determination rather than brokers on their behalf. The Commission further notes that NASD rules do not provide for broker voting on any matters and NYSE rules prohibit broker voting on equity compensation plans.[20] Therefore, the Exchange's proposed provision would be consistent with NASD and NYSE rules regarding broker voting on equity compensation plans. The Commission has considered the impact on smaller issuers, such as those listed on Nasdaq and the Amex, in response to the comments on this issue.[21] The Commission believes that the benefit of ensuring that the votes reflect the views of beneficial shareholders on equity compensation plans outweighs the potential difficulties in obtaining the vote.

The Commission also notes that the Exchange proposes to implement a transition period that would make the new rule eliminating broker voting on equity compensation plans applicable only to shareholder meetings that occur on or after the 90th day from the effective date of the Exchange's proposal.

I. Summary

Overall, the Commission believes that the Exchange's proposal, as amended, is similar to the NYSE and Nasdaq's recently approved shareholder approval rules.[22] The Commission therefore believes that the Exchange's amended proposal should provide for more clear and uniform standards for shareholder approval of equity compensation plans. The Commission notes that, even with the availability of the proposed limited exemptions from shareholder approval under the Exchange's amended proposal, shareholder approval under the new standards would be required in more circumstances than under existing Exchange rules. The Commission further notes that the Exchange proposes to adopt a requirement that an issuer must notify it in writing when it uses one of the exemptions from the shareholder approval requirements. The Commission believes that such a requirement, coupled with the additional disclosure requirements for inducement grants, should reduce the potential for abuse of any of the exemptions.[23] In addition, the Exchange's proposed amendment to BSE Section 3, which would preclude broker-dealers from voting on equity compensation plans without explicit instructions from the beneficial owner, is consistent with the standard under current NYSE and NASD rules.

The Commission believes that the Exchange's proposal, as amended, which is similar to the NYSE and Nasdaq's shareholder approval rules,[24] sets a consistent, minimum standard for shareholder approval of equity compensation plans. The Commission believes that the Exchange's proposal, as amended, should help to ensure that companies will not make listing decisions simply to avoid shareholder approval requirements for equity compensation plans and should provide shareholders with greater protection from the potential dilutive effect of equity compensation plans. Based on the above, the Commission finds that the Exchange's proposal, as amended, should help to protect investors, is in the public interest, and does not unfairly discriminate among issuers, consistent with Section 6(b)(5) of the Act.[25] The Commission therefore finds the Exchange's proposal, as amended, to be consistent with the Act and the rules and regulations thereunder.

V. Accelerated Approval of the Exchange's Proposal and Amendment Nos. 1 and 2

The Commission finds good cause for approving the Exchange's proposal and Amendment Nos. 1 and 2 thereto prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Commission notes that the Exchange's proposal, as amended, is similar to the NYSE and Nasdaq's proposals requiring shareholder approval of equity compensation plans. Both the NYSE and Nasdaq's proposals were published for comment in the **Federal Register** and recently approved by the Commission.[26] The Commission believes that it already considered and addressed the issues that may be raised by the Exchange's amended proposal in its approval of the NYSE and Nasdaq's proposals.[27]

The Commission believes that accelerated approval of the Exchange's proposal, as amended, is essential to allow for immediate harmonization of, and consistency in, the shareholder approval requirements for equity compensation plans among the markets. This will prevent issuers from making listing decisions based on differences in self-regulatory organization shareholder approval requirements and should provide equal investor protection to shareholders on the dilutive effects of plans irrespective of where the security trades. The Commission further believes that making the Exchange's new shareholder approval rules effective upon Commission approval will immediately impose the same requirements on the Exchange's issuers as those imposed upon NYSE, Nasdaq, and Amex issuers. Based on the above, the Commission finds good cause, consistent with Sections 6(b)(5) and 19(b)(2) of the Act, [28] to approve the Exchange's proposal and Amendment Nos. 1 and 2 thereto on an accelerated basis.

VI. Conclusion

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[29] that the proposed rule change (SR–BSE–2003–16) and Amendment Nos. 1 and 2 thereto are hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[30]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 03–28076 Filed 11–6–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48737; File No. SR–CBOE–2003–45]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change by the Chicago Board Options Exchange, Inc. and Amendment No. 1 Thereto Relating to Shareholder Approval of Equity Compensation Plans and the Voting of Proxies

October 31, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

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[20] *See* NASD Rule 2260; NYSE Rule 452; and Section 402.08 of the NYSE's *Listed Company Manual.*

[21] *See supra* notes 6 and 20.

[22] *See supra* note 6; *see also supra* note 14.

[23] *See also supra* note 16 and accompanying text.

[24] *See supra* note 6; *see also supra* note 14.

[25] 15 U.S.C. 78f(b)(5).

[26] *See* Securities Exchange Act Release No. 46620 (October 8, 2002), 67 FR 63486 (notice of the NYSE's proposal). The Commission also published a correction to the notice of the NYSE's proposal. *See* Securities Exchange Act Release No. 44620A (October 21, 2002), 67 FR 65617 (October 25, 2002). *See* Securities Exchange Act Release No. 46649 (October 11, 2002), 67 FR 64173 (notice of Nasdaq's proposal). *See supra* note 6; *see also supra* note 14.

[27] Some of the substantive provisions ultimately adopted by the NYSE and Nasdaq, and now being proposed for adoption by the Exchange, were in response to these comments. The comments on the NYSE and Nasdaq proposals were also discussed in detail in the Commission's approval order of the NYSE and Nasdaq proposals. *See supra* note 6; *see also supra* note 14.

[28] 15 U.S.C. 78f(b)(5) and 78s(b)(2).

[29] 15 U.S.C. 78s(b)(2).

