Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2009–87 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2009–87. 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 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 such 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 publicly available. All submissions should refer to File Number SR–NYSE–2009–87 and should be submitted on or before September 18, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–20821 Filed 8–27–09; 8:45 am]

BILLING CODE 8010–01–P

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60559; File No. SR–ISE–2009–27]

Self-Regulatory Organizations; International Securities Exchange, LLC; Order Granting Approval of a Proposed Rule Change as Modified by Amendment No. 1 Thereto To Adopt Rules Implementing the Options Order Protection and Locked/Crossed Market Plan

I. Introduction

On May 11, 2009, the International Securities Exchange, LLC (''ISE'' 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 June 8, 2009.[3] On June 10, 2009, the Exchange filed Amendment No. 1 to the proposed rule change.[4] The Commission received no comments on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

The Exchange proposes to amend and adopt new ISE rules to implement the Options Order Protection and Locked/Crossed Market Plan (''Plan'').[5] Specifically, the Exchange proposes to completely replace Chapter 19 of its rules 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'').[6] 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.[7] 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,[8] namely Principal Acting as Agent Orders (''P/A Orders''), Principal Orders, and Satisfaction Orders.[9] 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.[10] Each of the Participating Options Exchanges, including the Exchange, has submitted an amendment to the Old Plan to withdraw from such Plan.[11] 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'').[12]

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

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 60014 (June 1, 2009), 74 FR 27224 (''Notice'').

[4] Amendment No. 1 clarified that this proposed rule change will become effective upon the Exchange's withdrawal from the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage and the effectiveness of the Options Order Protection and Locked/Crossed Market Plan. Because the amendment only provided clarification and did not affect the substance of the rule filing, the amendment did not require notice and comment.

[5] 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: Chicago Board Options Exchange, Incorporated (''CBOE''); 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 ISE (each exchange individually a ''Participant'' and, together, the ''Participating Options Exchanges'').

[6] 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).

[7] Section 8(c) of the Old Plan.

[8] 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.

[9] Section 2(16) of the Old Plan.

[10] Section 7(a)(i)(C) of the Old Plan.

[11] *See* Securities Exchange Act Release No. 60360 (July 21, 2009) 74 FR 37265 (July 28, 2009) (File No. 4–429).

[12] 17 CFR 242.608.

orders via private linkages that exist for NMS stocks under Regulation NMS.[13] The Plan requires the Participating Options Exchanges to adopt rules ''reasonably designed to prevent Trade-Throughs.''[14] 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.[15] As further described below, the Plan incorporates a number of exceptions to trade-through liability.[16] Some of these exceptions are carried over from the Old Plan, including exceptions for trading rotations, non-firm quotes, and complex trades.[17] 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'').[18] In addition, the Plan contains a new exception for stopped orders and price improvement.[19]

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.[20]

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.[21] As such, the Exchange proposes to adopt all applicable definitions from the Plan into the Exchange's rules.[22]

In addition, the Exchange proposes to prohibit its members from effecting Trade-Throughs, unless an exception applies.[23] 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.[24]

The Exchange also proposes a rule to address locked and crossed markets, as required by the Plan.[25] 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.[26]

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, with respect to a locking quotation, when the order entered on the Exchange that will lock a Protected Bid or Protected Offer, is (i) not a customer order, and the Exchange can determine via identification available pursuant to the OPRA Plan that such Protected Bid or Protected Offer does not represent, in whole or in part, a customer order; or (ii) a customer order, and the Exchange can determine via identification available pursuant to the OPRA Plan that such Protected Bid or Protected Offer does not represent, in whole or in part, a customer order, and, on a case-by-case basis, the customer specifically authorizes the member to lock such Protected Bid or Protected Offer.[27] The Exchange believes that, in most cases, locked market maker quotes are good for the investing public, but recognizes that the benefits of a locked market become more complicated when one or both of the locking quotations represent a customer order. Where there is market interest willing to trade with a customer, the Exchange believes that the customer order should be filled. Thus, the Exchange proposes that it would not exempt from the locked market prohibition situations involving customer orders unless the customer entering the locking order specifically authorizes the lock on a case-by-case basis.[28] As a result, its members would not be permitted to lock another Participant's quotation unless the Exchange can establish that the quotation on the other Participant's market is not for the account of a customer.

The Exchange also proposes rules to permit it to continue to accept P/A Orders and Principal Orders from Participating Options Exchanges that are not able to send ISOs in order to avoid Trade-Throughs.[29] The Exchange noted that, even upon the approvals of the Plan and the implementing rules of the various Participating Options Exchanges, it is possible that not all the Participants will be functionally able to operate pursuant to the Plan. 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.

