

Act,<sup>57</sup> that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange would issue ITPs, consistent with the issuance findings, when doing so would be in the interest of fair and orderly markets. In CBOE's judgment, therefore, the issuance of a limited number of permits through an objective methodology would contribute to the vitality of its market, thereby increasing the attractiveness of CBOE's market and consequently enhancing its value to CBOE members and other users of CBOE's facilities. In addition, as discussed above, the Exchange has proposed to provide compensation to holders of CBOE memberships that are unable to lease their seats at market rates when ITPs are outstanding, which the Commission believes would mitigate any potential burden that the proposal might represent to lessors of CBOE memberships.

Finally, the Commission notes the desire of a commenter to have CBOE delay the proposal and have the Commission hold hearings on the proposal.<sup>58</sup> Section 19(b)(1) of the Act<sup>59</sup> requires CBOE to file with the Commission any proposed changes to, or interpretations of, its rules and the Commission is thereafter obligated to consider CBOE's proposal. In this instance, given the member vote and approval, the Commission is acting on CBOE's proposal.

#### E. ITP Fees

Holders of ITPs would be required to pay to the Exchange a monthly access fee. The monthly access fee would be established and adjusted through a proposed rule change that would be filed with the Commission under Section 19(b) of the Act.<sup>60</sup> Such fees would be due and payable in accordance with the provisions of the Exchange fee schedule and would be the same for all ITP holders.<sup>61</sup> Commenters suggested that CBOE provide better justification for its claim to floor access revenue.<sup>62</sup> In response, CBOE stated that, because its members own the Exchange, they are the ultimate beneficiaries of any revenues that may be generated by the permit plan and that the members will have an opportunity to be heard on that aspect of the proposal when they vote on the

proposal.<sup>63</sup> CBOE also noted that the commenter incorrectly suggested that it is unusual for an exchange to set the level of and retain trading access fees, and noted that the CBSX permit plan is based on that model.<sup>64</sup> The Commission is not today approving the level of the monthly access fee for ITPs and notes that such fees would be the subject of a separate proposed rule change. Nevertheless, the Commission agrees with CBOE that it is consistent with Section 6(b)(4) of the Act<sup>65</sup> for exchanges to charge for access to their facilities.<sup>66</sup>

#### F. Conforming Rule Changes To Accommodate ITPs and Clarifying Changes Relating to CBSX Permits

The Exchange proposed several conforming changes in its rules to ensure that individuals and organizations that receive ITPs can conduct their activities in a manner similar to holders of Exchange memberships.<sup>67</sup> These changes relate to, among other things, registration, designation of nominees, and qualifications. Other conforming changes have been made to the rules so that certain requirements related to the holders of memberships would apply to the holders of ITPs. For example, CBOE would amend Rule 3.2(c) to specify that individual ITP holders would be required to have authorized trading functions.<sup>68</sup>

Additionally, though unrelated to the ITP proposal, CBOE also proposed to adopt several changes to clarify how CBSX permits currently are treated under the Certificate of Incorporation, Constitution, and rules. These changes, which adopt certain language that is also being proposed for ITPs, are non-substantive in nature and do not modify the rights of the holders of such permits or materially alter the status quo with

respect to the Exchange's operation of CBSX.<sup>69</sup>

The Commission finds that the conforming and clarifying changes proposed by the Exchange are consistent with the requirements of Section 6 of the Act. In particular, the clarifying and conforming changes are non-substantive in nature and should provide greater clarity to market participants, including CBOE's members and CBSX permit holders, regarding the application and operation of the Exchange's rules.

#### III. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>70</sup> that the proposed rule change (SR-CBOE-2008-40), as modified by Amendment No. 1 thereto, be, and hereby is approved.

By the Commission.

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58164; File No. SR-ISE-2008-56]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fee Waivers

July 15, 2008.

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> notice is hereby given that on July 1, 2008, International Securities Exchange, LLC (the "ISE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The ISE filed the proposal pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders

<sup>63</sup> See CBOE Letter 2, *supra* note 6, at 2. On May 19, 2008, the CBOE membership approved the ITP plan. See Amendment No. 1, *supra* note 4.

<sup>64</sup> See CBOE Letter 2, *supra* note 6, at 2. CBOE also sought to clarify a reference in the Andrew Letter to trading access funds that, according to the Andrew Letter, are being held in "escrow." CBOE noted that the fees to be collected under its ITP proposal would not be held in escrow and no escrowed funds would be affected by its proposal. See *id.*

<sup>65</sup> 15 U.S.C. 78f(b)(4).