[30] 17 CFR 200.30–3(a)(12).

(''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 6, 2003, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On October 29, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal and Amendment No. 1 thereto 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 CBOE Rules 31.79, 31.80, 31.85 and 31.96, and CBOE Form 1 under ''Forms For Listing,'' to strengthen listing standards relating to shareholder approval for stock option plans or other equity compensation arrangements and to adopt interpretative material pertaining to shareholder approval for stock option plans or other equity compensation arrangements.

Below is the text of the proposed rule change.[4] Proposed new language is *italicized;* proposed deleted language is [bracketed].

* * * * *

Chicago Board Options Exchange, Incorporated

Rules

* * * * *

Chapter XXXI

* * * * *

Shareholders' Approval

* * * * *

Rule 31.79 Options to Officers, Directors, [or Key] Employees *or Consultants*

Approval of shareholders is required [(unless exempted under paragraphs (a) and (b) below) as a prerequisite to approval of applications to list additional shares reserved for] *with respect to the establishment of (or material amendment to) a stock* option[s] *or purchase plan or other equity compensation arrangement pursuant to which options or stock may be acquired by officers, directors, employees, or consultants* [granted or to be granted to officers, directors or key employees], regardless of whether or not such authorization is required by law or by the company's charter, *except for*:[.] [The Exchange requires that such shareholder's approval be solicited pursuant to a proxy statement conforming to SEC proxy rules which discloses all of the essential details of the options or of the plan pursuant to which the options will be granted.]

[**Note:** This policy does not preclude the adoption of a stock option plan, or the granting of options, subject to ratification by shareholders, prior to the filing of an application for the listing of the shares reserved for such purpose.

The Exchange will not require shareholder's approval as a condition to listing shares reserved for the exercise of options when:]

(a) [such options are issued] *issuances* to an individual, not previously *an* employee[d] *or director of* [by] the company, *or following a bonafide period of non-employment,* as an inducement [essential] *material* to entering into [a contract of] employment with the company, provided [that] *(i) such issuances are approved by either a majority of the company's independent directors or the company's independent compensation committee and (ii) the company discloses in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved, promptly following an issuance of any employment inducement grant in reliance on this exception* [the potential issuance of shares pursuant to such options does not exceed 5% of the company's outstanding common stock]; or

(b) [such options are to be granted:]

[(i)] [under a] *tax qualified, non-discriminatory employee benefit* plan*s* [or arrangement] (*e.g., plans that meet the requirements of Section 401(a) or 423 of the Internal Revenue Code) or parallel nonqualified plans, provided such plans are approved by a majority of the company's independent directors or the company's independent compensation committee, or plans that merely provide a convenient way to purchase shares on the open market or from the company at fair market value* [in which all, or substantially all, of the company's employees participate, in a fair and equitable manner,]*;* or

(c) Plans or arrangements relating to an acquisition or merger; or

(d) Warrants or rights issued generally to all security holders of the company or stock purchase plans available on equal terms to all security holders of the company (such as a typical dividend reinvestment plan).

The Exchange requires that such shareholder's approval be solicited pursuant to a proxy statement conforming to SEC proxy rules which discloses all of the essential details of the options or of the plan pursuant to which the options will be granted.

[(ii) under a plan or arrangement for officers, directors or key employees provided such incentive arrangement for officers, directors or key employees do not authorize the issuance in any one year of more than the lesser of 1% of the number of shares outstanding common stock, 1% of the voting power outstanding, or 25,000 shares and provided that all arrangements adopted without shareholder approval in any five-year period do not authorize, in the aggregate, the issuance of more than 10% of outstanding common stock or voting power outstanding. (For the purpose of calculating the percentage of stock issued in the aggregate, stock to be issued pursuant to options which have expired and/or been canceled shall not be included.)

For purposes of the above policy, the term ''options'' includes not only the usual type of nontransferable options granted in consideration of continued employment but also any other arrangement under which controlling shareholders, officers, directors or key employees may acquire (other than as part of a public offering) stock or convertible securities of a company at a price below market price at the time such stock is acquired or through the use of credit extended, directly or indirectly, by the company. Thus, the sale to such a person(s) of common stock purchase warrants or rights (not part of a public offering) or the sale of stock to such person who has borrowed money from the company, will normally necessitate shareholder approval.]

* * * * *

**** * * Interpretations and Policies:***

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

[2] 17 CFR 240.19b–4.

[3] *See* letter from David Doherty, Attorney, Legal Division, CBOE, to Sapna C. Patel, Special Counsel, Division of Market Regulation (''Division''), Commission, dated October 29, 2003 (''Amendment No. 1''). In Amendment No. 1, the Exchange made a technical correction to its proposed rule language by underlining the heading ''Interpretations and Policies'' under CBOE Rule 31.79 to indicate that it is proposed new language. Because this is a technical amendment, it is not subject to notice and comment.

[4] With respect to implementation of revised CBOE Rules 31.79, 31.80, 31.85 and 31.96, and CBOE Form 1 under ''Forms For Listing,'' the Exchange notes that they become effective upon SEC approval, and that existing plans would be grandfathered. However, any material modification to plans in place or adopted after the effective date would require shareholder approval. Telephone conversation between David Doherty, Attorney, Legal Division, CBOE, and Sapna C. Patel, Special Counsel, Division, Commission, on October 28, 2003.

.01 Rule 31.79 requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following:

(1) Any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction);

(2) Any material increase in benefits to participants, including any material change to:

(i) permit a repricing (or decrease in the exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan;

(3) Any material expansion of the class of participants eligible to participate in the plan; and

(4) Any expansion in the types of options or awards provided under the plan.