The Exchange also proposes changes to its rules relating to an ISE Primary Market Maker's (''PMM'') obligation to address customer orders when there is a better market displayed on another exchange. The Exchange proposes changes to ISE Rule 803(c) and the Supplementary Material to Rule 803 to specify that ISE will discharge its obligations under the Plan to ''establish,

[13] *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 5.

[14] 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.

[15] Section 5(a)(ii) of the Plan.

[16] Section 5(b) of the Plan.

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

[18] Subparagraphs (i), (iii), (vi), (ix), (xi), and (iv)–(v), respectively, of Section 5(b) of the Plan.

[19] Subparagraph (x) of Section 5(b) of the Plan.

[20] 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.

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

[22] Proposed ISE Rule 1900.

[23] Proposed ISE Rule 1901(a).

[24] Proposed ISE Rule 1901(b)(1)–(10). In addition, the Exchange proposes to add ISOs as a new type of order under proposed ISE Rule 715(b)(5).

[25] A ''locked market'' is defined as a quoted market in which a Protected Bid is equal to a Protected Offer. Proposed ISE Rule 1900(i). A ''crossed market'' is defined as a quoted market in which a Protected Bid is higher than a Protected Offer. Proposed ISE Rule 1900(e).

[26] Proposed ISE Rule 1902(a).

[27] Proposed ISE Rule 1902(b)(1)–(4).

[28] ISE noted that it can envision a customer authorizing a lock when the fees associated with trading against the locked market make the execution price uneconomical to the customer. *See* Notice, *supra* note 3, at 27226.

[29] Proposed ISE Temporary Rule 1903.

maintain and enforce written policies and procedures * * * reasonably designed to prevent Trade-Throughs'' [30] by requiring PMMs to address customer orders when there is a better market away via the use of ISOs.[31] ISE proposes that a PMM could comply with their obligation either by (i) executing a customer order at a price that at least matches the best price displayed or (ii) sending ISO(s) as agent for the customer to any other exchange(s) displaying a superior price and, with respect to any remaining portion of the customer order, either (a) releasing the remaining portion of the order for execution in the Exchange's auction market or (b) executing the remaining portion of the order at a price superior to the best price in the Exchange's auction market.[32]

ISE further proposes that, in addressing customer orders that are not automatically executed because there is a displayed bid or offer on another exchange trading the same option that is better than the best bid or offer on the Exchange, ISE would act in compliance with its rules and 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 [33] that the rules of 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.[34] ISE also proposes to make clear that all orders entered on ISE and routed by the PMM to another exchange via an ISO pursuant to proposed ISE Rule 803(c)(2) and that result in an execution are binding on the member that entered such orders.[35]

The Exchange also proposes changes to ISE Rule 810, which governs ''informational barriers'' that ISE market makers must maintain within their firms. ISE stated that these barriers restrict the flow of information between personnel handling market making activities on the one hand, and personnel performing other functions, including acting as agent for customer orders, on the other hand. ISE noted that, under the Old Plan, when there was a better market on another exchange, a PMM could send a P/A Order to that exchange in an attempt to access that better price for the customer. ISE believes that this was consistent with Rule 810 under the Old Plan because a P/A Order is a principal order, and a firm is permitted to send such an order from the market-making side of the information barrier. Under the Plan and ISE's proposed rules, PMMs would send ISOs representing the underlying customer orders, rather than P/A Orders, when there is a better market away. Because these ISOs would be orders on behalf of a public customer, ISE notes that current ISE Rule 810 would prohibit a PMM from sending such an order. The Exchange therefore proposes a carve-out to Rule 810 that would permit a PMM to send ISOs solely to comply with its obligation under Rule 803 to address public customer orders when there is a better market on another exchange. ISE states that PMMs would act as agent in these circumstances, and would send the ISOs from the market making side of the information barrier. The Exchange represents that, in all other respects, PMMs would be subject to proposed Rule 810.[36]

Pursuant to Rule 811(b), which governs Directed Orders, ISE market makers may act as agent for customer orders only when handling such orders. ISE proposes to amend that rule to reflect the ability of PMMs to act as agent when sending ISOs under proposed ISE Rule 803(c)(2). The Exchange also proposes a rule to clarify that all public customer ISOs entered by an Electronic Access Member (''EAM'') on behalf of another options exchange shall be represented on the Exchange as Priority Customer Orders, defined in ISE Rule 100(37B), and that an EAM does not have an obligation to determine whether the public customer for whom such other exchange is routing an ISO meets the definition of a Priority Customer.[37]

