

to such bids in the sequence in which they are made. Rule 963NY also contains certain provisions for related to split-price priority and priority of complex orders. Violators of any part of Rule 6.63NY are subject to a sanction pursuant to the MRP, specifically Rule 476A Part 1C(iii)(i)29. Suggested fines for violations of Rule 963NY are presently \$500 for the first violation in a rolling twenty-four month period, \$1,000 for a second violation within the same period fine and a third violation is subject to a \$2,000 fine.

At this time the Exchange believes the current monetary fine levels contained in the MRP, for the three above mentioned violations, are inadequate, given the serious nature of these rules. In order to act as an effective deterrent against future violations, while also serving as a just penalty for those who commit these violations, the Exchange feels an increase in the fine levels for these three violations is warranted. NYSE Amex now proposes fine levels of \$1,000 for the first violation in a rolling twenty-four month period, \$2,500 for a second violation within the same period fine and \$5,000 for a third violation within the same period fine. These fine levels will apply to all three types of violations mentioned above.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>4</sup> of the Securities Exchange Act of 1934 (the "Act"), in general, and furthers the objectives of Section 6(b)(5)<sup>5</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposal is also consistent with Section 6(b)(6)<sup>6</sup> and 6(b)(7),<sup>7</sup> which requires that members and persons associated with members are appropriately disciplined for violations of Exchange rules and are provided a fair procedure for disciplinary procedures.

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

The Exchange does not believe that the proposed rule change will 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*

No written comments were solicited or received with respect to the proposed rule change.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

### **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-NYSEAmex-2009-45 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-NYSEAmex-2009-45. 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-NYSEAmex-2009-45 and should be submitted on or before September 16, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>8</sup>

**Florence E. Harmon,**  
*Deputy Secretary.*

[FR Doc. E9-20533 Filed 8-25-09; 8:45 am]

BILLING CODE 8010-01-P

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-60527; File No. SR-NYSEArca-2009-45]

### **Self-Regulatory Organizations; NYSE Arca, Inc.; 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**

August 18, 2009.

#### **I. Introduction**

On May 20, 2009, 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 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 12, 2009.<sup>3</sup> On July 12, 2009, the Exchange filed Amendment No. 1 to the

<sup>8</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. 60054 (June 5, 2009), 74 FR 28078 ("Notice").

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

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

<sup>6</sup> 15 U.S.C. 78f(b)(6).

<sup>7</sup> 15 U.S.C. 78f(b)(7).

proposed rule change.<sup>4</sup> 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 NYSE Arca rules to implement the Options Order Protection and Locked/Crossed Market Plan ("Plan").<sup>5</sup> Specifically, the Exchange proposes to amend and/or replace NYSE Arca Rules 6.92 through 6.96 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").<sup>6</sup> In pertinent part, the Old Plan

<sup>4</sup> 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. In addition, Amendment No. 1 revised Proposed NYSE Arca Rule 6.95(b) to delete the last sentence which stated, in reference to the proposed locked/crossed market exception for non-customer quotes, that the "exemption is operative as long as the Exchange identifies the presence of Customer orders in its disseminated bid or offer" because the sentence was not included in similar rules of other exchanges. Because the amendment provided clarification and revised the Exchange's proposed locked and crossed market rule in a non-substantive manner to conform with similar proposed rules of other exchanges, the amendment did not require notice and comment.

<sup>5</sup> 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"); The NASDAQ Stock Market LLC ("Nasdaq"); NASDAQ OMX BX, Inc. ("BOX"); NASDAQ OMX PHLX, Inc. ("Phlx"); NYSE Amex LLC ("NYSE Amex"); and NYSE Arca (each exchange individually a "Participant" and, together, the "Participating Options Exchanges").

<sup>6</sup> 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).

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.<sup>7</sup> 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,<sup>8</sup> namely Principal Acting as Agent Orders ("P/A Orders"), Principal Orders, and Satisfaction Orders.<sup>9</sup> 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.<sup>10</sup> Each of the Participating Options Exchanges, including the Exchange, has submitted an amendment to the Old Plan to withdraw from such Plan.<sup>11</sup> 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").<sup>12</sup>

### 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.<sup>13</sup> The Plan requires the Participating Options Exchanges to adopt rules "reasonably designed to prevent Trade-Throughs."<sup>14</sup> Participating Options Exchanges are also required to conduct

<sup>7</sup> Section 8(c) of the Old Plan.

<sup>8</sup> 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.

<sup>9</sup> Section 2(16) of the Old Plan.

<sup>10</sup> Section 7(a)(i)(C) of the Old Plan.

<sup>11</sup> See Securities Exchange Act Release No. 60360 (July 21, 2009) 74 FR 37265 (July 28, 2009) (File No. 4-429).

<sup>12</sup> 17 CFR 242.608.

<sup>13</sup> 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.

<sup>14</sup> 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.