While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. However, if a plan contains a formula for automatic increases in the shares available (sometimes called an ''evergreen formula''), or for automatic grants pursuant to a dollar-based formula (such as annual grants based on a certain dollar value, or matching contributions based upon the amount of compensation the participant elects to defer), such plans cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. However, plans that do not contain a formula and do not impose a limit on the number of shares available for grant would require shareholder approval of each grant under the plan. A requirement that grants be made out of treasury shares or repurchased shares will not alleviate these additional shareholder approval requirements.

As a general matter, when preparing plans and presenting them for shareholder approval, issuers should strive to make plan terms easy to understand. In that regard, it is recommended that plans meant to permit repricing use explicit terminology to make this clear.

Rule 31.79 provides an exception to the requirement for shareholder approval for warrants or rights offered generally to all shareholders. An exception is also provided for tax qualified, non-discriminatory employee benefit plans as well as parallel nonqualified plans as these plans are regulated under the Internal Revenue Code and Treasury Department regulations. An equity compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable tax qualified non-discriminatory employee benefit plan or parallel nonqualified plan that the issuer provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law, are also exempt from shareholder approval under this section. The term ''parallel nonqualified plan'' means a plan that is a ''pension plan'' within the meaning of the Employee Retirement Income Security Act (''ERISA''), 29 U.S.C. § 1002 (1999), that is designed to work in parallel with a plan intended to be qualified under Internal Revenue Code Section 401(a), to provide benefits that exceed the limits set forth in Internal Revenue Code Section 402(g) (the section that limits an employee's annual pre-tax contributions to a 401(k) plan), Internal Revenue Code Section 401(a)(17) (the section that limits the amount of an employee's compensation that can be taken into account for plan purposes) and/or Internal Revenue Code Section 415 (the section that limits the contributions and benefits under qualified plans) and/or any successor or similar limitations that may thereafter be enacted. However, a plan will not be considered a parallel nonqualified plan unless: (i) It covers all or substantially all employees of an employer who are participants in the related qualified plan whose annual compensation is in excess of the limit of Code Section 401(a)(17) (or any successor or similar limitation that may hereafter be enacted); (ii) its terms are substantially the same as the qualified plan that it parallels except for the elimination of the limitations described in the preceding sentence; and (iii) no participant receives employer equity contributions under the plan in excess of 25% of the participant's cash compensation.

Further, there is an exception for inducement grants to new employees because in these cases a company has an arm's length relationship with the new employees. Inducement grants for these purposes include grants of options or stock to new employees in connection with a merger or acquisition. Rule 31.79 requires that such issuances must be approved by the issuer's independent compensation committee or a majority of the issuer's independent directors. The rule further requires that promptly following an issuance of any employment inducement grant in reliance on this exception, the listed company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

In addition, plans or arrangements involving a merger or acquisition do not require shareholder approval in two situations. First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction. Second, shares available under certain plans acquired in acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exception applies to situations where the party which is not a listed company following the transaction has shares available for grant under pre-existing plans that were previously approved by shareholders pursuant to Rule 31.79. These shares may be used for post-transaction grants of options and other equity awards by the listed company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or arrangement or another plan or arrangement, without further shareholder approval, provided: (1) The time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (2) such options and other awards are not granted to individuals who were employed by the granting company or its subsidiaries at the time the merger or acquisition was consummated. A plan or arrangement adopted in contemplation of the merger or acquisition transaction would not be viewed as pre-existing for purposes of this exception. This exception is appropriate because it will not result in any increase in the aggregate potential dilution of the combined enterprise. In this regard, any additional shares available for issuance under a plan or arrangement acquired in connection with a merger or acquisition would be counted in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock, thus triggering the shareholder approval requirements of Rule 31.80(b).

A listed company is not permitted to use repurchased shares to fund option plans or grants without prior shareholder approval.

Pursuant to Rule 31.96(H), a listed company is required to notify the Exchange in writing prior to the use of any of the exceptions set forth in

paragraphs (a) through (d) of Rule 31.79.

* * * * *

Rule 31.80 Acquisitions

* * * * *

*** * * Interpretations and Policies**

.01 Any additional shares available for issuance under a stock option or purchase plan or other equity compensation arrangement acquired in connection with a merger or acquisition are counted in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock as provided in Rule 31.80(b).

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Rule 31.85 Giving Proxies by Member Organizations

(a) No change.

(b) When a member organization may not vote without customer instructions—A member organization may not give a proxy to vote without instructions from beneficial owners when the matter to be voted upon:

(1)–(8) No change.

(9) involves a waiver or modification of preemptive rights[, except when the company's proposal is to waive such rights with respect to shares being offered pursuant to stock options or purchase plans involving the additional issuance of not more than 5% of the company's outstanding common shares];

(10)–(11) No change.

(12) [authorizes the issuance of stock, or options to purchase stock to directors, officers or employees in an amount which exceeds 5% of the total amount of the class outstanding] *authorizes the implementation of any equity compensation plan, or any material revision to the terms of any existing equity compensation plan (whether or not shareholder approval of such plan is required by Rule 31.79);*

(13)–(18) No change.

(c)–(h) No change.

* * * * *

Rule 31.96 Notices to Exchange

(A)–(G) No change.

(H) Reliance on Shareholder Approval Exceptions

A listed company is required to notify the Exchange in writing prior to the use of any of the exceptions set forth in paragraphs (a) through (d) of Rule 31.79.

* * * * *

Forms for Listing

* * * * *

Form 1

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Listing Agreement

_____ (the ''Company''), in consideration of the listing of its securities, hereby agrees with the Chicago Board Options Exchange, Incorporated (the ''Exchange''), that it will:

1. Promptly notify the Exchange of the following:

(a)–(i) No change.

