78f(b)(5).

42 Section 6 of the Plan permits exceptions to the Plan's locked and crossed market rules as may be contained in the rules of a Participant approved by the Commission.

or Protected Offer. The fourth exception would permit a locking quotation if it is otherwise permissible pursuant to CBOE Rules 6.45A(d) and 6.45B(d).

The Commission believes that the Exchange's proposed rules relating to locked and crossed markets are consistent with the Plan and the Act and should help ensure that the display of locked or crossed markets will be limited and that any such display will be promptly reconciled. The Commission also believes that each of the proposed exceptions to locked and crossed markets relate to circumstances when it is appropriate to permit a limited, narrow exception to the general locked and crossed market rule.

Therefore, the Commission finds that Exchange's rule regarding locked and crossed markets appropriately implements Section 6 of the Plan, and is consistent with Section 6(b)(5) of the Act[43] which requires, among other things, that the rules of a national securities exchange be 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.

The Commission also finds that proposed CBOE Temporary Rule 6.83, which facilitates the participation of certain Participating Options Exchanges, including CBOE, who may require the use of P/A Orders and Principal Orders after implementation of the Plan, and would permit CBOE to transmit P/A Orders and Principal Orders, is consistent with the Act. Although the Commission has already approved the Plan,[44] the Commission also recognizes that the Exchange and other Plan Participants may require a temporary transition period during which they may

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[43] 15 U.S.C. 78f(b)(5).

[44] See Plan Approval, supra, note 5.

want to utilize these order types that exist currently under the Old Plan.[45] The Exchange and each of the other Participating Options Exchanges have proposed substantially identical temporary provisions to accommodate this.[46] Further, because the Exchange intends also to send P/A Orders and Principal Order for a temporary period, the Exchange has proposed temporary rules to permit this.[47] The Commission finds that the proposed rule relating to the Exchange's receipt and handling, and transmission of P/A Orders and Principal Orders, and imposing certain obligations on the Exchange with respect to such orders that are similar to those that exist under the Old Plan, is appropriate and consistent with Section 6(b)(5) of the Act[48] which requires, among other things, that the rules of a national securities exchange be 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.

The Commission further finds that CBOE's proposed rule governing routing of sweep orders is consistent with the Act. As described above, the Exchange would enter into agreements that govern the routing of orders to away markets. Further, the routing of sweep orders would be optional;[49] and the Exchange would be responsible for routing decisions and

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45 The Commission notes that any Participating Options Exchange that wishes to utilize such order types in a manner that would result in a Trade-Through would need to separately request an exemption from the Plan for such use. See, supra, note 27.

46 The Commission notes that the rules contained in CBOE Temporary Rule 6.83 are not required by the Plan, but rather are rules proposed by the Exchange in order to facilitate the participation in the Plan of certain exchanges, including CBOE, during an initial transition period.

47 See also, supra, note 27.

48 15 U.S.C. 78f(b)(5).

49 Members may chose to avoid routing by using the Immediate or Cancel designation. See Notice.

would retain control of the routing logic. Neither the Exchange, nor any affiliate of the Exchange, may be the designated examining authority for the routing service provider.[50] The Commission also notes that the rule contemplates procedures and internal controls designed to protect confidential and proprietary information, which should help ensure that the routing service provider does not misuse routing information obtained from the Exchange. In addition, the Exchange would provide its routing services in compliance with the Act and the rules thereunder, including but not limited to, the requirements in Sections 6(b)(4) and (5) of the Act[51] that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members and other persons using the Exchange's facilities, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[52]

Proposed CBOE Rule 6.53 proposes four new order types: ISO, AIM ISO, Sweep and AIM Order, and CBOE-only Order. The Commission believes that the design of each of these order types should ensure that Protected Bids and Protected Orders are not traded-through in violation of the Plan while also providing market participants with flexibility in executing transactions that meet the specific requirements of the order type. Therefore, the Commission finds that Exchange's rule permitting these new order types is consistent with Section 6(b)(5) of the Act[53] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect

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[50] See proposed CBOE Rule 6.14B(c).

[51] 15 U.S.C. 78f(b)(4) and (5).

[52] See proposed CBOE Rule 6.14B(c).

[53] 15 U.S.C. 78f(b)(5).

the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange is also proposing to introduce an updated HAL process (i.e., HAL2) and revise its rule governing automatic executions.[54] The Commission finds that such changes are appropriate and consistent with the Act and the Plan.

Finally, the Commission finds that CBOE's proposed amendments to certain other CBOE rules to reflect the provisions of the Plan, and to delete provisions of CBOE's rules rendered unnecessary due to the Plan, are appropriate and consistent with the Act and the Plan.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[55] that the proposed rule change (SR-CBOE-2009-040), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[56]

Florence E. Harmon
Deputy Secretary

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[54] See notes 28-32, infra, and accompanying text.

[55] 15 U.S.C. 78s(b)(2).

[56] 17 CFR 200.30-3(a)(12).