

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-51717; File No. SR-CBOE-2004-59)

May 19, 2005

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving Proposed Rule Change and Amendment Nos. 1, 2, and 3 and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 4 and 5 Relating to Back-up Trading Arrangements

I. Introduction

On August 27, 2004, 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”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to establish rules covering emergency procedures for CBOE members and back-up trading arrangements in the event that the Exchange’s main facility is unavailable. On October 21, 2004, the Exchange amended its proposal.<sup>3</sup> On October 26, 2004, the Exchange further amended its proposal.<sup>4</sup> On March 23, 2005, the Exchange submitted a third amendment.<sup>5</sup>

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See letter from Jaime Galvan, Attorney, CBOE, to Nancy Sanow, Assistant Director, Division of Market Regulation (“Division”), Commission, dated October 20, 2004 (“Amendment No. 1”). In Amendment No. 1, the Exchange modified the text of proposed CBOE Rule 6.16 and made certain other clarifying changes to the original submission. Amendment No. 1 replaced CBOE’s original filing in its entirety.

<sup>4</sup> See letter from Jaime Galvan, Attorney, CBOE, to Brian Trackman, Special Counsel, Division, Commission, dated October 25, 2004 (“Amendment No. 2”). In Amendment No. 2, the Exchange corrected typographical errors in the proposed rule text.

<sup>5</sup> See Amendment No. 3, dated March 23, 2005 (“Amendment No. 3”) In Amendment No. 3, the Exchange modified portions of the proposed rule text and corresponding sections of the Form 19b-4 describing the rule proposal. Amendment No. 3 replaces CBOE’s previously amended filing in its entirety. CBOE also submitted with its Amendment No. 3 a copy of the back-up trading agreement it has negotiated with the Philadelphia Stock Exchange (“Phlx”) as Exhibit 3.A to its Form 19b-4, together with a copy of a first amendment to the agreement as Exhibit 3.B. These exhibits are available for viewing on

The proposed rule change, as amended, was published for notice and comment in the Federal Register on April 14, 2005.<sup>6</sup> The Commission received no comment letters regarding the proposed rule change. On May 11, 2005, CBOE submitted a clarifying amendment.<sup>7</sup> On May 16, 2005, CBOE submitted an additional clarifying amendment.<sup>8</sup> This order approves the proposed rule change, as modified by Amendment Nos. 1, 2 and 3. Simultaneously, the Commission provides notice of filing of Amendment Nos. 4 and 5 and grants accelerated approval of Amendment Nos. 4 and 5.

## II. Description of Proposal

CBOE proposes to adopt new rules that will facilitate the CBOE entering into arrangements with one or more other exchanges that would provide back-up trading facilities for CBOE listed options at another exchange if CBOE's facility becomes disabled and trading is prevented for an extended period of time, and similarly provide trading facilities at CBOE for another exchange to trade its listed options if that exchange's facility becomes disabled. The Exchange also proposes an amendment to its Fee Schedule relative to the fees that shall apply to transactions in the options of a Disabled Exchange effected on a Back-up Exchange.

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the Commission's Web site, [www.sec.gov/rules/sro.shtml](http://www.sec.gov/rules/sro.shtml), and at the Exchange and the Commission.

<sup>6</sup> See Securities Exchange Act Release No. 51510 (April 8, 2005), 70 FR 19812 ("Notice").

<sup>7</sup> See Amendment No. 4, dated May 11, 2005 ("Amendment No. 4"). In Amendment No. 4, the Exchange made one minor correction to the rule text in Section (d)(2) of proposed CBOE Rule 6.16 to state that any arbitration relating to trading of CBOE exclusively listed options on the facility of CBOE at the Back-up Exchange will be conducted in accordance with the rules of the Back-up Exchange, unless otherwise agreed by the parties.

<sup>8</sup> See Amendment No. 5, dated May 16, 2005 ("Amendment No. 5"). In Amendment No. 5, the Exchange changed the number of the footnote it proposes to add to its Fee Schedule from 17 to 16.

Additionally, the Exchange proposes to adopt a new Rule 6.17, which addresses Exchange procedures under emergency conditions and is similar to rules that have been adopted by other exchanges. Finally, the rule proposal will replace and supersede current CBOE Rule 3.22, which the Exchange adopted following the events of September 11, 2001.