(j) Any diminution in the supply of the security available for trading caused by deposit of the security under voting trust, tender offer or other agreements; [and]

(k) The existence of any technical default or default in interest or principal payment, cumulative dividends, sinking funds, or redemption fund requirements of the Company or any controlled corporation, whether consolidated or unconsolidated*; and[.]*

(l) the use of any of the exceptions set forth in paragraphs (a) through (d) of Rule 31.79, which notice must be sent to the Exchange in writing prior to such use.

(2)–(28) No change.

* * * * *

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 Exchange 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 III below. The Exchange 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 Basisfor, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its non-option rules (*i.e.,* equity rules) that apply to listing standards for stocks that may be listed on the Exchange. CBOE Rule 31.79 currently requires listed companies to obtain shareholder approval for stock option plans and other arrangements in which officers, directors, and key employees participate. However, the current Rule contains two exceptions, one for ''broadly based plans,'' which, under CBOE Rule 31.79, is a plan in which all or substantially all of the company's employees participate in a fair and equitable manner, even if officers, directors and key employees receive options grants under the plan, and one for de minimis grants. To enhance investor confidence in the national securities markets, the Exchange now proposes to require shareholder approval of all stock option and equity compensation plans, including ''broad based plans.'' The proposed rule change would also provide four exceptions to the shareholder approval requirement based on the proposals set forth in a recent approval order of the New York Stock Exchange, Inc. (''NYSE'') and the National Association of Securities Dealers, Inc. (''NASD'')/The Nasdaq Stock Market, Inc. (''Nasdaq'') proposals related to equity compensation plans.[5] In addition, the Exchange proposes to eliminate the de minimis exception currently reflected in CBOE Rule 31.79(b)(ii), which generally allows for the grant of the lesser of 1% of the number of outstanding shares of common stock, 1% of the voting power outstanding or 25,000 shares without shareholder approval, as this exception is not in accord with the concept of restricting the use of unapproved options.

Proposed CBOE Rule 31.79(a) amends the current exception set forth in CBOE Rule 31.79(a) to provide for inducement grants to new employees or to previous employees following a bonafide period of non-employment with the listed company. The proposed rule change would delete the reference that limits the grant to five percent of the company's outstanding common stock, which would align proposed CBOE Rule 31.79(a) with the Nasdaq/NYSE Proposals. The Exchange does not believe that shareholder approval is necessary for these types of inducement grants since in these cases a company has an arm's length relationship with

[5] *See* Securities Exchange Act Release No. 48108 (June 30, 2003), 68 FR 39995 (July 3, 2003) (order approving File Nos. SR–NYSE–2002–46 and SR–NASD–2002–140) (the ''Nasdaq/NYSE Proposals''). *See also* Securities Exchange Act Release No. 48627 (October 14, 2003), 68 FR 60426 (October 22, 2003) (notice of filing and order granting accelerated approval to File No. SR–NASD–2003–130, incorporating amendments to the NASD's recently approved shareholder approval rules for equity compensation plans applicable to Nasdaq quoted securities). The Commission also published a correction to the notice of File No. SR–NASD–2003–130. *See* Securities Exchange Act Release No. 48627A (October 22, 2003), 68 FR 61532 (October 28, 2003). The Commission notes that these additional amendments by Nasdaq make the NYSE and Nasdaq proposals more consistent and uniform. *See also infra* note 11 (regarding the Commission's recent approval of a similar proposal by the American Stock Exchange LLC (''Amex'')).

the new employees, and its interests are directly aligned with those of shareholders. The Exchange believes that any potential abuse of the inducement exception would be mitigated by the requirement that the company's independent compensation committee or a majority of the company's independent directors approve the inducement grant. In addition, a listed company relying on the inducement award exception, as set forth in Rule 31.79(a), must disclose in a press release the material terms of the award, including the recipient(s) of the award and the number of shares involved.

Proposed CBOE Rule 31.79(b), a new exception based on the Nasdaq/NYSE Proposals, does not require shareholder approval for tax qualified, nondiscriminatory benefit plans, as these plans are regulated under the Internal Revenue Code and Treasury Department regulations. However, the listed company's independent compensation committee or a majority of the listed company's independent directors must approve these plans. Along with tax qualified, non-discriminatory employee benefit plans, proposed CBOE Rule 31.79(b) also proposes an exception for parallel nonqualified plans. The proposed rule change would not impact any shareholder approval or other requirements under the Internal Revenue Code or other applicable laws or requirements for such plans. Additionally, an equity compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable tax qualified, non-discriminatory employee benefit plan or parallel nonqualified plan that the issuer provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law, is also exempt from the shareholder approval requirements.

Proposed Interpretation .01 to CBOE Rule 31.79 makes clear that a company would not be permitted to use repurchased shares to fund options plans without prior shareholder approval. However, plans that merely provide a convenient way to purchase shares on the open market or from the issuer at fair market value would not require shareholder approval.

With respect to plans or arrangements relating to an acquisition or merger, as set forth in proposed CBOE Rule 31.79(c), proposed Interpretation .01 to CBOE Rule 31.79 makes clear that these plans or arrangements would not require shareholder approval in two situations. First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction. Second, shares available under certain plans acquired in acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exception applies to situations where the party that is not a listed company following the transaction has shares available for grant under pre-existing plans that were previously approved by shareholders. These shares may be used for post-transaction grants of options and other equity awards by the listed company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or another plan, without further shareholder approval, so long as (1) the time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (2) such options and other awards are not granted to individuals who were employed by the granting company or its subsidiaries at the time the merger or acquisition was consummated. The Exchange would view a plan adopted in contemplation of the merger or acquisition transaction as not pre-existing for purposes of this exception. The Exchange believes that this exception is appropriate because it believes that it would not result in any increase in the aggregate potential dilution of the combined enterprise.

