

with the requirements of the Act and the rules and regulations thereunder.⁹ Specifically, the Commission believes that the proposed OPRA Plan amendment, which would revise the manner in which OPRA engages in capacity planning and the allocation of system capacity among the exchanges that are parties to the Plan, is consistent with section 11A of the Act¹⁰ and Rule 11Aa3-2 thereunder,¹¹ in that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.

Specifically, the Commission believes that OPRA's proposal to require each party to the Plan to independently project the capacity it would need and to confidentially submit to the ISCA requests for capacity based on such projections is designed to eliminate joint action by the OPRA participants in determining the amount of total capacity to be procured and the allocation of such capacity. The Commission notes that the proposal requires that the ISCA maintain these individual capacity projections and requests in confidence, and not use such confidential, capacity-related information in any of its business activities that may result in the information being made available to any of the parties of the Plan, or in any manner that is inconsistent with its obligation to hold the information in confidence. The Commission believes that these requirements provide additional assurances that each exchange's non-public business information would remain segregated and would not be made available to its competitors. Furthermore, the Commission emphasizes that neither the Plan nor the Capacity Guidelines should be construed in any manner that would permit individual exchange capacity projections or requests or other confidential, capacity-related information to be shared with the other parties to the Plan.

The Commission believes that the proposed Capacity Guidelines adequately provide for the allocation of capacity to new parties to OPRA. Under Guideline No. 2 of the proposed Capacity Guidelines, a prospective new options exchange would have to inform the ISCA, at least 6 months prior to the

time it proposes to commence trading, of the initial amount of system capacity it would need. The ISCA would then aggregate this request for capacity with the requests received from the existing exchanges. Also, under Guideline No. 6 of the proposed Capacity Guidelines, if the new party has not received the capacity it has requested at the time it has commenced trading options, and to the extent there is any excess capacity available in the system that has not been provided to any of the parties, the ISCA would be able to allocate to the new party all or a portion of any such excess capacity to provide the new party with the amount of capacity determined by the ISCA to be sufficient to satisfy the reasonable needs of the new party until it has been provided with the capacity it initially requested. These provisions in the proposed Capacity Guidelines, which specifically contemplate new entrants and provide a mechanism for them to acquire capacity, together with the prohibitions imposed on the ISCA from using confidential capacity-related information in any of its other business activities that may result in the information being made available to any of the parties to the Plan or in any manner inconsistent with the ISCA's obligations to hold such information in confidence, are designed to ensure that the existing exchanges would not be able to restrain new entrants from joining OPRA and acquiring the capacity that they require.¹²

Accordingly, to permit the exchanges to commence capacity planning without the need for joint action, as required by the Order, the Commission believes it is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect mechanisms of, a national market system to approve the proposed amendment to the OPRA Plan on a permanent basis.

It is therefore ordered, pursuant to section 11A of the Act,¹³ and Rule 11Aa3-2 thereunder,¹⁴ that the proposed OPRA Plan amendment, as modified by Amendments No. 1 and 2, (SR-OPRA-2003-01) is hereby approved on a permanent basis.

¹² The Commission notes that the BSE recently joined OPRA and began operation of a fully electronic options exchange ("Boston Options Exchange" or "BOX"). See Securities Exchange Act Release No. 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (SR-BSE-2002-15).

¹³ 15 U.S.C. 78k-1.

¹⁴ 17 CFR 240.11Aa3-2.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49319; File No. SR-Amex-2003-39]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3 and 4 Thereto by the American Stock Exchange LLC To Adopt an Obvious Error Rule and Half-Point Error Guarantee for Trades on the Exchange in Nasdaq National Market Securities

February 25, 2004.

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 April 30, 2003, the American Stock Exchange LLC ("Amex" 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 Exchange. The Amex submitted Amendment No. 1 to the proposed rule change on October 15, 2003.³ The Amex submitted Amendment No. 2 to the proposed rule change on November 21, 2003.⁴ The Amex submitted Amendment No. 3 to the proposed rule change on December 10, 2003.⁵ The Amex submitted Amendment No. 4 to the proposed rule

¹⁵ 17 CFR 200.30-3(a)(29).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter from Bill Floyd Jones, Associate General Counsel, Amex, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated October 14, 2003 ("Amendment No. 1"). Amendment No. 1 replaced the original proposed rule change in its entirety.