A. Rule 6.16 – Back-up Trading Arrangements

a. Background

As set forth in the Notice, the Exchange proposes to adopt new CBOE Rule 6.16, Back-Up Trading Arrangements, which will facilitate the CBOE entering into arrangements with one or more other exchanges (each a “Back-up Exchange”) to permit CBOE and its members to use a portion of a Back-up Exchange's facilities to conduct the trading of CBOE exclusively listed options<sup>9</sup> in the event of a Disabling Event, and similarly will permit the CBOE to provide trading facilities at CBOE for another exchange's exclusively listed options if that exchange (a “Disabled Exchange”) is prevented from trading due to a Disabling Event.

Proposed Rule 6.16 would also permit the CBOE to enter into arrangements with a Back-up Exchange to provide for the listing and trading of CBOE singly listed options<sup>10</sup> by the Back-up Exchange if CBOE’s facility becomes disabled, and conversely provide for the listing and trading by CBOE of the singly listed options of a Disabled Exchange.<sup>11</sup>

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<sup>9</sup> For purposes of proposed CBOE Rule 6.16, the term “exclusively listed option” means an option that is listed exclusively by an exchange (because the exchange has an exclusive license to use, or has proprietary rights in, the interest underlying the option).

<sup>10</sup> For purposes of proposed Rule 6.16, the term “singly listed option” means an option that is not an “exclusively listed option” but that is listed by an exchange and not by any other national securities exchange.

<sup>11</sup> In its proposal, CBOE stated that the back-up trading arrangements contemplated by proposed Rule 6.16 represent the Exchange’s immediate plan to ensure that CBOE’s exclusively listed and singly listed options will have a trading venue if a catastrophe renders its primary facility inaccessible or inoperable. The Exchange noted that, in

b. If CBOE Is the Disabled Exchange

Section (a) of proposed Rule 6.16 describes the back-up trading arrangements that would apply if CBOE were the Disabled Exchange. Under proposed paragraph (a)(1)(B), the facility of the Back-up Exchange used by CBOE to trade some or all of CBOE's exclusively listed options will be deemed to be a facility of CBOE, and such option classes shall trade as listings of CBOE.

Since the trading of CBOE exclusively listed options will be conducted using the systems of the Back-up Exchange, proposed paragraph (a)(1)(C) provides that the trading of CBOE exclusively listed options on CBOE's facility at the Back-up Exchange shall be conducted in accordance with the rules of the Back-up Exchange, except that (i) such trading shall be subject to CBOE rules with respect to doing business with the public, margin requirements, net capital requirements, listing requirements and position limits, (ii) CBOE members that are trading on CBOE's facility at the Back-up Exchange (not including members of the Back-up Exchange who become temporary members of CBOE pursuant to paragraph (a)(1)(F)) will be subject to CBOE rules governing or applying to the maintenance of a person's or a firm's status as a member of CBOE, and (iii) CBOE Rule 8.87.01 may be utilized to establish a lower DPM participation rate applicable to trading on CBOE's facility on the Back-up Exchange than the rate that is applicable under the rules of the Back-up Exchange if agreed to by CBOE and the Back-up Exchange. In addition, CBOE and the Back-up Exchange may agree that other CBOE rules will apply to such

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September 2003, it had entered into separate Memoranda of Understanding with the American Stock Exchange LLC ("Amex"), Pacific Exchange ("PCX") and Philadelphia Stock Exchange ("Phlx") to memorialize their mutual understanding to work together to develop bi-lateral back-up trading arrangements in the event that trading is prevented at one of the exchanges. Since then, the Exchange has been working with each of these exchanges to put in place written agreements outlining essential commercial terms with respect to the arrangements as well as operational plans that describe the operational and logistical aspects of the arrangements. At present, CBOE and Phlx have signed an

trading. The Back-up Exchange rules that govern trading on CBOE's facility at the Back-up Exchange shall be deemed to be CBOE rules for purposes of such trading.

Proposed paragraph (a)(1)(D) reflects that the Back-up Exchange has agreed to perform the related regulatory functions with respect to trading of CBOE exclusively listed options on CBOE's facility at the Back-up Exchange, in each case except as CBOE and the Back-up Exchange may specifically agree otherwise. The Back-up Exchange and CBOE will coordinate with each other regarding surveillance and enforcement respecting such trading. CBOE shall retain the ultimate legal responsibility for the performance of its self-regulatory obligations with respect to CBOE's facility at the Back-up Exchange.

