

regulatory functions as an agent on behalf of Amex. The RSA provides a framework for oversight of Amex members and enforcement of Amex rules and federal securities laws, and describes the services that NASD will perform so as to ensure a regulatory program that will satisfy applicable statutory requirements. Specifically, pursuant to the RSA, NASDR and NASDDR will provide market and trade practice surveillance and analysis; financial and operational regulation; options sales practice regulation; disciplinary and enforcement functions; and dispute resolution services.

The Amex stated that in performing services under the RSA, the NASD will be operating pursuant to the statutory self-regulatory responsibilities of the Amex under Section 6 and Section 19 of the Act⁸ and will apply Amex's rules. The Exchange also stated that any action taken by NASD or its employees or authorized agents pursuant to the RSA (or any other SRO with which the Exchange contracts) will be deemed an action taken by the Amex (without, however, affecting the Commission's oversight of such other self-regulatory organization). The Amex noted, however, that it retains ultimate responsibility for performance of its self-regulatory duties under the RSA.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6 of the Act.⁹ Specifically, the Commission finds that the proposed rule change is consistent with and furthers the objectives of Sections 6(b)(1),¹⁰ 6(b)(6),¹¹ and 6(b)(7)¹² of the Act, which require that the Exchange enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange; that the rules of the Exchange provide that its members and persons associated with its members shall be appropriately disciplined for violations of the Act, the rules and regulations thereunder, and the rules of the Exchange; and that the rules of the Exchange provide a fair procedure for

the disciplining of members and persons associated with members.

The Commission has previously stated and continues to believe that contractual regulatory agreements between self-regulatory organizations may be permissible in instances where it is consistent with the public interest.¹³ The Commission believes that it is reasonable and consistent with the public interest to allow a self-regulatory organization to contract with another self-regulatory organization to perform disciplinary and enforcement functions.¹⁴ The Commission also believes NASD has the expertise and experience to perform these functions, and thus will be able to assist Amex in fulfilling its self-regulatory responsibilities as set forth under the Act.

The Commission continues to believe, however, that it is important, and required by the Act, for ultimate responsibility and primary liability for self-regulatory failures to rest with the Exchange itself rather than the contracted self-regulatory organization.¹⁵ Consistent with this approach, Amex will bear ultimate legal responsibility for the performance of its self-regulatory functions, despite the fact that NASD's subsidiaries will be carrying out the regulation of Amex's market pursuant to the RSA. Nevertheless, the Commission has stated and again reiterates that the self-regulatory organization providing regulatory services may bear liability for causing, or, in appropriate circumstances, aiding and abetting, regulatory failures by the Exchange.¹⁶ Thus, NASD may bear secondary liability if the Commission finds that the contracted regulatory functions are being performed so inadequately as to cause a violation of the federal securities laws by Amex.

The Commission also notes that Amex has represented that any NASD

employee acting pursuant to the RSA will be deemed to be an Amex employee for purposes of Amex's rules. In particular, Amex represents that for purposes of any rule that requires an employee or personnel of Amex to perform a specific regulatory oversight, disciplinary or enforcement function, any NASD employee that is performing such function pursuant to the RSA will be deemed to be an Amex employee for purposes of Amex's rules as a result of this rule change. Thus, no changes to Amex's rules are required as a result of this filing.¹⁷

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹⁸ that the proposed rule change (SR-Amex-2004-32) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 04-18003 Filed 8-5-04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50124; File No. SR-BSE-2004-32]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of the Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to the Extension of the Linkage Fee Pilot Program

July 30, 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 July 29, 2004, the Boston Stock Exchange, Inc. ("BSE" 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 Commission is publishing this notice to solicit comments on the proposed rule from interested persons and is approving the proposed rule change on an accelerated basis.

¹⁷ Telephone call between William Floyd-Jones, Jr., Associate General Counsel, Amex, and Heather Seidel, Attorney-Fellow, Division, Commission, on July 29, 2004.

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

⁸ 15 U.S.C. 78f and 15 U.S.C. 78s.

⁹ 15 U.S.C. 78f.

¹⁰ 15 U.S.C. 78f(b)(1).

¹¹ 15 U.S.C. 78f(b)(6).

¹² 15 U.S.C. 78f(b)(7).

¹³ See Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) at Section III(D)(2) ("ISE Approval Order") (approving the application for registration of the International Securities Exchange, Inc., including authority to contract with another self-regulatory organization to perform regulatory functions).