⁴ See Letter from Bill Floyd Jones, Associate General Counsel, Amex, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, dated November 20, 2003 ("Amendment No. 2"). Amendment No. 2 replaced the original proposed rule change and Amendment No. 1 in their entirety.

⁵ See Letter from Bill Floyd Jones, Associate General Counsel, Amex, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, dated December 9, 2003 ("Amendment No. 3"). Amendment No. 3 replaced the original proposed rule change and Amendment Nos. 1 and 2 in their entirety. In Amendment No. 3, Amex also represented that Exchange Staff plans to propose the adoption of an obvious error rule similar to proposed Amex Rule 118(l) for Amex listed securities similar to that contained in the proposed rule change, at the next regularly scheduled Amex board meeting.

⁹ In approving this proposed OPRA Plan amendment, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78k-1.

¹¹ 17 CFR 240.11Aa3-2.

change on February 2, 2004.⁶ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Amex proposes to adopt an obvious error rule and half point error guarantee for transactions on the Exchange in Nasdaq National Market securities.

The text of the proposed rule change is below. Additions are *italicized*:

* * * * *

Trading in Nasdaq National Market Securities

Rule 118. (a) through (j) No change.

(k) *Reserved*

(l) *Clearly Erroneous Transactions in Nasdaq National Market Securities—*

(i) *A Floor Official shall, pursuant to the procedures set forth in below, have the authority to review any transaction in a Nasdaq National Market security that is claimed to be clearly erroneous arising out of the use or operation of any facility of the Exchange. In reviewing a trade in a Nasdaq National Market security that is claimed to be clearly erroneous, a Floor Official shall review the transaction with a view toward maintaining a fair and orderly market and the protection of investors and the public interest. Based upon this review, the Floor Official shall decline to "break" a disputed transaction if the Floor Official believes that the transaction under dispute is not clearly erroneous. If the Floor Official determines the transaction in dispute is clearly erroneous, however, he or she shall declare that the transaction is null and void or modify one or more terms of the transaction. When adjusting the terms of a transaction, the Floor Official shall seek to adjust the price and/ or size of the transaction to achieve an equitable rectification of the error that would place the parties to a transaction in the same position, or as close as possible to the same position, as they would have been in had the error not occurred. For the purposes of this Rule, the terms of a transaction are clearly*

erroneous when there is an obvious error in any term, such as price, number of shares or other unit of trading, or identification of the security.

(ii) *Any member who seeks to have a transaction reviewed pursuant to subparagraph (i) above shall submit the matter to a Floor Official and deliver a written complaint to Service Desk within 30 minutes of the transaction. Once a complaint has been received, the complainant shall have up to thirty 30 minutes, or such longer period as the Floor Official may specify, to submit any supporting written information concerning the complaint necessary for a review of the transaction. The other party to the trade shall have up to thirty minutes after being notified of the complaint, or such longer period as specified by the Floor Official, to submit any supporting written information concerning the complaint necessary for a review of the transaction. Either party to a disputed trade may request the written information provided by the other party pursuant to this subparagraph. Once a party to a disputed trade communicates that he or she does not intend to submit any further information concerning a complaint, the party may not thereafter provide additional information unless requested to do so by the Floor Official. If both parties to a disputed trade indicate that they have no further information to provide concerning the complaint before their respective thirty-minute information submission period has elapsed, then the matter may be immediately considered by a Floor Official. Members or persons associated with members and member organizations involved in the transaction shall provide the Floor Official with any information that he or she requests in order to resolve the matter on a timely basis notwithstanding the time parameters set forth above. Once a member has applied to a Floor Official for a ruling, the Floor Official shall review the transaction and make a ruling unless both parties to the transaction agree to withdraw the application for review prior to the time that the Floor Official makes the ruling. A member may seek review of a Floor Official's ruling pursuant to the procedures described in Rule 22(d) and Commentary .02 to Rule 22.*