Under proposed paragraph (a)(1)(E), CBOE shall have the right to designate its members that will be authorized to trade CBOE exclusively listed options on CBOE's facility at the Back-up Exchange and, if applicable, its member(s) that will be a Lead Market-Maker ("LMM") or Designated Primary Market-Maker ("DPM") in those options. If the Back-up Exchange is unable to accommodate all CBOE members that desire to trade on CBOE's facility at the Back-up Exchange, CBOE may determine which members shall be eligible to trade at that facility by considering factors such as whether the member is a DPM or LMM in the applicable product(s), the number of contracts traded by the member in the applicable product(s), market performance, and other factors relating to a member's contribution to the market in the applicable product(s).

Under proposed paragraph (a)(1)(F), members of the Back-up Exchange shall not be authorized to trade in any CBOE exclusively listed options, except that (i) CBOE may deputize willing floor brokers of the Back-up Exchange as temporary CBOE members to permit them to

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agreement relative to back-up trading arrangements and are in the process of completing the operational plan for those arrangements. See supra note 5.

execute orders as brokers in CBOE exclusively listed options traded on CBOE's facility at the Back-up Exchange,<sup>12</sup> and (ii) the Back-up Exchange has agreed that it will, at the instruction of CBOE, select members of the Back-up Exchange that are willing to be deputized by CBOE as temporary CBOE members authorized to trade CBOE exclusively listed options on CBOE's facility at the Back-up Exchange for such period of time following a Disabling Event as CBOE determines to be appropriate, and CBOE may deputize such members of the Back-up Exchange as temporary CBOE members for that purpose. The second of the foregoing exceptions would permit members of the Back-up Exchange to trade CBOE exclusively listed options on the CBOE facility on the Back-up Exchange if, for example, circumstances surrounding a Disabling Event result in CBOE members being delayed in arriving at the Back-up Exchange in time for prompt resumption of trading.

Section (a)(2) of the proposed rule provides for the continued trading of CBOE singly listed options at a Back-up Exchange in the event of a Disabling Event at CBOE. Proposed paragraph (a)(2)(B) provides that CBOE may enter into arrangements with a Back-up Exchange under which the Back-up Exchange will agree, in the event of a Disabling Event, to list for trading option classes that are then singly listed only by CBOE. Such option classes would trade on the Back-up Exchange as listings of the Back-up Exchange and in accordance with the rules of the Back-up Exchange. Under proposed paragraph (a)(2)(C), any such options class listed by the Back-up Exchange that does not satisfy the standard listing and maintenance criteria of the Back-up Exchange will be subject, upon listing by the Back-up Exchange, to delisting (and, thus,

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<sup>12</sup> The exchanges that acted as Back-up Exchanges in the emergency situations noted above also deputized its floor brokers in this manner. See infra note 16.

restrictions on opening new series, and engaging in opening transactions in those series with open interest, as may be provided in the rules of the Back-up Exchange).

CBOE singly listed option classes would be traded by members of the Back-up Exchange and by CBOE members selected by CBOE to the extent the Back-up Exchange can accommodate CBOE members in the capacity of temporary members of the Back-up Exchange. If the Back-up Exchange is unable to accommodate all CBOE members that desire to trade CBOE singly listed options at the Back-up Exchange, CBOE may determine which members shall be eligible to trade such options at the Back-up Exchange by considering the same factors used to determine which CBOE members are eligible to trade CBOE exclusively listed options at the CBOE facility at the Back-up Exchange.

Proposed Section (a)(3) provides that CBOE may enter into arrangements with a Back-up Exchange to permit CBOE members to conduct trading on a Back-up Exchange of some or all of CBOE's multiply listed options in the event of a Disabling Event. While continued trading of multiply listed options upon the occurrence of a Disabling Event is not likely to be as great a concern as the continued trading of exclusively and singly listed options, CBOE nonetheless believes a provision for multiply listed options should be included in the rule so that the exchanges involved will have the option to permit members of the Disabled Exchange to trade multiply listed options on the Back-up Exchange. Such options shall trade as a listing of the Back-up Exchange and in accordance with the rules of the Back-up Exchange.