¹⁴ *Id.* In the ISE Approval Order, the Commission also stated that "[d]iscipline and enforcement are fundamental elements to a regulatory program, and constitute core self-regulatory functions. It is essential to the public interest and the protection of investors that these functions are carried out in an exemplary manner, and the Commission believes that NASD Regulation has the expertise and experience to perform these functions."

¹⁵ See ISE Approval Order at Section III(D)(2), and Sections 6(b), 19(g) and 19(h) of the Act. 15 U.S.C. 78f(b), 78s(g) and 78s(h).

¹⁶ See ISE Approval Order at footnote 68 and accompanying text.

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

BSE proposes to extend the current pilot program applicable to Options Intermarket Linkage ("Linkage") fees for one year until July 31, 2005.

The proposed fee schedule is available at the principal office of the Exchange and at the Commission's Public Reference Room.

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 Basis for, the Proposed Rule Change

1. Purpose

BSE proposes to extend the current pilot program for Linkage fees on its Boston Options Exchange ("BOX") facility through July 31, 2005. BOX's current fee structure for Principal ("P") and Principal Acting as Agent ("P/A") Orders³ executed on BOX is operating under a pilot program which expires on July 31, 2004. Currently, because all Linkage Orders received by BOX are for the account of a broker-dealer market maker on another exchange, the fees applicable to P and P/A Orders are the same as fees applicable to market

makers on other exchanges that submit orders to BOX outside of the Linkage. The side of a BOX trade opposite an inbound P or P/A order would be billed normally as any other BOX trade. Also, consistent with the Plan, no fees will be charged to a party sending a Satisfaction request ("S" order) to BOX. However, a fee will be charged to the BOX Options Participant that was responsible for the trade-through that caused the S order to be sent.

BSE now proposes to extend the pilot program to July 31, 2005, in order to remain consistent with the other options exchanges concerning these fees.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of section 6(b) of the Act,⁴ in general, and furthers the objectives of section 6(b)(4),⁵ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members.

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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

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. 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. Please include File Number SR-BSE-2004-32 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-BSE-2004-32. 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal offices of BSE. 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-BSE-2004-32 and should be submitted on or before August 27, 2004.

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

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder, applicable to a national securities exchange,⁶ and, in particular, with the requirements of section 6(b) of the Act⁷ and the rules and regulations thereunder. The Commission finds that the proposed rule change is consistent with section 6(b)(4) of the Act,⁸ which requires that the rules of the Exchange provide for the equitable allocation or reasonable dues, fees and other charges among its members and other persons using its facilities. The Commission believes that the extension of the Linkage fee pilot until July 31, 2005 will give the Exchange and the Commission further opportunity to evaluate whether such fees are appropriate.

The Commission finds good cause, pursuant to section 19(b)(2) of the Act,⁹

³ Under section 2(16) of the Purpose of Creating and Operating an Options Intermarket Linkage ("Plan") and Chapter XII of the BOX Rules, which tracks the language of the Plan, a "Linkage Order" means an Immediate or Cancel order routed through the Linkage as permitted under the Plan. There are three types of Linkage orders:

(i) "P/A Order," which is an order for the principal account of a Market Maker (or equivalent entity on another Participant Exchange that is authorized to represent Public Customer orders), reflecting the terms of a related unexecuted Public Customer order for which the specialist is acting as agent;

(ii) "P Order," which is an order for the principal account of a market maker (or equivalent entity on another Participant exchange) and is not a P/A Order; and

(iii) "Satisfaction Order," which is an order sent through the Linkage to notify a Participant Exchange of a Trade-Through and to seek satisfaction of the liability arising from that Trade-Through.

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(4).

⁶ In approving this rule, the Commission notes that it has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4).

⁹ 15 U.S.C. 78s(b)(2).

for approving the proposed rule change prior to the thirtieth day after the date of publication of the notice of the filing thereof in the **Federal Register**. The Commission believes that granting accelerated approval will preserve the Exchange's existing pilot program for Linkage fees without interruption as BSE and the Commission further consider the appropriateness of Linkage fees.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act¹⁰ that the proposed rule change (SR-BSE-2004-32) is hereby approved on an accelerated basis for a pilot period to expire on July 31, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50130; File No. SR-CBOE-2004-47]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change by the Chicago Board Options Exchange, Incorporated Relating to Marketing Fee Voting Procedures

July 30, 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 July 19, 2004, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I and II 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, and at the same time is granting accelerated approval of the proposed rule change on a six-month pilot basis.

