

where applicable, will vote the shares of each Insurance Fund held in their VLI Accounts and VA Accounts in a manner consistent with voting instructions timely received from Variable Contract owners. Participating Insurance Companies will be responsible for assuring that each of their VLI and VA Accounts investing in an Insurance Fund calculates voting privileges in a manner consistent with all other Participating Insurance Companies investing in that Fund. The obligation to calculate voting privileges as provided in this Application shall be a contractual obligation of all Participating Insurance Companies under their Participation Agreement with the Insurance Fund. Each Participating Insurance Company will vote shares of each Insurance Fund held in its VLI or VA Accounts for which no timely voting instructions are received, as well as shares held by its general account or otherwise attributed to it, in the same proportion as those shares for which voting instructions are received. Each Plan will vote as required by applicable law, governing Plan documents and as provided in this application.

7. As long as the Act requires pass-through voting privileges to be provided to Variable Contract owners or the Commission interprets the Act to require the same, an Insurance Fund investment adviser (or its affiliates) or any general account will vote their shares of the Insurance Fund in the same proportion as all votes cast on behalf of all Variable Contract owners having voting rights; provided, however, that such an investment adviser (or affiliates) shall vote its shares in such other manner as may be required by the Commission or its staff.

8. Each Insurance Fund will comply with all provisions of the Act requiring voting by shareholders (which, for these purposes, shall be the persons having a voting interest in its shares), and, in particular, the Insurance Fund will either provide for annual meetings (except to the extent that the Commission may interpret Section 16 of the Act not to require such meetings) or comply with Section 16(c) of the Act (although each Insurance Fund is not, or will not be, one of those trusts of the type described in Section 16(c) of the Act), as well as with Section 16(a) of the Act and, if and when applicable, Section 16(b) of the Act. Further, each Insurance Fund will act in accordance with the Commission's interpretations of the requirements of Section 16(a) with respect to periodic elections of directors/trustees and with whatever

rules the Commission may promulgate thereto.

9. An Insurance Fund will make its shares available to the VLI Accounts, VA Accounts, and Plans at or about the time it accepts any capital from its investment adviser (or affiliates) or from a general account of a Participating Insurance Company.

10. Each Insurance Fund has notified, or will notify, all Participants that disclosure regarding potential risks of mixed and shared funding may be appropriate in VLI Account and VA Account prospectuses or Plan documents. Each Insurance Fund will disclose, in its prospectus that: (a) Shares of the Fund may be offered to both VA Accounts and VLI Accounts and, if applicable, to Plans, (b) due to differences in tax treatment and other considerations, the interests of various Variable Contract owners participating in the Insurance Fund and the interests of Plan participants investing in the Insurance Fund, if applicable, may conflict, and (c) the Insurance Fund's Board will monitor events in order to identify the existence of any material irreconcilable conflicts and to determine what action, if any, should be taken in response to any such conflicts.

11. If and to the extent Rule 6e-2 and Rule 6e-3(T) under the Act are amended, or Rule 6e-3 under the Act is adopted, to provide exemptive relief from any provision of the Act, or the rules thereunder, with respect to mixed or shared funding, on terms and conditions materially different from any exemptions granted in the order requested in this Application, then each Insurance Fund and/or Participating Insurance Companies, as appropriate, shall take such steps as may be necessary to comply with Rules 6e-2 or 6e-3(T), as amended, or Rule 6e-3, to the extent such rules are applicable.

12. Each Participant, at least annually, shall submit to the Board of each Insurance Fund such reports, materials or data as the Board reasonably may request so that the directors/trustees of the Board may fully carry out the obligations imposed upon the Board by the conditions contained in this Application. Such reports, materials and data shall be submitted more frequently if deemed appropriate by the Board of an Insurance Fund. The obligations of the Participants to provide these reports, materials and data to the Board, when it so reasonably requests, shall be a contractual obligation of all Participants under their Participation Agreement with the Insurance Fund.

13. All reports of potential or existing conflicts received by the Board of each Insurance Fund, and all Board action

with regard to determining the existence of a conflict, notifying Participants of a conflict and determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the Board or other appropriate records, and such minutes or other records shall be made available to the Commission upon request.

14. Each Insurance Fund will not accept a purchase order from a Plan if such purchase would make the Plan an owner of 10 percent or more of the net assets of the Insurance Fund unless the Plan executes an agreement with the Insurance Fund governing participation in the Insurance Fund that includes the conditions set forth herein to the extent applicable. A Plan will execute an application containing an acknowledgement of this condition at the time of its initial purchase of shares.