c. If CBOE Is the Back-up Exchange

Section (b) of proposed Rule 6.16 describes the back-up trading arrangements that would apply if CBOE were the Back-up Exchange. In general, the provisions in Section (b) are the converse of the provisions in Section (a). With respect to the exclusively listed options of the

Disabled Exchange, the facility of CBOE used by the Disabled Exchange to trade some or all of the Disabled Exchange's exclusively listed options will be deemed to be a facility of the Disabled Exchange, and such option classes shall trade as listings of the Disabled Exchange. Trading of the Disabled Exchange's exclusively listed options on the Disabled Exchange's facility at CBOE shall be conducted in accordance with CBOE rules, except that (i) such trading shall be subject to the Disabled Exchange's rules with respect to doing business with the public, margin requirements, net capital requirements, listing requirements and position limits, and (ii) members of the Disabled Exchange that are trading on the Disabled Exchange's facility at CBOE (not including CBOE members who become temporary members of the Disabled Exchange pursuant to paragraph (b)(1)(D)) will be subject to the rules of the Disabled Exchange governing or applying to the maintenance of a person's or a firm's status as a member of the Disabled Exchange. In addition, the Disabled Exchange and CBOE may agree that other Disabled Exchange rules will apply to such trading.

CBOE will perform the related regulatory functions with respect to such trading, in each case except as the Disabled Exchange and CBOE may specifically agree otherwise. Proposed paragraph (b)(1)(C) reflects that the Disabled Exchange has agreed to retain the ultimate legal responsibility for the performance of its self-regulatory obligations with respect to the Disabled Exchange's facility at CBOE.

Sections (b)(2) and (b)(3) describe the arrangements applicable to trading of the Disabled Exchange's singly and multiply listed options at CBOE, and are the converse of Sections (a)(2) and (a)(3). One difference is in paragraph (b)(2)(A), which includes a provision that would permit CBOE to allocate singly listed option classes of the Disabled Exchange to a CBOE DPM

in advance of a Disabling Event, without utilizing the allocation process under CBOE Rule 8.95, to enable CBOE to quickly list such option classes upon the occurrence of a Disabling Event.

d. Member Obligations

Section (c) describes the obligations of members and member organizations with respect to the trading by “temporary members” on the facilities of another exchange pursuant to Rule 6.16. Section (c)(1) sets forth the obligations applicable to members of a Back-up Exchange who act in the capacity of temporary members of the Disabled Exchange on the facility of the Disabled Exchange at the Back-up Exchange.

Section (c)(1) provides that a temporary member of the Disabled Exchange shall be subject to, and obligated to comply with, the rules that govern the operation of the facility of the Disabled Exchange at the Back-up Exchange. This would include the rules of the Disabled Exchange to the extent applicable during the period of such trading, including the rules of the Disabled Exchange limiting its liability for the use of its facilities that apply to members of the Disabled Exchange. Additionally, (i) such temporary member shall be deemed to have satisfied, and the Disabled Exchange has agreed to waive specific compliance with, rules governing or applying to the maintenance of a person’s or a firm’s status as a member of the Disabled Exchange, including all dues, fees and charges imposed generally upon members of the Disabled Exchange based on their status as such, (ii) such temporary member shall have none of the rights of a member of the Disabled Exchange except the right to conduct business on the facility of the Disabled Exchange at the Back-up Exchange to the extent described in the Rule, (iii) the member organization associated with such temporary member, if any, shall be responsible for all obligations arising out of that temporary member's activities on or relating to the Disabled

Exchange, and (iv) the Clearing Member of such temporary member shall guarantee and clear the transactions of such temporary member on the Disabled Exchange.

Section (c)(2) sets forth the obligations applicable to members of a Disabled Exchange who act in the capacity of temporary members of the Back-up Exchange for the purpose of trading singly and multiply listed options of the Disabled Exchange. Such temporary members shall be subject to, and obligated to comply with, the rules of the Back-up Exchange that are applicable to the Back-up Exchange's own members, including the rules of the Back-up Exchange limiting its liability for the use of its facilities that apply to members of the Back-up Exchange. Temporary members of the Back-up Exchange have the same obligations as those set forth in Section (c)(1) that apply to temporary members of the Disabled Exchange, except that, in addition, temporary members of the Back-up Exchange shall only be permitted (i) to act in those capacities on the Back-up Exchange that are authorized by the Back-up Exchange and that are comparable to capacities in which the temporary member has been authorized to act on the Disabled Exchange, and (ii) to trade in those option classes in which the temporary member is authorized to trade on the Disabled Exchange.