<sup>66</sup> See, e.g., Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251, 11268 (March 6, 2006) (SR-NYSE-2005-77) (approving a process to determine an access fee for trading licenses and noting that the exchange would later file a separate proposed rule change to amend its fee schedule to establish the price).

<sup>67</sup> See Notice, *supra* note 3, 73 FR at 20992-94 (describing each such proposed rule change).

<sup>68</sup> See Notice, *supra* note 3, 73 FR at 20993.

<sup>69</sup> For example, the Exchange proposes to change the terminology in CBOE Rule 3.26(c) to note that (except as indicated therein) CBSX permit holders are treated the "same as" members, rather than being "deemed to be" members for purposes of the Certificate of Incorporation, Constitution, and rules. In addition, the Exchange is proposing to amend CBOE Rule 3.26(c) to clarify that an organization that holds a CBSX permit or that has a CBSX permit registered for it shall be treated the same as a "member organization" for purposes of the CBOE rules. See Notice, *supra* note 3, 73 FR at 20993.

<sup>70</sup> 15 U.S.C. 78s(b)(2).

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

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

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

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

<sup>57</sup> 15 U.S.C. 78f(b)(8).

<sup>58</sup> See Blum/Mondrus Letter, *supra* note 5.

<sup>59</sup> 15 U.S.C. 78s(b)(1).

<sup>60</sup> 15 U.S.C. 78s(b).

<sup>61</sup> See proposed CBOE Rule 3.27(f)(ii).

<sup>62</sup> See Andrew Letter, *supra* note 5, at 2.

the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The ISE is proposing to amend its Schedule of Fees by adopting fee waivers related to the execution on ISE of public customer orders exposed to members before those orders are sent out for execution on another exchange through the intermarket linkage ("Linkage"). The text of the proposed rule change is available at the Exchange, <http://www.ise.com>, and the Commission's Public Reference Room.

### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

#### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

##### **1. Purpose**

Before a Primary Market Maker ("PMM") sends a customer order through the Linkage when ISE is not at the national best bid or offer ("NBBO"), the Exchange exposes these customer orders to all its members to give them an opportunity to match the NBBO.<sup>5</sup>

Specifically, before the PMM sends a Linkage Order on behalf of a public customer, the public customer order is exposed at the NBBO price for a period established by the Exchange not to exceed one second. During this exposure period, Exchange members may enter responses up to the size of the order being exposed in the regular trading increment applicable to the option. If at the end of the exposure period, the order is executable at the then-current NBBO and the ISE is not at

the then-current NBBO, the order is executed against responses that equal or better the then-current NBBO. The exposure period is terminated if the exposed order becomes executable on the ISE at the prevailing NBBO or if the Exchange receives an unrelated order that could trade against the exposed order at the prevailing NBBO price. If, after an order is exposed, the order is not executed in full on the Exchange at the then-current NBBO or better, and it is marketable against the then-current NBBO, the PMM sends a Linkage Order on the customer's behalf for the balance of the order as provided in Rule 803(c)(2)(ii). If the balance of the order is not marketable against the then-current NBBO, it is placed on the ISE book.

To encourage ISE members to respond to the exposure of these public customer orders, ISE proposes to waive the Firm Proprietary, ISE Market Maker and Payment for Order Flow fees incurred by members who step up and match or improve the NBBO during the exposure period so these public customer orders can be executed on the Exchange.<sup>6</sup>

The Exchange notes that the proposed rule change will allow ISE to retain more flow by giving these customer orders additional opportunity to be executed at the NBBO at ISE and will also reduce PMM costs by reducing the number of Linkage orders they must send to other exchanges.<sup>7</sup>

##### **2. Statutory Basis**

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(4) that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

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

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A) of the Act<sup>8</sup> and Rule 19b-4(f)(2) thereunder,<sup>9</sup> because it establishes or changes a due, fee, or other charge imposed on members by ISE. Accordingly, the proposal is effective upon filing with the Commission. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2008-56 on the subject line.

#### *Paper Comments*

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

All submissions should refer to File Number SR-ISE-2008-56. 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

<sup>5</sup> See Securities Exchange Act Release No. 58038 (June 26, 2008), 73 FR 38261 (July 3, 2008) (SR-ISE-2008-50) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Exposure of Public Customer Orders to all ISE Members).