15. Each Insurance Fund will make its shares available through an Account at or about the same time that the Insurance Fund receives any seed money from the general account of a Participating Insurance Company.

#### *Conclusion:*

For the reasons summarized above, applicants assert that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-4064 Filed 2-25-09; 8:45 am]

**BILLING CODE 8011-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-59425; File No. SR-CBOE-2009-009]**

### **Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change To Amend Its Rules Prohibiting Members From Functioning as Market-Makers**

February 19, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 18, 2009, the Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") filed with the Securities and Exchange Commission (the

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

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

“Commission”) the proposed rule change as described in Items I, II, and III 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.

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

The Exchange proposes to amend Rule 6.8C, *Prohibition Against Members Functioning as Market-Makers*, to eliminate some of its restrictions. The Exchange also proposes to make a related cross-reference update to Rule 1.1(fff), which pertains to Voluntary Professionals. The text of the proposed rule change is available on the Exchange’s Web site (<http://www.cboe.org/Legal>), at the Office of the Secretary, CBOE and at the Commission.

### 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 IV 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 the Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The Exchange is proposing to amend Rule 6.8C in order to eliminate some of its restrictions. First, Rule 6.8C currently provides that a member, acting either as principal or agent, may neither enter nor permit the entry of orders into the Exchange’s electronic order routing system if (i) the orders are limit orders for the account or accounts of the same beneficial owner(s) and (ii) the limit orders are entered in such a manner that the beneficial owner(s) effectively is operating as a market maker by holding itself out as willing to buy and sell such securities on a regular or continuous basis. The Exchange is proposing that these restrictions be amended to only be applicable to customer orders (*i.e.*, non-broker-dealer orders) that are not Voluntary Professional orders (as described below), since such customer orders have priority at any price over

the bids and offers of non-customers.<sup>3</sup> The restrictions would no longer be applicable to instances where a member is acting as principal on its own behalf or is acting as agent on behalf of other broker-dealer orders or Voluntary Professional orders (which are a sub-category of customer orders that are treated in the same manner as broker-dealer orders).<sup>4</sup>

Rule 6.8C was adopted in 2001 to limit the ability of members that are not Designated Primary Market-Makers or market makers to compete on preferential terms within CBOE’s automated systems. Because customer orders are provided with certain benefits such as priority of bids and offers, the Exchange continues to believe that customer orders should be subject to the Rule’s restrictions. However, because broker-dealer orders are not subject to priority that is any better than market makers, the Exchange no longer believes it is necessary to impose the Rule’s restrictions on the entry of broker-dealer orders. Similarly, because Voluntary Professionals are not subject to priority that is any better than market makers, the Exchange does not believe it is necessary to impose the Rule’s restrictions on Voluntary Professionals.<sup>5</sup>

<sup>3</sup> The Exchange notes that the Commission has previously found that it is consistent with the Act for an options exchange not to prohibit a user of its market from effectively operating as a market maker by holding itself out as willing to buy and sell options contracts on a regular or continuous basis without registering as a market maker. See Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080) (order approving, among other things, the rules governing the trading of options on the NASDAQ Options Market (“NOM”)). The Exchange also notes that the Commission has published a rule proposal for the NYSE Alternext U.S. LLC (“Amex”) that would only prohibit *de facto* market making through the use of customer orders, since customer orders have priority at any price over the bids and offers of non-customers but that would not prohibit such activity for other non-market maker broker-dealers. See Securities Exchange Act Release No. 59142 (December 22, 2008), 73 FR 80494 (December 31, 2008) (SR-NYSEALTR-2008-14) (notice of proposal to, among other things, adopt rules governing the trading of options on a new Amex trading platform).

<sup>4</sup> A Voluntary Professional is a new category of non-member market participant on the Exchange. The term “Voluntary Professional,” means any person or entity that is not a broker or dealer in securities that elects, in writing, to be treated in the same manner as a broker or dealer in securities for purposes of certain order handling, order execution, and cancel fee calculation purposes. See Rule 1.1(fff) and Securities Exchange Act Release No. 58327 (August 7, 2008), 73 FR 47988 (August 15, 2008) (SR-CBOE-2008-09). As part of this rule change, the Exchange is proposing to amend Rule 1.1(fff) to provide that a Voluntary Professional will be treated in the same manner as a broker or dealer in securities for purposes of Rule 6.8C.