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

The Exchange proposes to reinstate its Marketing Fee Voting Procedures,³ which previously were set forth in Interpretation and Policy .12 to CBOE Rule 8.7. Under those procedures, a trading crowd could determine whether or not to participate in the CBOE's marketing fee program. Under the procedures, as proposed to be reinstated, electronic DPMs ("e-DPMs")⁴ would be incorporated into the Marketing Fee Voting Procedures.⁵ Below is the text of the proposed rule change. Proposed new language is italicized.

* * * * *

RULE 8.7 Obligations of Market-Makers

(a)-(c) No change.

Interpretations and Policies

.01-.11 No change.

.12 *Marketing Fee Voting Procedures: The following procedures specify how a trading crowd determines whether to participate or not to participate in the Exchange's marketing fee program. These procedures expire six months from the date of SEC approval, or such earlier time as the Commission has approved them on a permanent basis.*

(a) *Eligible Voters*

(i) *The term "trading crowd" is synonymous with the term "station," which is defined in Interpretation and Policy .01 to Rule 8.8.*

(ii) *Eligible Trading Crowd Members: Members of a trading crowd that will be eligible to participate in the vote ("eligible trading crowd members") shall include (1) those Market-Makers who have transacted at least 80% of their Market-Maker contracts and transactions in each of the three immediately preceding calendar months in option classes traded in the trading crowd, and who continue to be present in the trading crowd in the capacity of a Market-Maker at the time of the vote;*

³ The voting procedures previously were described in SR-CBOE-2003-20. See Securities Exchange Act Release No. 47957 (May 30, 2003), 68 FR 35035 (June 11, 2003) ("Marketing Fee Voting Procedures Approval Order").

⁴ On July 12, 2004, the SEC approved a proposed rule change, SR-CBOE-2004-24, which pertains to the establishment of e-DPMs. See Securities Exchange Act Release No. 50003 (July 12, 2004), 69 FR 43028 (July 19, 2004).

⁵ Upon approval of this proposed rule change, the CBOE intends to file a proposed rule change, pursuant to Section 19(b)(3)(A)(ii) of the Act and subparagraph (f)(2) of Rule 19b-4 thereunder, incorporating e-DPMs into the CBOE's existing marketing fee program.

(2) the DPM for a trading crowd; and (3) any e-DPM, and shall each have one vote. Any e-DPM appointed to one or more option classes shall be eligible to vote on marketing fees for those option classes.

(b) *Requesting a Trading Crowd Vote. Any eligible trading crowd member (including the DPM and any e-DPM) can request that a vote be held to determine whether or not the trading crowd should continue to participate in the marketing fee program for one or more of the option classes located at that station by submitting a written request to that effect to the Secretary of the Exchange. The Exchange shall post a notice at the station and provide written notice to the e-DPM of the time and date of any vote to be taken at least 10 calendar days prior to the time of the vote. The marketing fee oversight committee shall determine all other administrative procedures pertaining to the vote.*

(c) *Participation in the Marketing Fee Program. A trading crowd shall be deemed to have indicated that it desires to participate in the Exchange's marketing fee program for one or more of the option classes located at that station if a majority of those eligible trading crowd members participate in the vote and if a majority of the total votes cast are in favor of participating in the marketing fee program for those option classes. Conversely, a trading crowd shall be deemed to have indicated that it does not desire to participate in the Exchange's marketing fee program for one or more of the option classes located at that station if a majority of those eligible trading crowd members participate in the vote and if a majority of the total votes cast are against participating in the marketing fee program for those option classes.*

(i) *Frequency of Vote: Once a crowd votes to participate in the marketing fee program, subsequent votes to determine whether to continue its participation may be held only once every three calendar months. Once a crowd votes not to participate in the marketing fee program, subsequent votes to determine whether to participate in the marketing fee program may be held only once every thirty days.*

(ii) *Tie Votes: If a vote conducted in accordance with this rule results in a tie, the status quo for that trading crowd shall remain in effect. Accordingly, if the trading crowd currently participates in the marketing fee program and a tie vote occurs, the marketing fee program will remain in effect in that trading crowd. If the trading crowd does not participate in the marketing fee at the*

¹⁰ *Id.*

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.