(iii) *In the event of (1) a disruption or malfunction in the use or operation of any facility of the Exchange, (2) a disruption or malfunction in the use or operation of any facility of Nasdaq that results in Nasdaq nullifying or modifying trades in the Nasdaq market pursuant to its rules, or (3) extraordinary market conditions or*

other circumstances in which the nullification or modification of transactions executed on the Exchange in Nasdaq National Market securities may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest, a Floor Governor may review any transactions arising out of or reported through any facility of the Exchange; provided, however, that a Floor Governor may not review transactions arising out of the use or operation of any execution or communication system owned or operated by Nasdaq. Prior to the nullification or modification of transactions as a result of a disruption or malfunction in the use or operation of any facility of Nasdaq, the Exchange must receive confirmation from NASD or Nasdaq that there is a disruption or malfunction on Nasdaq's market that has resulted in the nullification or modification of trades in that market. A Floor Governor acting pursuant to this subsection may declare any Amex transaction null and void or modify the terms of any such transactions if the Floor Governor determines that (1) the transaction is clearly erroneous, or (2) such actions are necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest; provided, however, that, in the absence of extraordinary circumstances, the Floor Governor must take action pursuant to this subsection within thirty (30) minutes of detection of the transaction, but in no event later than 3 p.m., Eastern Time, on the next trading day following the date of the trade at issue. A member may seek review of a Floor Governor's ruling from a three Governor Panel as described in Rule 22(d) and Commentary .02 to Rule 22 without first seeking review of the ruling from a Floor Official or Exchange Official.

(m) *Half-Point Error Guarantee. The provisions of Rule 129 shall not apply to orders for Nasdaq National Market securities of 1,000 shares or less received by the specialist through the Exchange's electronic order routing system ("System"). As to such orders, erroneous execution reports sent by the specialist via the System shall be binding except that (i) if the erroneous report is at a price which is more than \$.50 away from the execution price, then the price of the execution shall be binding, and (ii) if the member organization that entered the order requests a correction from the specialist prior to the opening on the second business day following the day of the transaction, the specialist shall correct*

⁶ See Letter from Bill Floyd Jones, Associate General Counsel, Amex, to Nancy J. Sanow, Assistant Director, Division, Commission, dated January 30, 2004 ("Amendment No. 4"). In Amendment No. 4, Amex revised the proposed rule change to: (1) make technical amendments to the rule text to better reflect the proposed rule change, and (2) confirm that the Exchange has determined for business reasons not to extend the half-point error guarantee to other securities traded on the Exchange at this time.

the execution report to the price of the execution and that price shall be binding. If the erroneous execution report sent by the specialist is at a price which is more than \$.50 away from the execution price and if a transaction has appeared on the tape at the price of the erroneous report and in a quantity equal to or exceeding the amount reported, the specialist must render a corrected report no later than noon on the business day following the day of the transaction. If not so corrected, the specialist will be responsible for any resulting loss. However, as to limit orders, erroneous execution reports sent by the specialist shall also not be binding where the subject security did not trade at or below (or above, as the case may be) the limit price specified on the order on that trading day.

(n) Rule 390 shall not preclude a member, member organization, allied member, registered representative, or officer from sharing or agreeing to share in any losses in any customer's account with respect to Nasdaq National Market securities after the member organization has established that the loss was caused in whole or in part by the action or inaction of such member, member organization, allied member, registered representative or officer, provided, however, that this provision shall not permit a member, member organization, allied member, registered representative or officer to guarantee any customer against loss in his account.
 Commentary: 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 IV 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 Basis for, the Proposed Rule Change

1. Purpose

Trades in Nasdaq securities may occur at clearly erroneous prices due to human or system errors. The Exchange, accordingly, is proposing to adopt an obvious error rule for use on the

Exchange in connection with unlisted trading privileges ("UTP") transactions on the Exchange in Nasdaq securities. New Amex Rule 118(l) would be similar to Rule 11890 (Clearly Erroneous Transactions) of the National Association of Securities Dealers, Inc. ("NASD") for the Nasdaq Stock Market.

Like the NASD's rule, the proposed Amex obvious error rule would allow the Exchange to break or revise single or multiple trades that are obviously erroneous. Under the proposed rule, a member may request an Amex Floor Official⁷ to review a transaction that is claimed to be clearly erroneous. Once a ruling is requested, a Floor Official must review the trade unless both parties agree to withdraw the application before the Floor Official makes a ruling.