Finally, proposed CBOE Rule 31.79(d) sets forth a new exception for warrants or rights offered generally to all shareholders. The Exchange believes that this issuance does not raise the same concerns regarding self-dealing and dilution as other, more exclusive stock option plans or arrangements may create.

The Exchange's proposal also clarifies that only material amendments to plans (including existing plans) will require shareholder approval. Proposed Interpretation .01 to CBOE Rule 31.79 specifies a non-exclusive list of plan amendments that would be considered material. While broad, general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would be required.[6] Certain provisions in a plan, however, cannot be amended without shareholder approval. For example, plans that contain a formula for automatic increases in the shares available (sometimes called an ''evergreen formula'') or that automatically grant shares pursuant to a dollar-based formula cannot have a term in excess of ten years, unless shareholder approval is obtained every ten years. In addition, plans that do not contain a formula and do not impose a limit on the number of shares available for grant would require shareholder approval of each grant under the plan. A requirement that grants be made out of treasury shares or repurchased shares will not alleviate these additional shareholder approval requirements. Proposed Interpretation .01 to CBOE Rule 31.79 also provides that issuers should strive to make plan terms easily understandable and that plans meant to permit repricing should use explicit terminology in this regard.

Proposed Interpretation .01 to CBOE Rule 31.80 reflects the concept set forth in proposed Interpretation .01 to CBOE Rule 31.79, that additional shares available for issuance under a stock option or purchase plan or other equity compensation arrangement acquired in connection with a merger or acquisition are counted in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock. Furthermore, the Exchange proposes to amend CBOE Rule 31.96 and the Listing Agreement set forth on CBOE Form 1 to require issuers to notify the Exchange in writing prior to the use of any of the exceptions set forth in paragraphs (a) through (d) of CBOE Rule 31.79.

In addition, the Exchange proposes to amend CBOE Rule 31.85 to preclude the Exchange's member organizations from giving a proxy to vote on equity compensation plans unless the beneficial owner of the shares has given voting instructions.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, in that it is 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. As previously noted, the Exchange believes that the proposed rule change will strengthen shareholder approval

[6] The Commission notes that if a plan permits a specific action without further shareholder approval, it must be clear and specific enough to provide meaningful shareholder approval of those provisions.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

requirements with respect to stock option plans.

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

Written comments on the proposed rule change were neither solicited nor received.

III. 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–CBOE–2003–45 and should be submitted by November 28, 2003.

IV. Commission's Findings and Order Granting Accelerated Approval to the Proposed Rule Change

After careful review, the Commission finds that the Exchange's proposal is consistent with the Act and the rules and regulations promulgated thereunder applicable to a national securities exchange and, in particular, with the requirements of Section 6(b) of the Act.[9] Specifically, the Commission finds that approval of the Exchange's proposal is consistent with Section 6(b)(5) of the Act[10] in that it is designed to, among other things, facilitate transactions in securities; 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; and does not permit unfair discrimination among issuers.

The Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, restore investor confidence in the national marketplace. The Commission believes that the Exchange's proposal, which requires shareholder approval of equity compensation plans and which follows the Commission's approval of similar proposals by the NYSE, Nasdaq, and Amex[11] is the first step under this directive because it should have the effect of safeguarding the interests of shareholders, while placing certain restrictions on Exchange-listed companies.

In addition, the Commission notes that the Exchange's proposal is similar and almost identical to proposals by NYSE and Nasdaq requiring shareholder approval of equity compensation plans that have previously been approved by the Commission.[12] The Commission believes that it has already considered and addressed the issues that may be raised by the Exchange's proposal when it approved these proposals. The Commission notes that approval of the Exchange's proposal will conform the Exchange's shareholder approval requirements for equity compensation plans with those of the NYSE and Nasdaq, and will immediately impose the same requirements on the Exchange's issuers as those imposed upon NYSE, Nasdaq, and Amex issuers. The adoption of these standards by the Exchange is an important step to ensure that issuers will not be able to avoid shareholder approval requirements for equity compensation plans based on their listed marketplace.

A. Exception From Shareholder Approval for Inducement Grants

The Commission believes that the requirement that the issuance of all inducement grants be subject to review by either the issuer's independent compensation committee or a majority of the board's independent directors, under the Exchange's proposal, should prevent abuse of this exception from shareholder approval. In addition, the Exchange proposes to limit its exception for inducement grants to new employees or to previous employees being rehired after a bona fide period of interruption of employment, and to new employees in connection with an acquisition or merger. The Commission believes that these limitations should help to prevent the inducement exception from being used inappropriately.

The Commission notes that the Exchange is proposing to include a requirement, similar to the requirement under the NYSE and Nasdaq's recently approved shareholder approval rules, that, promptly following the grant of any inducement award, companies must disclose in a press release the material terms of the award, including the recipient(s) of the award and the number of shares involved.[13] The Commission notes that the Exchange is also proposing a requirement, similar to the requirements under the NYSE and Nasdaq's recently approved shareholder approval rules,[14] that an issuer must notify it in writing when it uses this exception, and/or any other exception, from its shareholder approval requirement. The Commission believes that these disclosure and notification requirements will provide transparency to investors and should reduce the potential for abuse of this exception for inducement grants.

B. Exception From Shareholder Approval for Mergers and Acquisitions

The Commission notes that the Exchange's exception from shareholder approval for mergers and acquisitions contains safeguards that should prevent abuse in this area. First, only pre-existing plans that were previously approved by the acquired company's shareholders would be available to the listed company for post-transactional grants. In addition, shares under those previously approved plans could not be granted to individuals who were

[9] 15 U.S.C. 78f(b). In approving the Exchange's proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78f(b)(5).