<sup>5</sup> The Exchange notes that this rule change would only eliminate the restrictions of Rule 6.8C in the

Second, in those instances where the restrictions are applicable, Rule 6.8C currently provides that, in determining whether a beneficial owner effectively is operating as a market maker, the Exchange will consider, among other things, the simultaneous or near simultaneous entry of limit orders to buy and sell the same security, the entry of multiple limit orders at different prices in the same security, and the multiple acquisition and liquidation of positions in the security during the same day. The Exchange is proposing to remove this latter condition pertaining to the multiple acquisition and liquidation of positions from its list of factors used for determining whether a beneficial owner is operating as a market maker. In light of the proliferation of day trading activity and the fact that such a prohibition does not exist on at least one other market,<sup>6</sup> the Exchange no longer believes this activity should be considered a factor in determining whether a beneficial owner is effectively acting as a market maker.

##### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section

manner proposed. Members would continue to remain subject to the requirements of Rule 4.18 (which requires members to establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of such member’s business, to prevent the misuse of material, nonpublic information by such member or persons associated with such member); Rule 6.9(e), (which considers it conduct inconsistent with just and equitable principles of trade and a violation of Rule 4.1 for any member or person associated with a member, who has knowledge of all material terms and conditions of an original order and a solicited order, including a facilitation order, that matches the original order’s limit, the execution of which are imminent, to enter, based on such knowledge, an order to buy or sell an option of the same class as an option that is the subject of the original order, or an order to buy or sell the security underlying such class, or an order to buy or sell any related instrument until either (i) all the terms and conditions of the original order and any changes in the terms and conditions of the original order of which that member or associated person has knowledge are disclosed to the trading crowd or (ii) the solicited trade can no longer reasonably be considered imminent in view of the passage of time since the solicitation); Rules 6.45A.01 and 6.45B.01 (which provide that order entry firms may not execute as principal against orders they represent as agent unless: (i) agency orders are first exposed on the Hybrid System for at least one second, (ii) the order entry firm has been bidding or offer for at least one second prior to receiving an agency order that is executable against such bid or offer, or (iii) the order entry firm proceeds in accordance with the crossing rules contained in Rule 6.74); and Rules 6.45A.02 and 6.45B.02 (which provide that order entry firms must expose orders they represent as agent for at least one second before such orders may be executed electronically via the electronic execution mechanism of the Hybrid System, in whole or in part, against orders solicited from members and non-member broker-dealers to transact with such orders).

<sup>6</sup> See note 3, *supra*.

6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>8</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, protect investors and the public interest. The proposed changes to the rule should continue to contribute to the Exchange's ability to maintain a fair and orderly market in a manner that will limit unfair advantage and encourage competition.

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

CBOE does not believe that the proposed rule change will impose any burden on competition 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-CBOE-2009-009 on the subject line.

#### *Paper Comments*

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

All submissions should refer to File Number SR-CBOE-2009-009. 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 CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-CBOE-2009-009 and should be submitted on or before March 19, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-4120 Filed 2-25-09; 8:45 am]

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### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-59424; File No. SR-NASDAQ-2009-009]

#### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Clarify Nasdaq's Definition of "Controlled Company"**

February 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 February 10, 2009, The NASDAQ Stock Market LLC ("Nasdaq") 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 Nasdaq. Nasdaq has designated the proposed rule change as effecting a change described under Rule 19b-4(f)(6) under the Act,<sup>3</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq proposes to clarify its definition of a "controlled company." Nasdaq will implement the proposed rule upon approval [sic]. The text of the proposed rule change is below. Proposed new language is in *italics*.<sup>4</sup>

\* \* \* \* \*

4350. Qualitative Listing Requirements for Nasdaq Issuers Except for Limited Partnerships.

(a)-(b) No change.

(c) Independent Directors

(1)-(4) No change.

(5) A Controlled Company is exempt from the requirements of this Rule 4350(c), except for the requirements of subsection (c)(2) which pertain to executive sessions of independent directors. A Controlled Company is a company of which more than 50% of the voting power *for the election of directors* is held by an individual, a group or another company. A Controlled Company relying upon this exemption must disclose in its annual meeting proxy statement (or, if the issuer does

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaqomx.cchwallstreet.com>.

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

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> 17 CFR 200.30-3(a)(12).