The Exchange proposes to amend certain other rules to reflect the Plan and its related terms. In particular, the Exchange proposes to amend Rule 714 to reflect terminology under the Plan. The Exchange is also proposing to delete provisions that are no longer applicable under the Plan. Specifically, ISE is deleting current ISE Rule 701(a)(5), which relates to the sending of P/A Orders through the Linkage Hub during the opening, and is deleting Supplemental Material .07 to current ISE Rule 716, relating to block trades and away market prices.

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.[38] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act [39] 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 of which it is a participant.[40] Finally, the Commission finds that the proposed rule change is consistent with the requirements of the Plan.[41]

Proposed ISE Rule 1900 would define applicable terms in a manner that is substantively identical to the defined terms of the Plan.[42] As such, the Commission finds that proposed ISE Rule 1900 is consistent with the Act and the Plan.

Proposed ISE Rule 1901(a) would prohibit members from effecting Trade-Throughs unless an exception applies. Proposed ISE Rule 1901(b) would

[30] Section 5(a) of the Plan.

[31] Proposed ISE Rule 803(c)(2)(ii). ISE noted that the routing of public customer orders to another exchange when the ISE is not at the best price is, in effect, voluntary. *See* Notice, *supra* note 3, at 27227. ISE stated that a customer could avoid such routing by entering an Immediate or Cancel order (''IOC'') or Fill or Kill (''FOK'') order. *See* ISE Rule 715(b)(3) and ISE Rule 715(b)(2) respectively. If ISE cannot immediately execute such orders, it would cancel all of the order (FOK orders) or the unexecuted portion of the order (IOC orders) without routing such orders to another exchange. *See* Notice, *supra* note 3, at 27227.

[32] Proposed ISE Rule 803(c)(2).

[33] 15 U.S.C. 78(f)(b)(4) and (5).

[34] Proposed ISE Rule 803, Supplementary Material, .04.

[35] Proposed ISE Rule 803, Supplementary Material, .05.

[36] Proposed ISE Rule 810.

[37] The Exchange stated that, because other options exchanges have not adopted a distinction between Priority Customer and Professional Orders, ISE does not believe it is practical or appropriate to require ISOs representing customer orders sent from other exchanges to be marked as Professional Orders. *See* Notice, *supra* note 3, at 27227.

[38] 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).

[39] 15 U.S.C. 78f(b)(5).

[40] 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.''

[41] *See supra* note 5.

[42] The Commission notes that the Exchange's proposed definition of ''Complex Trade'' under proposed ISE Rule 1900(d) is identical to the definition of ''Complex Trade'' under old ISE Rule 1900(3), which is being deleted.

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.[43] 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 ISE Rule 1901(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 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 ISE Rule 1901(b) would be an exception for certain transactions involving ISOs.[44] 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.

Finally, proposed Supplementary Material .01 to ISE Rule 1901 would ensure that all public customer ISOs routed from another Participant and entered by an Electronic Access Member (''EAM'') would be Priority Customer Orders, rather than ''Professional Orders,'' [45] and would not obligate such EAM to determine whether the public customer for whom the away market is routing the ISO meets the definition of Priority Customer. The Commission believes that this provision clarifies the obligations of EAMs for such orders.

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.

Accordingly, the Commission finds that proposed ISE Rule 1901 is consistent with Section 5 of the Plan and Section 6(b)(5) of the Act [46] 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 ISE Rule 1902(a) would require Exchange members to reasonably avoid displaying, and not engage in a pattern or practice of displaying, any quotation that locks or crosses a Protected Quotation, subject to certain exceptions delineated in proposed ISE Rule 1902(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 ISE Rule 1902(b) would permit four exceptions to the Exchange's general rule relating to locked and crossed markets.[47] The first three would be similar to analogous certain trade-through exceptions under proposed ISE Rule 1901(b), and relate to when the Exchange is experiencing systems issues, when there exists a crossed market, and when a member simultaneously routes ISOs against the full displayed size of any locked or crossed Protected Bid or Protected Offer.