The proposed rule requires a Floor Official to review a transaction or series of transactions with a view toward maintaining a fair and orderly market and the protection of investors and the public interest. Based upon this review, a Floor Official would decline to "break" a disputed transaction if the Floor Official believes that the transaction under dispute is not clearly erroneous. If the Floor Official determines the transaction in dispute is clearly erroneous, however, the Floor Official may declare the transaction null and void or modify one or more terms of the transaction. When adjusting the terms of a transaction, the Floor Official would seek to adjust the price and/or size of the transaction to achieve an equitable rectification of the error that would place the parties to a transaction in the same position, or as close as possible to the same position, as they would have been in had the error not occurred.

Subparagraph (ii) of proposed Amex Rule 118(l) establishes deadlines and procedures for Floor Official review of a disputed transaction. Any member who seeks to have a transaction or series of transactions reviewed must submit the matter to a Floor Official and deliver a written complaint to Service Desk within 30 minutes of the transaction. Once a complaint has been received, the complainant would have up to thirty 30

minutes, or such longer period as the Floor Official may specify, to submit any supporting written information concerning the complaint necessary for a review of the transaction. The other party to the trade would have up to thirty minutes after being notified of the complaint, or such longer period as specified by the Floor Official, to submit any supporting written information concerning the complaint necessary for a review of the transaction. Either party to a disputed trade may request the written information provided by the other party. Once a party to a disputed trade communicates that he or she does not intend to submit any further information concerning a complaint, the party may not thereafter provide additional information unless requested to do so by the Floor Official. If both parties to a disputed trade indicate that they have no further information to provide concerning the complaint before their respective thirty-minute information submission period has elapsed, then the matter may be immediately considered by a Floor Official. Members or persons associated with members and member organizations involved in the transaction would be required to provide the Floor Official with any information that he or she requests in order to resolve the matter on a timely basis.

Subparagraph (iii) of proposed Amex Rule 118(l) provides that, in the event of (1) a disruption or malfunction in the use or operation of any facility of the Exchange, (2) a disruption or malfunction in the use or operation of any facility of Nasdaq that results in the nullification or modification of trades in that market,⁸ or (3) extraordinary market conditions or other circumstances in which the nullification or modification of transactions in Nasdaq National Market securities may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest, a Floor Governor may review any transactions arising out of or reported through any facility of the Exchange. A Floor Governor acting pursuant to this subsection may declare any Amex transaction null and void or modify the terms of any such transactions if the Floor Governor determines that (1) the transaction is clearly erroneous, or (2)

⁷ Floor Officials are deemed to be Officers of the Exchange. See Amex Rule 22(c). Floor Officials are generally responsible for the supervision of operations the Exchange Floor. There are four classifications of Floor Official. In ascending order of responsibility, these classifications are: (1) Floor Official, (2) Exchange Official, (3) Senior Floor Official, and (4) Senior Supervisory Officer. The Vice Chairman of the Exchange is a Floor Governor and serves as the Senior Supervisory Officer. Governors of the Exchange that spend a significant amount of time on the Floor are Senior Floor Officials. Numerous provisions of the Exchange's rules specifically call for Floor Official involvement in the Exchange's operations.

⁸ Prior to the nullification or modification of transactions as a result of a disruption or malfunction in the use or operation of any facility of Nasdaq, the Exchange must receive confirmation from NASD or Nasdaq that there is a disruption or malfunction on Nasdaq's market that has resulted in the nullification or modification of trades in that market.

such actions are necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest; provided, however, that, in the absence of extraordinary circumstances, the Floor Governor must take action pursuant to proposed Amex Rule 118(l)(iii) within thirty minutes of detection of the transaction, but in no event later than 3 p.m., Eastern Time, on the next trading day following the date of the trade at issue.

