

2. Section 3(a)(1)(A) of the Act provides that an issuer is an "investment company" if it is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities. Applicants believe that the Fund will not be an investment company under section 3(a)(1)(A) because the Fund will be in the business of investing in and being beneficial owner of apartment complexes, not securities.

3. Section 3(a)(1)(C) of the Act provides that an issuer is an "investment company" if it is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire "investment securities" having a value exceeding 40% of the value of such issuer's total assets (exclusive of Government securities and cash items). Applicants state that although the Local Limited Partnership interests may be deemed "investment securities," they are not readily marketable, cannot be sold without severe adverse tax consequences, and have no value apart from the value of the apartment complexes owned by the Local Limited Partnerships.

4. Applicants believe that the two-tier structure is consistent with the purposes and criteria set forth in the SEC's release concerning two-tier real estate partnership (the "Release").<sup>1</sup> The Release states that investment companies that are two-tier real estate partnerships that invest in limited partnerships engaged in the development and operation of housing for low and moderate income persons may qualify for an exemption from the Act pursuant to section 6(c). Section 6(c) provides that the SEC may exempt any person from any provision of the Act and any rule thereunder, if, and to the extent that, such exemption is necessary or 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. Section 6(c) permits the SEC to require companies exempted from the registration requirements of the Act to comply with certain specified provisions of the Act as though the company were a registered investment company.

5. The Release lists two conditions, designed for the protection of investors, which must be satisfied by two-tier partnerships to qualify for the exemption under section 6(c). First,

interests in the issuer should be sold only to persons for whom investments in limited profit, essentially tax-shelter, investments would not be unsuitable. Second, requirements for fair dealing by the general partner of the issuer with the limited partners of the issuer should be included in the basic organizational documents of the company.

6. Applicants assert, among other things, that the suitability standards set forth in the application, the requirements for fair dealing provided by the Partnership Agreement, and pertinent governmental regulations imposed on each Local Limited Partnership by various Federal, state, and local agencies provide protection to investors in Units. In addition, applicants assert that the requested exemption is both necessary and appropriate in the public interest.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 01-26897 Filed 10-24-01; 8:45 am]

**BILLING CODE 8010-01-M**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** [66 FR 53282, October 19, 2001]

**STATUS:** Closed meeting.

**PLACE:** 450 Fifth Street, NW., Washington, DC.

**DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING:** Tuesday, October 23, 2001 at 9:30 a.m.

**CHANGE IN THE MEETING:** Cancellation of meeting.

The closed meeting scheduled for Tuesday, October 23, 2001, has been cancelled.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942-7070.

Dated: October 23, 2001.

**Jonathan G. Katz,**  
*Secretary.*

[FR Doc. 01-27016 Filed 10-23-01; 2:11 pm]

**BILLING CODE 8010-01-M**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44952; File No. SR-BSE-2001-01]

### Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 2 to the Proposed Rule Change Relating to the Trading of Nasdaq Securities on the Floor of the Exchange

October 18, 2001.

#### I. Introduction

On May 15, 2001, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "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 regarding the trading of Nasdaq securities on the floor of the Exchange, pursuant to unlisted trading privileges ("UTP"). On June 15, 2001, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> The proposed rule change, as amended by Amendment by Amendment No. 1, was published in the **Federal Register** on July 3, 2001.<sup>4</sup> The Commission received two comment letters on the proposed rule change.<sup>5</sup> On October 4, 2001, the BSE submitted Amendment No. 2 to the proposed rule change.<sup>6</sup> This order approves the proposed rule change, as amended. In addition, the Commission solicits comment on Amendment No. 2 to the proposed rule change from interested persons.

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

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

<sup>3</sup> See Form 19b-4 dated June 14, 2001 ("Amendment No. 1").

<sup>4</sup> Securities Exchange Act Release No. 44476 (June 26, 2001), 66 FR 35293.

<sup>5</sup> See letters to Jonathan G. Katz, Secretary, SEC, from Kevin J.P. O'Hara, General Counsel, Archipelago, L.L.C., dated July 13, 2001 ("Archipelago Letter"); and Eugene A. Lopez, Senior Vice President, Nasdaq Stock Market, Inc., dated August 15, 2001 ("Nasdaq Letter").