The fourth exception would permit an order entered onto the Exchange to lock a Protected Bid or Protected Offer when such order is: (1) Not a customer order, and the Exchange can determine that such Protected Bid or Protected Offer does not represent, in whole or in part, a customer order; or (2) a customer order, and the Exchange can determine that such Protected Bid or Protected Offer does not represent, in whole or in part, a customer order and, on a case-by-case basis, the customer specifically authorizes the Exchange's member to lock such Protected Bid or Protected Offer. This exception would not protect a market maker quote or broker-dealer order from being locked.

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.

In particular, the Commission believes that the fourth exception is appropriate because it would protect customer orders that are Protected Bids or Protected Offers from being locked, and would only permit a customer order entered onto the Exchange to lock a Protected Bid or Protected Offer when a customer specifically authorizes an Exchange member, and only when such Protected Bid or Protected Offer itself does not represent, in whole or in part, a customer order. Because of the rapidity with which options quotes are

[43] Proposed ISE Rule 1901(b)(1)–(10).

[44] Proposed ISE Rule 1901(b)(4).

[45] *See* Securities Exchange Act Release No. 59287 (January 23, 2009), 74 FR 5694 (January 1, 2009) (SR–ISE–2006–26).

[46] 15 U.S.C. 78f(b)(5).

[47] 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.

often updated today, particularly in response to changes in the underlying, there is an increasing likelihood that market maker quotations will lock each other. The proposed exception accounts for this dynamic by not prohibiting such locking instances. Importantly, the proposed exception in the Exchange's rules that the Commission is approving would allow non-customer orders to lock an away market's Protected Quotation only if the Exchange is able to affirmatively determine that the Protected Quotation on the away market is not, in whole or in part, for the account of a customer. If any portion of such away market's Protected Quotation is for the account of a customer, such Protected Quotation may not be locked. In addition, the Commission notes that the rule requires that such determination be made via identification available pursuant to the OPRA Plan, which is working with the participating options exchanges on a method to so identify customer quotations through OPRA. The Exchange has represented that, absent the ability to identify a customer quote as part of an exchange's BBO, the Exchange would assume that the quote represents, in whole or in part, a customer order. As such, the Exchange has represented that it would not permit its members to avail themselves of this exemption unless the away market has informed the Exchange that it would designate all customer orders as such in OPRA and such exchange's quotation does not contain such designation. Finally, the Exchange has represented that if an exchange chooses not to identify its customer quotations, the Exchange would treat all of such exchange's quotations as customer orders and, absent application of another exception, would not permit locks of such quotations.

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 [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 also finds that proposed ISE Temporary Rule 1903, which facilitates the participation of certain Participating Options Exchanges who may require the use of P/A Orders and Principal Orders after implementation of the Plan, is consistent with the Act. Although the Commission has already approved the Plan,[49] the Commission also recognizes that there may be one or more Participating Options Exchanges that may require a temporary transition period during which they may want to continue to utilize these order types that exist currently under the Old Plan.[50] The Exchange and each of the other Participating Options Exchanges have proposed substantially identical temporary provisions to accommodate this possibility.[51] Thus, the Commission finds that the proposed rule relating to the Exchange's receipt and handling 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 [52] 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 amendments to ISE's rules requiring ISE PMMs to execute or route customer orders when another exchange is displaying a better price are consistent with the Act, and in particular with Section 6(b)(5) of the Act.[53] In this regard, ISE proposes to discharge its obligations under the Plan to ''establish, maintain and enforce written policies and procedures * * * reasonably designed to prevent Trade-Throughs'' [54] by requiring its PMMs to address customer orders when there is a better away market.[55] Pursuant to amended ISE Rule 803(c)(2), PMMs would be required to either: (i) Execute the customer's order at a price that at least matches the best price displayed or (ii) send ISO(s) as agent for the customer order to any exchange(s) displaying a better price and, with respect to any remaining portion of the customer order, either (a) releasing such portion for execution on ISE's auction market or (b) executing such portion at a price better than the best price available on ISE's auction market.

In addressing customer orders that are not automatically executed because there is a better price displayed on another exchange, pursuant to proposed Commentary .04 to Rule 803, ISE will act in compliance with its rules, the Act, and the rules thereunder. In particular, ISE will act in compliance with Sections 6(b)(4) and (5) of the Act [56] which require the Exchange to: (1) Provide for the equitable allocation of reasonable dues, fees, and other charges among its participants and other persons using its facilities; and (2) prohibit unfair discrimination among customers, issuers, brokers or dealers. Customers may choose to avoid having their orders routed away by a PMM by entering their order with an Immediate or Cancel or Fill or Kill designation.[57]

