

revenue, provided that the total of such estimated payments or billings shall be reconciled at the end of each calendar year and, if necessary, adjusted by March 31st of the following year. Interest shall be included in quarterly payments and in adjusted payments made on March 31st of the following year. Such interest shall accrue monthly during the period in which revenue was earned and not yet paid and will be based on the 90-day Treasury bill rate in effect at the end of the quarter in which the payment is made. Interest shall not accrue during the period of up to 45 days between the end of each calendar quarter and the date on which an estimated quarterly payment or billing is made.

In conjunction with calculating estimated quarterly and reconciled annual payments under this Exhibit 1, the Processor shall submit to the Participants an itemized statement setting forth the basis upon which net operating income was calculated, including an itemized statement of the Processor costs set forth in Paragraph 3 of this Exhibit. Such Processor costs shall be reconciled annually based solely on the Processor's audited annual financial information. By majority vote of the Operating Committee, the Processor shall engage an independent auditor to audit the Processor's costs or other calculation(s), the cost of which audit shall be shared equally by all Participants. The Processor agrees to cooperate fully in providing the information necessary to complete such audit.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49130; File No. SR-CHX-2003-27]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Stock Exchange, Incorporated Relating to Execution of Limit Orders Following Exempted ITS Trade-Through

January 27, 2004.

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 August 7, 2003, the Chicago Stock Exchange, Incorporated ("CHX" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. On January 20, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> 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 certain provisions of CHX Article XX, Rule 37, which governs, among other things, execution of limit orders, in listed securities, in a CHX specialist's book following a trade-through in the primary market. Specifically, the CHX seeks to render voluntary a CHX specialist's obligation to fill limit orders in the specialist's book when the primary market is trading at the limit price, if the issue traded constitutes an Exempt ETF (as defined below). The text of the proposed rule change is available at the Commission and at the CHX.

#### 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 CHX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX 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

On August 28, 2002, the Commission issued an order granting a *de minimis* exemption (the "Exemption") for transactions in certain exchange-traded funds (the "Exempt ETFs") from the trade-through provisions of the Intermarket Trading System ("ITS") Plan.<sup>4</sup> On May 30, 2003, the

Commission issued an order extending effectiveness of the Exemption, through March 4, 2004.<sup>5</sup> In its orders relating to the Exemption, the Commission clearly outlined its belief that the nature of the ETF market is so dynamic and rapidly-changing that the trade-through provisions of the ITS Plan are inadequate and unduly restrictive.<sup>6</sup>

Article XX, Rule 37(a)(3) of the CHX Rules, which governs execution of limit orders in a CHX specialist's book, provides for execution of such orders at the limit price, *i.e.*, it requires the CHX specialist to provide "limit order protection," when certain conditions occur in the primary market. Among other things, these provisions generally obligate a CHX specialist to fill limit orders in his book if the primary market is trading at or through the limit price.

Following issuance of its Exemption order, the Commission approved a rule change proposed by the CHX, removing the requirement that CHX specialists guarantee limit order protection in the case of an Exempt Trade-Through in the primary market.<sup>7</sup> CHX specialists are permitted to provide this protection on a voluntary basis.

The Exchange believes that it is appropriate to extend the effect of this rule change by removing the remaining limit order protection requirements for orders in any of the Exempt ETFs. Specifically, the CHX believes that in instances where the primary market in an Exempt ETF is trading at the limit price, the CHX specialist should not be required to execute resting limit orders in his book under CHX Article XX, Rule 37(a)(3)(a) and 37(a)(3)(c).

Accordingly, the proposed rule change would permit, but would not require, a CHX specialist to fill limit orders in his book when the primary market in an Exempt ETF is trading at the limit price.<sup>8</sup> The CHX asserts that rationale for this proposal is similar to that articulated by the Commission in the Exemption order—it is difficult, if

<sup>5</sup> See Securities Exchange Act Release No. 47950 (May 30, 2003), 68 FR 33748 (June 5, 2003).

<sup>6</sup> See *supra* note 3, 67 FR at 56607-56608.

<sup>7</sup> See Securities Exchange Act Release No. 46760 (November 1, 2002), 67 FR 68219 (November 8, 2002). The CHX rule language approved by the Commission is currently in effect until March 4, 2004, the expiration date of the Exemption order. See Securities Exchange Act Release No. 48202 (July 21, 2003), 68 FR 44370 (July 28, 2003).

<sup>8</sup> The CHX believes that the proposed rule change, which broadens the scope of Interpretation and Policy .10 to CHX Article XX, Rule 37, contemplates the proposal outlined above. To the extent that the CHX Board of Governors designates subject issues other than or in addition to the Exempt ETFs, the Exchange will file those changes with the Commission as an interpretation of an existing rule pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(1).

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

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

<sup>3</sup> Amendment No. 1 replaces and supercedes the original filing in its entirety.

<sup>4</sup> See Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 4, 2002). At present, the exemption extends to transactions in three designated Exempt ETFs—the Nasdaq-100 Index ("QQQ"), the Dow Jones Industrial Average ("DIAMONDS") and the Standard & Poor's 500 Index ("SPDRs")—when the transactions are "executed at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS" (each, an "Exempted Trade-Through"). The exemption was effective as of September 4, 2002. The Exchange notes that the Commission's exemption extended to the subject *transactions* rather than the three subject *issues*. For purposes of this submission, however, the Exchange will refer to such issues at the "Exempt ETFs."

not impossible, for a CHX specialist to obtain liquidity on behalf of his customer via the ITS system in the case of Exempt ETFs, given the dynamic and rapidly changing nature of the Exempt ETF market.

## 2. Statutory Basis

The CHX believes the proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b).<sup>9</sup> The CHX believes the proposal is consistent with Section 6(b)(5) of the Act<sup>10</sup> in that it is designed to promote just and equitable principles of trade, to remove impediments to, and to 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 of Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

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

No written comments were either solicited or received.

## 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 other 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 the 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. 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](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-CHX-2003-27. 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, 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 Exchange. All submissions should refer to File No. SR-CHX-2003-27 and be submitted by February 24, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49129; File No. SR-NASD-2003-176]

### **Self-Regulatory Organizations; Notice of Designation of Longer Period for Commission Action and Extension of Comment Period on a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Chief Executive Officer and Chief Compliance Officer Certification**

January 27, 2004.

On November 28, 2003, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("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 to add NASD Rule 3013. Notice of the proposed rule

change was published for public comment in the **Federal Register** on December 31, 2003.<sup>3</sup> The notice provided that comments on the proposed rule change should be submitted to the Commission by January 21, 2004.

Section 19(b)(2) of the Act<sup>4</sup> provides that within thirty-five days of the publication of notice of the filing of a proposed rule change, or within such longer period as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding the Commission shall either approve the proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved. That thirty-five day period will end on February 4, 2004, with respect to the proposed rule change. The Commission has received comments on the proposed rule change, which it is still reviewing. The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the comments.

Accordingly, the Commission hereby designates March 30, 2004 as the date by which the Commission shall either approve the proposed rule change or institute proceedings to determine whether to disapprove it. The Commission is also extending the period for public comment through February 6, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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<sup>3</sup> See Securities Exchange Act Release No. 48981 (December 23, 2003), 68 FR 75704. The Release was incorrectly identified in the **Federal Register** as 34-48961. The correct number is 34-48981.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> 17 CFR 200.30-3(a)(31).

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

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

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