A member seeking a prompt, *i.e.*, prior to settlement, review of a Floor Official's ruling under proposed Amex Rule 118(l) would follow the procedures outlined in Amex Rule 22(d). These procedures provide possible appeals first to an Exchange Official, next to a Floor Governor, and finally to a three governor panel. Proposed Amex Rule 118 also provides that a member aggrieved by a Floor Governor's ruling under subsection (iii) of the proposed rule may appeal the ruling directly to a three Governor panel pursuant to Amex Rule 22(d) and Commentary .02. Commentary .02 to Amex Rule 22 requires Floor Officials to prepare and submit a written record of their decisions as soon as practical after making a ruling.⁹ Floor Officials, consequently, would have to prepare and submit written decisions regarding rulings on trades that may be clearly erroneous. The Commission recently reviewed and approved amendments to the Exchange's procedures for appealing Floor Official rulings.¹⁰

In conjunction with the adoption of an obvious error rule, the Exchange also proposes the adoption of a Half-Point Error Guarantee for transactions in Nasdaq stocks (proposed Amex Rule 118(m)). The proposed Amex error guarantee would allow small investors to rely upon reports of executions of system orders of sizes that may be designated by the Exchange from time to time where the report is within \$.50 of the execution price. System orders of 1,000 shares or less would be eligible for the Half-Point Error Guarantee.

As to such others, erroneous execution reports sent by the specialist via the Exchange's electronic order routing system would be binding except that if the erroneous report is at a price which is more than \$.50 away from the execution price, then the execution

price would be binding. In addition, if the member organization that entered the order requests a correction from the specialist prior to the opening on the second business day following the day of the transaction, the specialist would correct the execution report to the price of the execution and that price would be binding. If the erroneous execution report sent by the specialist is at a price which is more than \$.50 away from the execution price and if a transaction has appeared on the tape at the price of the erroneous report and in a quantity equal to or exceeding the amount reported, the specialist would be required to render a corrected report no later than noon on the business day following the day of the transaction. If not so corrected, the specialist would be responsible for any resulting loss. However, as the limit orders, erroneous execution reports sent by the specialist would also not be binding where the subject security did not trade at or below (or above, as the case may be) the limit price specified on the order on that trading day.¹¹ The Exchange believes that the Half-Point Error Guarantee would encourage investors to use the Exchange's electronic order routing facilities.¹²

To implement the Half-Point Error Guarantee, the Exchange also is proposing to adopt a rule (Rule 118(n)) that would codify current practice with respect to the resolution of errors in Nasdaq securities traded on the Exchange. The proposed rule change would state that members and member organizations may share in losses in a customer's account when the member or member organizations determine that the member or firm was responsible for the loss.¹³

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with

¹¹ Thus, if the subject security did not trade at or below (above) the limit price specified on the order on that trading day, then the provisions of Amex Rule 129 would apply. If the subject security did trade at or below (above) the limit price specified on the order on that trading day, then the Half-Point Error Guarantee would apply. Telephone conversation between Bill Floyd Jones, Associate General Counsel, Amex, David Fisch, Managing Director, Amex, Susie Cho, Special Counsel, Division, Commission, and Ian Kiran Patel, Attorney, Division, Commission, on January 29, 2004.

¹² Proposed Amex Rule 118(m) is similar to New York Stock Exchange, Inc. Rule 123B(b)(2).

¹³ Proposed Amex Rule 118(n) is based upon Supplementary Material .20 to NYSE Rule 352. The Exchange has represented that it plans to propose an obvious error rule for listed securities. *See supra* n. 5. However, for business reasons, the Exchange does not plan to propose a Half-Point Error Guarantee for listed securities. *See* Amendment No. 4, *supra* note 6.

Section 6(b) of the Act¹⁴ in general and furthers the objectives of Section 6(b)¹⁵ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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.

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

The Exchange believes that the proposed rule change will impose no 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 Exchange 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, as amended, 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. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-Amex-2003-39. This file number

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

⁹ Floor Governors would also have to comply with similar procedures under this rule. Telephone conversation between Bill Floyd Jones, Associate General Counsel, Amex, and Ian K. Patel, Attorney, Division, Commission, dated January 16, 2004.

¹⁰ *See*, Securities Exchange Act Release No. 47078 (December 30, 2002), 67 FR 79668 (December 20, 2002) (SR-Amex-2001-07).

should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR-Amex 2003-39 and should be submitted by March 24, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁶

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 04-4715 Filed 3-2-04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49318; File No. SR-CBOE-2004-10]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Inc., Relating to the Expansion of the \$5 Bid-Ask Differential Pilot Program

February 25, 2004.