Any PMM that handles customer orders pursuant to ISE Rule 803(c)(2) will be subject to oversight and enforcement responsibilities of a self-regulatory organization (''SRO'') other than ISE.[58] Additionally, ISE Rule 810 imposes certain restrictions on the business activities of ISE market makers, including PMMs. These restrictions prohibit a PMM from, among other things, handling orders as agent on behalf of customers unless there is an information barrier between its market making activities, on the one hand, and certain other activities, including handling customer orders as agent, on the other hand.[59] ISE proposes to amend ISE Rule 810 to permit PMMs to handle public customer orders when ISE is not at the best price. ISE represented that, under the Old Plan, PMMs were not subject to the information barrier requirement between market making activities and agency activities because PMMs sending P/A Orders seeking a better market away were sending a principal order.[60] The Commission finds that it is consistent with the Act to permit an exception to ISE's information barrier rule when a PMM

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

[49] *See* Plan Approval, *supra* note 5.

[50] 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.

[51] The Commission notes that the rules contained in ISE Temporary Rule 1903 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 during an initial transition period.

[52] 15 U.S.C. 78f(b)(5).

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

[54] *See* Section 5(a) of the Plan.

[55] *See* Notice, *supra* note 3, at 27227.

[56] 15 U.S.C. 78f(b)(4) and (5).

[57] *See* Notice, *supra* note 3, at 27227.

[58] *See* Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388, 11389 (March 2, 2000) (File No. 10–127). A PMM must have as their examining authority designated by the Commission pursuant to Rule 17d–1 of the Act, a SRO other than ISE. As such, such SRO is responsible for the oversight and enforcement of the PMM for compliance with the applicable financial responsibility rules.

[59] *See* ISE Rule 810(a).

[60] *See* Notice, *supra* note 3, at 27227.

sends an ISO as agent for a customer order to comply with its obligations under ISE Rule 803(c)(2), because such activity is limited by ISE's rules, as described above, and does not provide the potential for the type of harm against which ISE Rule 810 is intended to protect, specifically the inappropriate sharing of information that could result in market manipulation. The Commission also finds that the proposed change to ISE Rule 811, governing the Exchange's Directed Order program, to permit ISE PMMs that also handle Directed Orders on an agency basis, to act as agent when routing ISOs under ISE Rule 803(c)(2) is consistent with the Plan and the Act.

The Commission finds that ISE's proposed arrangements with respect to the handling of customer orders when ISE is not at the best price, and related amendment to its information barrier rules and Directed Order program, are designed to comply with its responsibility under the Plan to establish, maintain and enforce written policies and procedures reasonably designed to prevent Trade-Through. Accordingly, the Commission finds ISE's proposed arrangements consistent with the Plan and the Act.

Finally, the Commission finds that ISE's proposed amendments to certain other ISE rules to reflect the provision of the Plan, and to delete provisions of ISE'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,[61] that the proposed rule change (SR–ISE–2009–27), as modified by Amendment No. 1, be, and it hereby is, approved.

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

Florence E. Harmon,

Deputy Secretary.

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[61] 15 U.S.C. 78s(b)(2).

[62] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60550; File No. SR–Phlx–2009–61]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Order Granting Accelerated Approval of a Proposed Rule Change To Adopt Rules Implementing the Options Order Protection and Locked/Crossed Market Plan

August 20, 2009.

I. Introduction

On July 20, 2009, NASDAQ OMX PHLX, Inc. (''Phlx'' 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 28, 2009.[3] The Commission received no comments on the proposal. This order approves the proposed rule change on an accelerated basis.

II. Description of the Proposal

The Exchange proposes to amend and adopt new Phlx rules to implement the Options Order Protection and Locked/Crossed Market Plan (''Plan'').[4] Specifically, the Exchange proposes to replace the Exchange's current Intermarket Linkage rules (Phlx Rules 1081 and 1083–1087) with new rules implementing the Plan, amend other Exchange rules to reflect the Plan, and delete or modify provisions 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 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

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 60363 (July 22, 2009), 74 FR 37270 (''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: Chicago Board Options Exchange, Incorporated (''CBOE''); International Securities Exchange LLC (''ISE''); NASDAQ OMX BX, Inc. (''BOX''); The NASDAQ Stock Market LLC (''Nasdaq''); NYSE Amex LLC (''NYSE Amex''); NYSE Arca, Inc. (''NYSE Arca''); and Phlx (each exchange individually a ''Participant'' and, together, the ''Participating Options Exchanges'').

[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.

[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* Plan Notice and Plan Approval, *supra* note 4.