e. Member Proceedings

As noted above, proposed CBOE Rule 6.16 provides that the rules of the Back-up Exchange shall apply to the trading of the singly and multiply listed options of the Disabled Exchange traded on the Back-up Exchange's facilities, and (with certain limited exceptions) the trading of exclusively listed options of the Disabled Exchange traded on the facility of the Disabled Exchange at the Back-up Exchange. The proposed rule contemplates that the Back-up Exchange has agreed to perform the related regulatory functions with respect to such trading (except as the Back-up Exchange and the Disabled Exchange may specifically agree otherwise).

Section (d) of proposed Rule 6.16 provides that if a Back-up Exchange initiates an enforcement proceeding with respect to the trading during a back-up period of singly or multiply listed options of the Disabled Exchange by a temporary member of the Back-up Exchange or exclusively listed options of the Disabled Exchange by a member of the Disabled Exchange (other than a member of the Back-up Exchange who is a temporary member of the Disabled Exchange), and such proceeding is in process upon the conclusion of the back-up period, the Back-up Exchange may transfer responsibility for such proceeding to the Disabled Exchange following the conclusion of the back-up period. This approach to the exercise of enforcement jurisdiction is also consistent with past precedent.

With respect to arbitration jurisdiction, proposed Section (d) provides that arbitration of any disputes with respect to any trading during a back-up period of singly or multiply listed options of the Disabled Exchange or of exclusively listed options of the Disabled Exchange on the Disabled Exchange's facility at the Back-up Exchange will be conducted in accordance with the rules of the Back-up Exchange, unless the parties to an arbitration agree that it shall be conducted in accordance with the rules of the Disabled Exchange.

f. Member Preparations

To ensure that members are prepared to implement CBOE's back-up trading arrangements, proposed Section (e) of proposed CBOE Rule 6.16 requires CBOE members to take appropriate actions as instructed by CBOE to accommodate CBOE's back-up trading arrangements with other exchanges and CBOE's own back-up trading arrangements.

g. Interpretations and Policies

Proposed Interpretation and Policy .01 to CBOE Rule 6.16 clarifies that to the extent the rule text provides that another exchange will take certain action, it is reflecting what that

exchange has agreed to do by contractual agreement with CBOE, but Rule 6.16 itself is not binding on the other exchange.

B. Fee Schedule

The Exchange proposes to add a footnote to its Fee Schedule to inform its members regarding what fees will apply to transactions in the listed options of a Disabled Exchange effected on a Back-up Exchange under CBOE Rule 6.16. The footnote provides that if CBOE is the Disabled Exchange, the Back-up Exchange has agreed to apply the per contract and per contract side fees in the CBOE fee schedule to transactions in CBOE exclusively listed options traded on the CBOE facility on the Back-up Exchange.<sup>13</sup> If any other CBOE listed options are traded on the Back-up Exchange (such as CBOE singly listed options that are listed by the Back-up Exchange) pursuant to CBOE Rule 6.16, the fee schedule of the Back-up Exchange shall apply to such trades. The footnote contains a second paragraph stating the converse if CBOE is the Back-up Exchange under its Rule 6.16.

C. Proposed Rule 6.17 – Authority to Take Action under Emergency Conditions

The Exchange proposes to adopt a general emergency rule in proposed CBOE Rule 6.17. Although not directly related to the implementation of the back-up trading arrangements, the Exchange believes that it is appropriate to adopt such a rule in conjunction with implementing the back-up trading arrangements. Currently, there is no Exchange rule that grants specific authority in an emergency to any person or persons to take all actions necessary or appropriate for the maintenance of a fair and orderly market or the protection of investors. Authority to take actions affecting trading or the operation of CBOE systems is currently granted to the Board of

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<sup>13</sup> When Phlx Dell options relocated to Amex in June 1998, Phlx fees applied to transactions in Dell options on the Amex. See infra note 16.

Directors, floor officials and other individuals under several Exchange rules (e.g., CBOE Rules 4.16, 6.3, 6.6 and 24.7).

III. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, the Commission finds that CBOE's proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder, applicable to a national securities exchange.<sup>14</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>15</sup> which requires that the rules of an exchange, among other things, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, serve to protect investors and the public interest.

In light of the heightened security risks to the financial markets since the September 11, 2001 attacks on the World Trade Centers in New York City, the Commission has encouraged and worked with the national securities exchanges to develop contingency plans, emergency procedures, and back-up trading arrangements in order to minimize the potential disruption and market impact that a future Disabling Event could cause. The present rule change proposal is a direct response to that effort.

The Commission believes that CBOE's proposed rule changes are reasonably designed to address the key elements necessary to mitigate the effects of a Disabling Event affecting the

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<sup>14</sup> In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>15</sup> 15 U.S.C. 78f(b)(5).

Exchange, minimize the impact of such an event on market participants, and help ensure that that a liquid and orderly marketplace for securities listed and traded on CBOE will continue to exist. Specifically, the back-up trading arrangements contemplated by proposed CBOE Rule 6.16 are designed to provide a trading venue for the Exchange's exclusively listed and, to the extent feasible, its singly listed options in the event that a catastrophe required the Exchange's primary facility to be closed for an extended period.<sup>16</sup> The proposed rule also provides authority for CBOE to provide a back-up trading venue should another exchange be affected by a Disabling Event.

CBOE also proposes a new Rule 6.17 granting authority to take action under emergency conditions to the Chairman, President or such other person or persons as may be designated by the Board. The proposed rule text closely tracks that of other exchanges.<sup>17</sup> The Commission finds that proposed CBOE Rule 6.17 is consistent with the Act and should enable key actions to be taken by Exchange representatives in the event of a Disabling Event.

The Commission likewise finds that the proposed change to the Exchange's Fee Schedule is consistent with the Act. By affirming that CBOE and, by mutual agreement, the Back-up Exchange will apply the per contract and per contract side fees normally applicable to exclusively listed options under the Disabled Exchange's fee schedule, the Commission believes that the proposed rule change appears to be reasonably designed to minimize the disruption

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<sup>16</sup> The Commission notes that it has approved the basic approach set forth in the proposal of deeming a portion of the Back-up Exchange's facilities to be a facility of the Disabled Exchange. See Securities Exchange Act Release No. 27365 (October 19, 1989), 54 FR 43511 (October 25, 1989) (approving trading of options listed on the Pacific Stock Exchange at other exchanges in wake of earthquake); Securities Exchange Act Release No. 40088 (June 12, 1998), 63 FR 33426 (June 18, 1998) (approving trading of Dell options listed on Phlx at Amex on a temporary basis).

<sup>17</sup> See, e.g., New York Stock Exchange Rule 51.

associated with back-up trading of such options. The proposal also clarifies that, with regard to singly listed and multiply listed options, the fees charged shall be those set forth in the Back-up Exchange fee schedule where trading occurs at a Back-up Exchange, or, where trading occurs at CBOE, the CBOE fee schedule.

The Commission finds good cause, consistent with Sections 6(b)(5) and 19(b) of the Act,<sup>18</sup> to approve the proposal prior to the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. Amendment No. 4 simply corrects a reference to “Back-up Exchange” in Section (d)(2) of CBOE Rule 6.16. Likewise, Amendment No. 5 changes the number of the footnote CBOE proposes to add to its Fee Schedule from 17 to 16 to avoid a gap in the numbering of the notes. Because Amendment Nos. 4 and 5 propose minor corrections to the rule text that are consistent with the clear intent of the proposal, the Commission finds that it is appropriate to approve Amendment Nos. 4 and 5 on an accelerated basis.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment Nos. 4 and 5, including whether each of these amendments is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>);  
or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2004-59 on the subject line.

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<sup>18</sup> 15 U.S.C. 78f(b)(5) and 78s(b).

Paper comments:

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

All submissions should refer to File Number SR-CBOE-2004-59. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2004-59 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V.

Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>19</sup> that the proposed rule change (SR-CBOE-2004-59), as amended by Amendment Nos. 1, 2 and 3, is hereby approved, and that Amendment Nos. 4 and 5 to the proposed rule change are approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>20</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>19</sup> 15 U.S.C. 78s(b)(2).

<sup>20</sup> 17 CFR 200.30-3(a)(12).