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.<sup>15</sup> As further described below, the Plan incorporates a number of exceptions to trade-through liability.<sup>16</sup> Some of these exceptions are carried over from the Old Plan, including exceptions for trading rotations, non-firm quotes, and complex trades.<sup>17</sup> 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").<sup>18</sup> In addition, the Plan contains a new exception for stopped orders and price improvement.<sup>19</sup>

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.<sup>20</sup>

### 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.<sup>21</sup> As such, the Exchange proposes to adopt all applicable definitions from the Plan into the Exchange's rules.<sup>22</sup>

In addition, the Exchange proposes to prohibit its members from effecting Trade-Throughs, unless an exception applies.<sup>23</sup> Consistent with the Plan, the Exchange also proposes exceptions to the prohibition on trade throughs relating to: System issues; trading

<sup>15</sup> Section 5(a)(ii) of the Plan.

<sup>16</sup> Section 5(b) of the Plan.

<sup>17</sup> Subparagraphs (ii), (vii), and (viii), respectively, of Section 5(b) of the Plan.

<sup>18</sup> Subparagraphs (i), (iii), (vi), (ix), (xi), and (iv)-(v), respectively, of Section 5(b) of the Plan.

<sup>19</sup> Subparagraph (x) of Section 5(b) of the Plan.

<sup>20</sup> 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.

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

<sup>22</sup> Proposed NYSE Arca Rule 6.92.

<sup>23</sup> Proposed NYSE Arca Rule 6.94(a).

rotations; crossed markets; intermarket sweep orders; quote flickering; non-firm quotes; complex trades; customer stopped orders; stopped orders and price improvement; and benchmark trades.<sup>24</sup>

The Exchange also proposes a rule to address locked and crossed markets, as required by the Plan.<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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 to delete certain provisions of NYSE Arca rules to reflect the Exchange's withdrawal from the Old Plan.<sup>30</sup> Finally, the Exchange proposes to amend NYSE Arca Rule 10.12, the Exchange's Minor Rule Plan, to replace references to the Old Plan with references to the Plan.

## II. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>31</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act<sup>32</sup> 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.<sup>33</sup> Finally, the Commission finds that the proposed rule change is consistent with the requirements of the Plan.<sup>34</sup>

Proposed NYSE Arca Rule 6.92 would define applicable terms in a manner that are substantively identical to the defined terms of the Plan. As such, the Commission finds that proposed amendments to NYSE Arca Rule 6.92 are consistent with the Act and the Plan.

Proposed NYSE Arca Rule 6.94(a) would prohibit members from effecting Trade-Throughs unless an exception applies. Proposed NYSE Arca Rule 6.94(b) would provide for ten exceptions to the general Trade-Through prohibition, relating to systems issues, trading rotations, crossed markets, ISOs, quote flickering, non-firm quotes, complex trades, customer stopped orders, stopped orders and price improvement, and benchmark trades.<sup>35</sup> 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 NYSE Arca Rule 6.94(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

<sup>24</sup> Proposed NYSE Arca Rule 6.94(b)(1)–(10). In addition, the Exchange proposes to add ISOs as a new type of order under proposed NYSE Arca Rule 6.62(z).

<sup>25</sup> A "locked market" is defined as a quoted market in which a Protected Bid is equal to a Protected Offer. Proposed NYSE Arca Rule 6.92(a)(9). A "crossed market" is defined as a quoted market in which a Protected Bid is higher than a Protected Offer. Proposed NYSE Arca Rule 6.92(a)(5).

<sup>26</sup> Proposed NYSE Arca Rule 6.95(a).

<sup>27</sup> Proposed NYSE Arca Rule 6.95(b)(1)–(4).

<sup>28</sup> NYSE Arca noted that it can envision a customer authorizing a lock when the fees associating with trading against the locked market make the execution price uneconomical to the customer. See Notice, *supra* note 3 at 28080.

<sup>29</sup> Proposed NYSE Arca Temporary Rule 6.96.

<sup>30</sup> See Notice, *supra* note 3 at 28080–81, discussing proposed changes to NYSE Arca Rule 6.33, Commentaries .02–.04 to NYSE Arca Rule 6.35, and NYSE Arca Rule 6.76A.

<sup>31</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>32</sup> 15 U.S.C. 78f(b)(5).

<sup>33</sup> 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."

<sup>34</sup> See *supra* note 5.

<sup>35</sup> Proposed NYSE Arca Rule 6.94(b)(1)–(10).

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 NYSE Arca Rule 6.94(b) would be an exception for certain transactions involving ISOs.<sup>36</sup> An order identified as an ISO would be immediately executable by the Exchange (or any other Plan Participant that received such an order) based on the premise that the market participant sending the ISO has already attempted to access all better-priced Protected Quotations up to their displayed size. The Commission believes that this exception should help ensure more efficient and faster executions in the options markets.