[11] *See supra* note 5. The Commission notes that it has recently approved similar rules requiring shareholder approval of equity compensation plans for the Amex on an accelerated basis. The Amex's proposal is almost identical to, and based on, the NYSE and Nasdaq proposals. *See* Securities Exchange Act Release No. 48610 (October 9, 2003), 68 FR 59650 (October 16, 2003).

[12] *See supra* notes 5 and 11.

[13] This disclosure would, of course, be in addition to any information that is required to be disclosed in annual reports filed with the Commission. For example, Item 201(d) of Regulation S–K [17 CFR 229.201(d)] and Item 201(d) of Regulation S–B [17 CFR 228.201(d)] require issuers to present—in their annual reports on Form 10–K or Form 10–KSB—separate, tabular disclosure concerning equity compensation plans that have been approved by shareholders and equity compensation plans that have not been approved by shareholders.

[14] *See* Section 303A(8) of the NYSE's *Listed Company Manual* and NASD Rules 4310(c)(17)(A) and 4320(e)(15)(A).

employed, immediately before the transaction, by the post-transaction listed company or its subsidiaries. The Commission also notes that, under the Exchange's proposal, any shares reserved for listing in connection with a merger or acquisition pursuant to this exception would be counted by the Exchange in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock, thereby requiring shareholder approval under CBOE Rule 31.80(b). Finally, the Commission notes that the Exchange proposes an additional requirement that an issuer must notify it in writing when it uses this exception, and/or any other exception, from its shareholder approval requirement. Based on the above, the Commission believes that the Exchange has provided measures to ensure that the exception for mergers and acquisitions is only used in limited circumstances, which should help reduce the potential for dilution of shareholder interests.

C. Exception From Shareholder Approval for Tax Qualified and Parallel Nonqualified Plans

The Commission believes that, given the extensive government regulation—the Internal Revenue Code and Treasury regulations—for tax qualified plans and the general limitations associated with parallel nonqualified plans, shareholders should not experience significant dilution as a result of this exception. In addition, the Commission notes that the Exchange proposes to add a limitation under this exception that a plan would not be considered a nonqualified parallel plan under its proposal if employees who are participants in such a plan receive employer contributions under the plan in excess of 25% of the participants' cash compensation. The Commission further notes that the Exchange proposes an additional requirement that an issuer must notify it in writing when it uses this exception, and/or any other exception, from its shareholder approval requirement. The Commission believes that, taken together, these limitations should reduce concerns regarding abuse of this exception from the shareholder approval requirements.

In addition, the Commission notes that, similar to the exceptions in the NYSE and Nasdaq's recently approved shareholder approval rules, the Exchange proposes to adopt an exception from the shareholder approval requirements for an equity compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable tax qualified, non-discriminatory employee benefit plan or parallel nonqualified plan that the issuer provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law. The Commission believes that this change will conform the Exchange's shareholder approval rule to that of the NYSE and Nasdaq and will provide greater clarity for issuers regarding tax qualified, non-discriminatory employee benefit plans and parallel nonqualified plans for their non-U.S. employees.

D. Material Amendments/Revisions to Plans

The Commission notes that the Exchange proposes to provide a non-exclusive list, similar to lists found in the NYSE and Nasdaq's shareholder approval rules,[15] as to what constitutes a material amendment/revision to a plan. As noted above, material amendments/revisions to plans will require shareholder approval under Exchange rules. A material amendment/revision under the Exchange's proposal would include, but is not limited to: A material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); a material increase in benefits to participants, including any material change to (1) permit a repricing (or decrease in exercise price) of outstanding options, (2) reduce the price at which shares or options to purchase shares may be offered, or (3) extend the duration of the plan; a material expansion of the class of participants eligible to participate in the plan; and an expansion of the type of options or awards available under the plan. The Exchange's proposal also describes what would constitute a material amendment/revision for plans containing a formula for automatic increases (such as evergreen plans) and automatic grants requiring shareholder approval.

The Commission believes that the Exchange's non-exclusive list of what would constitute a material amendment/revision to a plan provides companies with clarity and guidance for when certain amendments and revisions to plans would require shareholder approval. The Commission also believes that the Exchange's proposal to conform its non-exclusive list with the NYSE and Nasdaq's rules on material amendments/revisions should help to ensure that the concept of material amendments/revisions is consistent among the markets so that differences between the markets cannot be abused.

[15] *See supra* note 5; *see also supra* note 11.

E. Repricing of Plans

The Commission notes that, under the Exchange's proposal, if a plan is amended to permit repricing, such an amendment would be considered a material amendment to a plan requiring shareholder approval. In addition, the Exchange recommended in its proposal that plans meant to permit repricing should explicitly and clearly state that repricing is permitted.

The Commission believes that the Exchange's proposal should benefit shareholders by ensuring that companies cannot do a repricing of options, which can have a dilutive effect on shares, without explicit shareholder approval of such provisions and their terms. The Commission also believes that the Exchange's approach to repricings is similar to the NYSE and Nasdaq's respective approaches to repricings, and should offer companies clarity and guidance as to when a change in a plan regarding the repricing of options would trigger a shareholder approval requirement.

F. Evergreen or Formula Plans and Plans Without a Formula or Limit on the Number of Shares Available

The Commission notes the Exchange's proposal provides guidance for the treatment of evergreen/formula plans. More specifically, under the Exchange's proposal, if a plan contains a formula for automatic increases in the shares available or for automatic grants pursuant to a formula, such plans cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. In addition, under the Exchange's proposal, if a plan contains no limit on the number of shares available and is not a formula plan, then each grant under the plan will require separate shareholder approval. Furthermore, the Exchange's proposal provides that a requirement that grants be made out of treasury or repurchased shares will not alleviate the need for shareholder approval for additional grants.