<sup>6</sup> See letter from John Boese, Assistant Vice President, Legal and Regulatory, BSE, to Katherine England, Assistant Director, Division of Market Regulation, SEC, dated October 3, 2001 ("Amendment No. 2"). In Amendment No. 2, the Exchange clarified language in the rule text and deleted a sentence in proposed Section 3 that required that transactions that could not be submitted to ACT be reported to the NASD's Market Regulations Department. According to BSE, this sentence was deleted because it reflected a NASD requirement that does not apply to UTP exchanges.

<sup>1</sup> Investment Company Act Release No. 8465 (Aug. 9, 1974).

## II. Description of the Proposal

The Exchange proposes to trade certain over-the-counter ("OTC") securities, *i.e.*, Nasdaq securities, on the floor of the Exchange, pursuant to UTP under Section 12(f) of the Act.<sup>7</sup>

Therefore, to accommodate these new securities on the Exchange floor, the Exchange proposes to add Chapter XXXV, Trading in Nasdaq Securities, to the Rules of Board of Governors of the Boston Stock Exchange ("BSE rules"). The rules set forth in Chapter XXXV specifically govern the trading of Nasdaq securities, with references to various sections of other BSE Rules relating to the trading of equity securities, as well as references to selected NASD rules, where appropriate. In addition, the BSE proposes a stock allocation program for Nasdaq securities, which phases out over a two year period.

## III. Summary of Comments

The Commission received two comments on the proposed rule change.<sup>8</sup> One commenter supported the proposal.<sup>9</sup> One commenter requested that the comment period be extended and requested clarification of certain issues.<sup>10</sup> BSE submitted a letter responding to Nasdaq's question.<sup>11</sup>

In its letter, Nasdaq requested further clarification of BSE's proposed Section 4(c), which permits specialists to switch from automatic execution to manual execution in unusual trading situations and how this section relates to BSE's intention to participate in the Nasdaq National Market Execution System ("SuperSoes").<sup>12</sup> Moreover, Nasdaq believed that the reference to "price volatility" to be vague and did not clearly define when a BSE specialist could turn off the auto-execution functionality. Finally, Nasdaq questioned whether BSE specialists were planning on quoting away from the BBO because Nasdaq believed that such practices may result in BSE specialists' *de facto* withdrawal from the market.

The BSE responded that specialists will only be permitted to turn off the auto-execution functionality on their workstation in rare circumstances, such as following a regulatory halt. Further, the Exchange stated that its surveillance

and front desk floor operations departments will protect against unwarranted and unfettered use of the ability to switch to manual execution. Specifically, the Exchange stated that a specialist will be required to get the approval of two floor officials to request that the auto-execution functionality be turned off and that the ability to switch to manual mode rests solely with the Exchange's surveillance and front desk floor operations departments. The Exchange, therefore, believed that the ability to switch to manual mode will not result in a *de facto* withdrawal from the market because it will be used only in extreme situations and will be controlled by the Exchange.

Nasdaq also requested information regarding BSE's audit trail requirements. BSE responded that as a part of the Intermarket Surveillance Group ("ISG"), all quotes and trades from the Exchange are captured by ISG's PATRINA system, which establishes an audit trail. The BSE also noted that the Exchange would be reporting its Nasdaq trades through ACT, which should further enhance the audit trail for BSE trades.

Nasdaq requested information regarding BSE's enforcement and surveillance capabilities regarding trading of Nasdaq securities. BSE noted that it had submitted its procedures to the Commission's Office of Compliance Inspections and Examinations for review.

Nasdaq also noted that BSE's examination and qualification requires are different than those applicable to Nasdaq market makers and requested information on how BSE intends to ensure that its members have a thorough understanding of the trading of Nasdaq securities. BSE responded that it had modified its floor examination to include sections relating to Nasdaq trading. Further, BSE noted that, although not required, every specialist who will be trading Nasdaq securities on the Exchange upon commencement of the process has voluntarily taken and passed the NASD Series 55 exam relating to the trading of Nasdaq securities, as well as the Series 63, NASAA Uniform State Law Examination.

Finally, Nasdaq questioned whether BSE would voluntarily comply with NASD Rule 4613 regarding locked/crossed markets before the open. BSE responded that it would not be trading before the opening.