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 February 20, 2004, 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 and II below, which items have been prepared by the Exchange. The CBOE has submitted the proposed rule change under section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ 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 Substance of the Proposed Rule Change

In January 2004, the CBOE implemented a six-month pilot program ("Pilot Program"), which expires on June 29, 2004, that permits quote spread parameters of up to \$5, regardless of the price of the bid, for up to 200 option classes traded on the CBOE's Hybrid Trading System ("Hybrid").⁵ The CBOE proposes to amend its rules to expand the Pilot Program to include all option classes traded on Hybrid.

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 IV 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 Basis for, the Proposed Rule Change

1. Purpose

The Pilot Program, which expires on June 29, 2004, permits quote spread parameters of up to \$5, regardless of the price of the bid, for up to 200 option classes traded on Hybrid. The purpose of the proposed rule change is to expand the Pilot Program to include all option classes traded on Hybrid.⁶ As a condition to the effectiveness of the Pilot Program, the CBOE committed to monitor the quotation quality of all classes in the Pilot Program and, based on the results, recommend either relaxing the spread requirements for all Hybrid classes, ending the Pilot Program, or adjusting the spread requirements for all Hybrid classes. To this end, the CBOE committed to prepare and submit to the Commission a report assessing the operation of the Pilot Program and, in particular, the

quality of the quotations for the Pilot Program options.⁷

The CBOE proposes to expand the number of option classes included in the Pilot Program from 200 classes to all classes trading on Hybrid. As proposed, any class trading on Hybrid would be eligible for inclusion in the Pilot Program, which means that when the proposal becomes operative, the permissible bid-ask differential for all Hybrid series will be \$5, regardless of the price at which they trade.⁸

As described above, the CBOE previously committed to prepare and submit to the Commission a report assessing the operation of the Pilot Program. The CBOE further commits to expand the scope of this report to include the top 550 Hybrid classes. The report will analyze the AQWA scores for the Pilot Program options and will include data from the date of inclusion in the Pilot Program through June 1, 2004.⁹

The CBOE believes that it is reasonable to expand the Pilot Program to include all Hybrid classes. In this

⁷ In this respect, the CBOE committed to provide to the Commission a report analyzing the Average Quote Width Analysis ("AQWA") scores for each of the Pilot Program options. The CBOE's report will compare the AQWA scores for each stock prior to the implementation of the Pilot Program versus the AQWA scores for each stock during the operation of the Pilot Program. The CBOE believes that this information will provide a meaningful comparison during the relevant periods so that the CBOE will be able to determine the effect of the \$5 quote width on quote quality. The CBOE expects to provide the Commission with its report on the Pilot Program by June 15, 2004. Telephone conversation between Steve Youhn, CBOE, and Yvonne Fraticelli, Special Counsel, Division of Market Regulation, Commission, on February 19, 2004.

⁸ The relaxed quotation spread requirements will apply after the opening trading rotation. During the opening rotation, market makers will be required to quote in accordance with the traditional bid-ask width requirements. The \$5 quotation requirements permitted under the Pilot Program would become operative immediately following the opening rotation.

⁹ See note 7, *supra*, for a description of the information that the CBOE will include in its Pilot Program report. When the current proposal becomes operative, the CBOE will add to the 200 classes currently included in the Pilot Program all of the remaining classes currently traded on Hybrid (approximately 350 classes). If after the operative date of the current proposal the CBOE converts additional classes to Hybrid trading, those classes will be eligible for inclusion in the Pilot Program. However, the CBOE will not include data for these additional classes in its Pilot Program report to the Commission. The CBOE proposes to exclude this information from the report because these classes may be added to Hybrid at different times (and some may not be added until near the end of the Pilot Program), which would result in separate measurement periods for each class and would necessarily complicate the preparation of the Pilot Program report. Moreover, the CBOE believes that it is unlikely that data provided for this relatively small number of classes would produce significant additional information concerning the operation of the Pilot Program.

¹⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ See Securities Exchange Act Release No. 49153 (January 29, 2004), 69 FR 5620 (February 5, 2004) (notice of filing and immediate effectiveness of File No. SR-CBOE-2003-50) ("Pilot Notice").

⁶ As of February 17, 2004, approximately 550 classes traded on Hybrid.