The Commission believes that these provisions should help to ensure that certain terms of a plan cannot be drafted so broad as to avoid shareholder scrutiny and approval. The Commission also believes that the Exchange's proposed rules relating to the treatment of evergreen/formula plans and plans that do not contain a formula or place a limit on the number of shares available should provide more clarity and transparency to issuers as to when shareholder approval would be required for such plans. Finally, the Commission believes that the provision ensuring that

treasury and repurchased shares cannot be used to avoid these additional shareholder approval requirements strengthens the proposal and ensures that companies cannot avoid compliance with the rule.

G. Miscellaneous Provisions

The Commission notes that the Exchange's proposal—similar to the NYSE and Nasdaq's recently approved shareholder approval rules [16]—incorporates the term ''equity compensation'' and proposes that plans that merely provide a convenient way to purchase shares in the open market or from the issuer at fair market price on equal terms to all security holders would not require shareholder approval. The Commission believes that the Exchange's proposal is consistent with the NYSE and Nasdaq's rules in this area and should provide greater clarity with respect to which plans would and would not require shareholder approval.

The Commission notes that the Exchange's proposal provides that pre-existing plans, which were adopted prior to the SEC's approval of the Exchange's proposal, would essentially be ''grandfathered'' and would not require shareholder approval unless the plans were materially amended. Under the Exchange's proposal, however, shareholder approval is required for each grant made pursuant to any pre-existing plans that were not approved by shareholders and that do not have an evergreen formula or a specific number of shares available under the plan. This is consistent with the NYSE, Nasdaq, and Amex shareholder approval rules on this matter. The Commission believes that this clarification should provide companies with guidance as to which plans would be subject to the Exchange's new shareholder approval requirements.

The Commission further notes that the Exchange proposes to adopt an exception from the shareholder approval requirement for warrants or rights offered generally to all shareholders. This exception would exclude stock purchase plans available on equal terms to all security holders of the company (*e.g.*, a dividend reinvestment plan). The Commission believes that the adoption of such an exception would make the Exchange's proposal consistent with the rules of other markets in this area.

Finally, the Commission notes that the proposed amendments to CBOE Form 1 concerning Listing Agreements, which requires advance written notice to the Exchange when issuers use any of the exceptions from shareholder approval, should help the Exchange to ensure that the use of any exception is consistent with the intent of the shareholder approval requirements for equity compensation plans.

H. Elimination of Broker-Dealer Voting on Equity Compensation Plans

The Commission believes that the Exchange's proposed amendment to CBOE Rule 31.85 to preclude broker voting on equity compensation plans is consistent with the Act. The Commission notes that equity compensation plans have become an important issue for shareholders. Because of the potential for dilution from issuances under such plans, shareholders should be making the determination rather than brokers on their behalf. The Commission further notes that NASD rules do not provide for broker voting on any matters and NYSE rules prohibit broker voting on equity compensation plans.[17] Therefore, the Exchange's proposed provision would be consistent with NASD and NYSE rules regarding broker voting on equity compensation plans. The Commission has considered the impact on smaller issuers, such as those listed on Nasdaq and the Amex, in response to the comments on this issue.[18] The Commission believes that the benefit of ensuring that the votes reflect the views of beneficial shareholders on equity compensation plans outweighs the potential difficulties in obtaining the vote.[19]

I. Summary

Overall, the Commission believes that the Exchange's proposal is similar to the NYSE and Nasdaq's recently approved shareholder approval rules.[20] The Commission therefore believes that the Exchange's proposal should provide for more clear and uniform standards for shareholder approval of equity compensation plans. The Commission notes that, even with the availability of the proposed limited exceptions from shareholder approval under the Exchange's proposal, shareholder approval under the new standards would be required in more circumstances than under existing Exchange rules. The Commission further notes that the Exchange proposes to adopt a requirement that an issuer must notify it in writing when it uses one of the exceptions from the shareholder approval requirements. The Commission believes that such a requirement, coupled with the additional disclosure requirements for inducement grants, should reduce the potential for abuse of any of the exceptions.[21] In addition, the Exchange's proposed amendment to CBOE Rule 31.85, which would preclude broker-dealers from voting on equity compensation plans without explicit instructions from the beneficial owner, is consistent with the standard under current NYSE and NASD rules.

The Commission believes that the Exchange's proposal, which is similar to the NYSE and Nasdaq's shareholder approval rules,[22] sets a consistent, minimum standard for shareholder approval of equity compensation plans. The Commission believes that the Exchange's proposal should help to ensure that companies will not make listing decisions simply to avoid shareholder approval requirements for equity compensation plans and should provide shareholders with greater protection from the potential dilutive effect of equity compensation plans. Based on the above, the Commission finds that the Exchange's proposal should help to protect investors, is in the public interest, and does not unfairly discriminate among issuers, consistent with Section 6(b)(5) of the Act.[23] The Commission therefore finds the Exchange's proposal to be consistent with the Act and the rules and regulations thereunder.

V. Accelerated Approval of the Exchange's Proposal and Amendment No. 1

The Commission finds good cause for approving the Exchange's proposal and Amendment No. 1 thereto prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Exchange has requested that the Commission approve the proposed rule change on an accelerated basis so that the proposed corporate governance listing standards relating to shareholder approval of equity compensation plans may be implemented as soon as possible. The Commission notes that the Exchange's

[16] *See supra* note 5; *see also supra* note 11.

[17] *See* NASD Rule 2260; NYSE Rule 452; and Section 402.08 of the NYSE's *Listed Company Manual.*

[18] *See supra* notes 5 and 17.