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

Accordingly, the Commission finds that proposed NYSE Arca Rule 6.94 is consistent with Section 5 of the Plan and Section 6(b)(5) of the Act<sup>37</sup> 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 NYSE Arca Rule 6.95(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 NYSE Arca Rule 6.95(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 NYSE Arca Rule 6.95(b) would permit four exceptions to the Exchange's general rule relating to locked and crossed markets.<sup>38</sup> The first three would be similar to analogous certain trade-through exceptions under proposed NYSE Arca Rule 6.94(b), and relate to when the Exchange is experiencing systems issues, when there is exists a crossed market, and when a member simultaneously routes ISOs against the full displayed size of any locked or crossed Protected Bid 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 on to 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 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

<sup>36</sup> Proposed NYSE Arca Rule 6.94(b)(4).

<sup>37</sup> 15 U.S.C. 78f(b)(5).

<sup>38</sup> 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.

Act<sup>39</sup> 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 NYSE Arca Temporary Rule 6.96, 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,<sup>40</sup> 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.<sup>41</sup> The Exchange and each of the other Participating Options Exchanges have proposed substantially identical temporary provisions to accommodate this possibility.<sup>42</sup> 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<sup>43</sup> 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.

Finally, the Commission finds that NYSE Arca's other proposed changes, including the proposed modifications to NYSE Arca Rule 6.33, Commentary .02-.04 to NYSE Arca Rule 6.35, NYSE Arca Rule 6.76.A, and NYSE Arca Rule 10.12 are appropriate and consistent with the Act.

<sup>39</sup> 15 U.S.C. 78f(b)(5).

<sup>40</sup> See Plan Approval, *supra*, note 5.

<sup>41</sup> 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.

<sup>42</sup> The Commission notes that the rules contained in NYSE Arca Temporary Rule 6.96 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.

<sup>43</sup> 15 U.S.C. 78f(b)(5).

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>44</sup> that the proposed rule change (SR-NYSEArca-2009-45), 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.<sup>45</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-20537 Filed 8-25-09; 8:45 am]

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60535; File No. SR-NYSEAmex-2009-55]

#### Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Amending Section 107(H) of the NYSE Amex Company Guide

August 19, 2009.

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 August 10, 2009, NYSE Amex LLC ("NYSE Amex" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposed rule change on an accelerated basis.

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

The Exchange proposes to amend Section 107(H) of the NYSE Amex Company Guide in order to add the CBOE Volatility Index® (VIX®) Futures ("VIX Futures") to the definition of Futures Reference Asset. The text of the proposed rule change is attached as Exhibit 5 to the 19b-4 form. A copy of this filing is available on the Exchange's Web site at <http://www.nyse.com>, at the Exchange's principal office and at the Commission's Public Reference Room.

<sup>44</sup> 15 U.S.C. 78s(b)(2).

<sup>45</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.

#### 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 those statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

##### 1. Purpose

Rule 19b-4(e)<sup>3</sup> under the Securities Exchange Act of 1934 ("Act")<sup>4</sup> provides that the listing and trading of a new derivative securities product by a self-regulatory organization ("SRO") shall not be deemed a proposed rule change, pursuant to section (c)(1) of Rule 19b-4,<sup>5</sup> if the Commission has approved, pursuant to Section 19(b) of the Act,<sup>6</sup> the SRO's trading rules, procedures, and listing standards for the product class that would include the new derivative securities product,<sup>7</sup> and the SRO has a surveillance program for the product class.<sup>8</sup> This proposal is substantially similar to the previously approved NYSE Arca Equities Rule 5.2(j)(6)(v).<sup>9</sup>

The Commission has approved the listing pursuant to Section 107(H) of the Amex Company Guide, including listing pursuant to Rule 19b-4(e), of Futures-Linked Securities.<sup>10</sup>

The Exchange is proposing to amend its generic listing standards under Section 107(H) of the NYSE Amex Company Guide<sup>11</sup> for Futures-Linked Securities pursuant to which it will be able to trade securities linked to VIX Futures without Commission approval of each individual product pursuant to

<sup>3</sup> 17 CFR 240.19b-4(e).

<sup>4</sup> 17 U.S.C. 78a.

<sup>5</sup> 17 CFR 240.19b-4(c)(1).

<sup>6</sup> 15 U.S.C. 78s(b).

<sup>7</sup> E-mail from Timothy Malinowski, Director, NYSE Euronext, to Edward Cho, Special Counsel, Division of Trading and Markets, Commission, dated August 11, 2009 ("Exchange Confirmation").

<sup>8</sup> See Securities Exchange Act Release No. 40761 (December 8, 1998), 63 FR 70952 (December 22, 1998) [sic].

<sup>9</sup> See Securities Exchange Act Release No. 34-58968 (November 17, 2008), 73 FR 64647 [sic] (SR-NYSEArca-2008-111).

<sup>10</sup> See Securities Exchange Act Release No. 34-57739 (April 30, 2008), 73 FR 25061 [sic] (SR-Amex-2008-17).

<sup>11</sup> See Exchange Confirmation, *supra* note 7.