<sup>6</sup> See e-mail from Samir Patel, Assistant General Counsel, ISE to Jennifer Colihan and Christopher Chow, Special Counsels, Commission, dated July 11, 2008.

<sup>7</sup> See *id.*

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(2).

the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2008-56 and should be submitted on or before August 12, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Florence E. Harmon,**  
Acting Secretary.

[FR Doc. E8-16686 Filed 7-21-08; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58174; File No. SR-NYSEArca-2008-54]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval to a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Amend Rules 6.62 and 6.91 Describing Complex Orders, Complex Order Priority, and Complex Order Execution

July 16, 2008.

#### I. Introduction

On May 23, 2008, NYSE Arca, Inc. ("NYSE Arca" 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 amend NYSE Arca Rules 6.62 and 6.91 describing complex orders, complex order priority, and complex order execution. On June 5, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The proposal, as modified by Amendment No. 1, was published for comment in the **Federal Register** on June 11, 2008.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

#### II. Description of the Proposal

The Exchange proposes to amend NYSE Arca Rules 6.62 and 6.91 describing complex orders, complex order priority, and complex order execution. Proposed NYSE Arca Rule 6.62 eliminates specific definitions for a number of complex order types and adopts a generic definition for Complex Orders that is consistent with the definition for Complex Orders approved for use for exemption from Trade Through Liability by the Options Linkage Authority as described in the *Plan For The Purpose Of Creating And Operating An Intermarket Option Linkage* ("Linkage Plan").

Proposed NYSE Arca Rule 6.91 describes the entry of Complex Orders in the Consolidated Book and the operation of the mechanism, called the Complex Order Matching Engine, in which Complex Orders will be executed against each other or against individual quotes and orders in the Consolidated Book. Complex Orders will be ranked in the Consolidated Book in price-time priority based on the strategy and the total or net debit or credit. OTP Holders and OTP Firms will have the ability to view Complex Orders in the Consolidated Book via an electronic interface and to submit orders to the Complex Matching Engine to trade against such orders.

Complex Orders eligible for execution in the Complex Matching Engine are defined to be consistent with the Linkage Plan Trade Through exemption. Therefore execution prices for the individual legs of a Complex Order that are outside of the National Best Bid or Offer may be reported. The Complex Matching Engine will never, however, execute any of the legs of a Complex Order at a price outside of the NYSE Arca best bid or offer ("NYSE Arca BBO") for that leg.

Under proposed NYSE Arca Rule 6.91, Complex Orders submitted to NYSE Arca will attempt to execute against other Complex Orders in the Consolidated Book before attempting to execute against the individual leg markets in the Consolidated Book, provided that if individual orders or quotes residing in the Consolidated Book can execute against the incoming Complex Order in full (or in a permissible ratio) at the same total or net debit or credit as a Complex Order in the Consolidated Book, the individual orders or quotes will have priority. Complex Orders that are not executable when submitted to NYSE Arca will be entered into the Consolidated Book. The Complex Matching Engine then will monitor

individual quotes and orders in the leg markets. If a new order(s) or quote(s) enters the Consolidated Book so that the Complex Order becomes executable in full (or in a permissible ratio), the Complex Order will be executed against the individual quotes and orders.

The Exchange also proposes that Lead Market Makers not be afforded any guaranteed allocation either (a) in the execution of a complex strategy or (b) if present at the NYSE Arca BBO, when a Complex Order executes against the individual leg markets since.

#### III. Discussion and Commission Findings

After careful review of the proposal, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>4</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>5</sup> which requires, among other things, that the rules of an 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.

The Commission believes that adopting a generic definition for Complex Orders that is consistent with the definition for Complex Orders approved for use for exemption from the Linkage Plan's Trade-Through Liability is consistent with the Act. The Commission notes that a generic definition for Complex Orders would provide increased flexibility in the use of orders that represent investment strategies designed to limit risk or unwind an already established position in a portfolio.

The Commission also believes that the Complex Matching Engine should increase the transparency of Complex Orders and could facilitate the execution of Complex Orders. The Commission notes that the priority of the individual leg markets will continue to be maintained. In this regard, if individual orders or quotes residing in the Consolidated Book can execute against the incoming Complex Order in full (or in a permissible ratio) at the same or better total or net debit or credit as a Complex Order in the Consolidated

<sup>10</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 57927 (June 5, 2008), 73 FR 33131.

<sup>4</sup> 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).

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