[19] The Commission notes that the Exchange did not propose to implement a transition period on the elimination of the broker vote, similar to the NYSE's 90-day transition period, because the proposed amendment will not impact any issuers currently listed on the Exchange. Telephone conversation between David Doherty, Attorney, Legal Division, CBOE, and Sapna C. Patel, Special Counsel, Division, Commission, on October 28, 2003.

[20] *See supra* note 5; *see also supra* note 11.

[21] *See also supra* note 13 and accompanying text.

[22] *See supra* note 5; *see also supra* note 11.

[23] 15 U.S.C. 78f(b)(5).

proposal is similar to the NYSE and Nasdaq's proposals requiring shareholder approval of equity compensation plans. Both the NYSE and Nasdaq's proposals were published for comment in the **Federal Register** and recently approved by the Commission.[24] The Commission believes that it already considered and addressed the issues that may be raised by the Exchange's proposal in its approval of the NYSE and Nasdaq's proposals.[25]

The Commission believes that accelerated approval of the Exchange's proposal is essential to allow for immediate harmonization of, and consistency in, the shareholder approval requirements for equity compensation plans among the markets. This will prevent issuers from making listing decisions based on differences in self-regulatory organization shareholder approval requirements and should provide equal investor protection to shareholders on the dilutive effects of plans irrespective of where the security trades. The Commission further believes that making the Exchange's new shareholder approval rules effective upon Commission approval will immediately impose the same requirements on the Exchange's issuers as those imposed upon NYSE, Nasdaq, and Amex issuers. Based on the above, the Commission finds good cause, consistent with Sections 6(b)(5) and 19(b)(2) of the Act,[26] to approve the Exchange's proposal and Amendment No. 1 thereto on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[27] that the proposed rule change (SR–CBOE–2003–45) and Amendment No. 1 thereto are hereby approved on an accelerated basis.

[24] *See* Securities Exchange Act Release No. 46620 (October 8, 2002), 67 FR 63486 (notice of the NYSE's proposal). The Commission also published a correction to the notice of the NYSE's proposal. *See* Securities Exchange Act Release No. 44620A (October 21, 2002), 67 FR 65617 (October 25, 2002). *See* Securities Exchange Act Release No. 46649 (October 11, 2002), 67 FR 64173 (notice of Nasdaq's proposal). *See supra* note 5; *see also supra* note 11.

[25] Some of the substantive provisions ultimately adopted by the NYSE and Nasdaq, and now being proposed for adoption by the Exchange, were in response to these comments. The comments on the NYSE and Nasdaq proposals were also discussed in detail in the Commission's approval order of the NYSE and Nasdaq proposals. *See supra* note 5; *see also supra* note 11.

[26] 15 U.S.C. 78f(b)(5) and 78s(b)(2).

[27] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[28]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 03–28075 Filed 11–6–03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48721; File No. SR–CBOE–2003–42]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by Chicago Board Options Exchange, Inc. To Amend Rule 6.8, Interpretation and Policy .01, Relating to the Retail Automatic Execution System

October 30, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 1, 2003, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''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 CBOE. 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 CBOE proposes to amend CBOE Rule 6.8, Interpretation and Policy .01 to allow broker-dealer orders that are eligible for execution on CBOE's Retail Automatic Execution System (''RAES'') to automatically execute against limit orders on the CBOE book in classes designated by the appropriate Floor Procedure Committee. The text of the proposed rule change is set forth below. Proposed new language is in italics.

* * * * *

Rule 6.8 RAES Operations

(a)–(g) No change.

* * * Interpretations and Policies

.01 (a) Notwithstanding Rule 6.8(c)(ii), the appropriate Floor Procedure Committee (''FPC'') may determine, by class and/or series to allow the following types of orders to be executed on RAES in accordance with the requirements of Rule 6.8, subject to the conditions set forth below in subparagraphs (b) and (c):

1. Broker-dealer orders; or

2. Broker-dealer orders that are not for the accounts of market-makers or specialists on an exchange who are exempt from the provisions of Regulation T of the Federal Reserve Board pursuant to section 7(c)(2) of the Securities Exchange Act of 1934.

(b) The appropriate FPC may permit broker-dealer orders to be automatically executed pursuant to this Interpretation and Policy .01, subject to the following provisions:

1. Broker-dealer orders entered through the Exchange's order routing system will not be automatically executed against orders in the limit order book *unless permitted on a class-by-class basis by the appropriate Floor Procedure Committee.* Broker-dealer orders may interact with orders in the limit order book only after being re-routed to a floor broker for representation in the trading crowd. Broker-dealer orders are not eligible to be placed in the limit order book pursuant to Rule 7.4.

2. The maximum order size eligibility for the broker-dealer orders may be less than the applicable order size eligibility for non-broker-dealer orders.

3. Non-broker-dealer orders may be eligible for automatic execution at the NBBO pursuant to Interpretations and Policies .02 of Rule 6.8, while broker-dealer orders may not be so eligible. In the event broker-dealer orders are not so eligible, they shall instead route to either PAR or BART.

4. The appropriate FPC may determine, by class and/or series, to prohibit access to RAES for broker-dealer orders after 3 pm.

(c) CBOE market-makers must assure that orders for their own accounts are not entered on the Exchange and represented or executed in violation of the following provisions: Interpretations and Policies .02 of Rule 6.55 and Interpretations and Policies .06 of Rule 8.9 (concurrent representation of a joint account), Rule 6.55 (concurrent representation of a market-maker account), and section 9 of the Securities Exchange Act of 1934 (wash sales).

.02–.09 No change.

* * * * *

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 CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed

[28] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.