## IV. Discussion

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, and in particular, with the requirements of Section 6(b)(5) of the Act.<sup>13</sup> The Commission believes that BSE's proposal to trade Nasdaq securities should promote competition, consistent with Section 6 of the Act.<sup>14</sup> In addition, the Commission believes that BSE has proposed rules that should ensure that trading in Nasdaq securities on its floor occurs in an orderly fashion, consistent with the requirements of the Act. The Commission, therefore, believes that the proposal should remove impediments to and perfect the mechanism of a free and open market in a manner that is consistent with the protection of investors and the public interest.<sup>15</sup> The Commission also notes that BSE's responses to the comments raised in the Nasdaq letter were sufficient.<sup>16</sup>

Furthermore, the proposed rule change is consistent with Section 12(f)(2) of the Act,<sup>17</sup> which grants the Commission explicit authority to approve UTP in OTC securities. Section 12(f)(2) of the Act requires the Commission, prior to approving UTP, to determine that the granting of UTP is consistent with the maintenance of fair and orderly markets and the protection of investors. The Commission believes that the proposed rule change is consistent with these goals and thus, the Commission is approving the proposed rule change, subject to the BSE complying with the requirements of the OTC/UTP Plan.<sup>18</sup>

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> 15 U.S.C. 78f.

<sup>15</sup> In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>16</sup> The Commission notes that proposed Section 28 of the BSE's rules, Short Sales, does not require an exemption from the Commission's short sales rule, Rule 10a-1, since Nasdaq securities currently are excluded from the Rule. See 17 CFR 240.10a-1(a)(1)(ii). However, Nasdaq has applied to become a national securities exchange. See Securities Exchange Act Release No. 44396 (June 7, 2001), 66 FR 31952 (June 13, 2001). If Nasdaq becomes a registered exchange, Nasdaq securities will be exchange listed and subparagraph (ii) of Rule 10a-1 will no longer be available. Accordingly, BSE specialists trading Nasdaq securities would be subject to Rule 10a-1 unless BSE obtains an exemption from the Rule. Nasdaq has requested an exemption from Rule 10a-1.

<sup>17</sup> 15 U.S.C. 781(f)(2).

<sup>18</sup> The OTC/UTP Plan refers to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Exchange-Listed Nasdaq/National Market System Securities and for Nasdaq/National Market System Securities Traded on Exchanges on an Unlisted Trading Privileges Basis. The Commission notes that on August 29, 2001, BSE became a full participant in the OTC/UTP Plan. The other participants of the OTC/UTP Plan are the American Stock Exchange LLC, the Chicago Stock Exchange, Inc., the Cincinnati Stock Exchange, Inc., the

<sup>7</sup> 15 U.S.C. 781(f).

<sup>8</sup> See note 5 *supra*.

<sup>9</sup> See Archipelago Letter.

<sup>10</sup> See Nasdaq Letter.

<sup>11</sup> See letter to Adena Friedman, Senior Vice President, Data Products, Nasdaq, from George W. Mann, Senior Vice President and General Counsel, BSE, dated August 29, 2001.

<sup>12</sup> According to Nasdaq, participants in SuperSoes are required to provide automatic execution when they are at the BBO.

Finally, the Commission finds good cause to accelerate approval of Amendment No. 2 to the proposed rule change prior to the thirtieth day after the date of publication in the **Federal Register**. The Commission notes that Amendment No. 2 merely clarifies the rule language and deletes inapplicable language. The amendment, therefore, does not substantively change the meaning or intent of the proposed rule change. For these reasons, the Commission believes that good cause exists, consistent with Sections 6(b)(5)<sup>19</sup> and 19(b)<sup>20</sup> of the Act, to approve Amendment No. 2 to the proposed rule change on an accelerated basis.

#### V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether Amendment No. 2 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-BSE-2001-01 and should be submitted by November 15, 2001.

#### VI. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>21</sup> that the proposed rule change (SR-BSE-2001-01), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>22</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

[FR Doc. 01-26864 Filed 10-24-01; 8:45 am]

**BILLING CODE 8010-01-M**

National Association of Securities Dealers, Inc., the Pacific Exchange, Inc. and the Philadelphia Stock Exchange, Inc.

<sup>19</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> 15 U.S.C. 78s.

<sup>21</sup> 15 U.S.C. 78s(b)(2).

<sup>22</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44950; File No. SR-NASD-00-02]

### Self-Regulatory Organizations; Notice of Filing of Amendments to Proposed Rule Change by National Association of Securities Dealers, Inc. Amending NASD Code of Arbitration Rules 10335 and 10205(h) Relating to Injunctive Relief

October 18, 2001.

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 December 18, 2000, May 17, 2001 and August 10, 2001, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. ("NASD Dispute Resolution") filed with the Securities and Exchange Commission ("Commission") Amendment No. 3, Amendment No. 4 and Amendment No. 5 to the proposed rule change respectively, as described in Items I, II, and III below, which items have been prepared by NASD Dispute Resolution.<sup>3</sup> On April 7, 2000, the proposed rule change, which incorporated Amendment No. 1 and Amendment No. 2,<sup>4</sup> was published for comment in the **Federal Register**.<sup>5</sup> The Commission is publishing this notice to solicit comments on Amendment Nos. 3, 4, and 5 from interested persons.

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

NASD Dispute Resolution is proposing to amend Rules 10335 and 10205(h) of the Code of Arbitration Procedure of the NASD ("Code"), to

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

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

<sup>3</sup> See letter from Laura Leedy Gansler, Counsel, NASD Dispute Resolution to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated December 18, 2000 ("Amendment No. 3"); letter from Laura Leedy Gansler, Counsel, NASD Dispute Resolution to Florence Harmon, Senior Special Counsel, Division, Commission, dated May 17, 2001 ("Amendment No. 4"); and letter from Laura Leedy Gansler, Counsel, NASD Dispute Resolution to Florence Harmon, Senior Special Counsel, Division, Commission, dated August 10, 2001 ("Amendment No. 5").

<sup>4</sup> See letters from Patrice Cliniecki, Vice President and Deputy General Counsel, NASD Dispute Resolution, to Katherine A. England, Assistant Director, Division, Commission, dated March 7, 2000 ("Amendment No. 1") and March 24, 2000 ("Amendment No. 2").

<sup>5</sup> See Securities Exchange Act Release No. 42606 (April 3, 2000), 65 FR 18405 (April 7, 2000) ("Original Proposal").

simplify and clarify the procedures for obtaining injunctive relief in certain disputes subject to arbitration. Below is the text of the proposed rule change. Changes to the proposed rule text added since the proposed rule change was published in the **Federal Register** on April 7, 2000 are in italics; deletions from the previously published rule change are in brackets.<sup>6</sup>

#### Rules of the Association

\* \* \* \* \*

10000. Code of Arbitration Procedure

\* \* \* \* \*

10300. Uniform Code of Arbitration

#### Rule 10335. Temporary Injunctive Orders; Requests for Permanent Injunctive Relief

(a) Temporary Injunctive Orders.

(1) In industry or clearing disputes required to be submitted to arbitration pursuant to Rule 10201, parties may seek a temporary injunctive order, as defined in paragraph (a)(2) of this Rule, from a court of competent jurisdiction. Parties to a pending arbitration may seek a temporary injunctive order from a court of competent jurisdiction even if another party has already filed a claim arising from the same dispute in arbitration pursuant to this paragraph, provided that an arbitration hearing on a request for permanent injunctive relief *pursuant to paragraph (b) of this Rule* has not yet *begun* [commenced].

(2) For purposes of this Rule, temporary injunctive order means a temporary restraining order, preliminary injunction or other form of initial, temporary injunctive relief.

(3) A party seeking a temporary injunctive order from a court with respect to an industry or clearing dispute required to be submitted to arbitration pursuant to Rule 10201 shall simultaneously file with the Director a Statement of Claim requesting permanent *injunctive and all other* relief with respect to the same dispute in the manner specified under this Code[, and shall simultaneously]. *The party seeking temporary injunctive relief shall also serve the Statement of Claim requesting permanent injunctive and all other relief on all other parties in the same manner and at the same time as the Statement of Claim is filed with the Director.* Filings and service under this Rule *shall* [may] be made by facsimile, overnight delivery service or messenger. *Service shall be made on all parties at the same time and in the same manner, unless*

<sup>6</sup> NASD Disputes Resolution represents that the proposal, and all amendments thereto are available at its web site, [www.nasdr.com](http://www.nasdr.com).