

A proposed rule change filed under Rule 19b-4(f)(6)<sup>16</sup> normally does not become operative prior to thirty days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The CBOE has requested that the Commission waive the thirty-day operative date specified in Rule 19b-4(f)(6)(iii)<sup>17</sup> in order to conform its rules pertaining to the submission of exercise notifications with those of other options exchanges.

The Commission believes that waiving the thirty-day operative date is consistent with the protection of investors and the public interest<sup>18</sup> because it will allow the CBOE to immediately implement rules similar to ones already in place at the other options exchanges,<sup>19</sup> and will simplify the manner in which CEAs, and similarly advice cancels, are submitted to the Exchange. For these reasons, the Commission designates the proposed rule change as effective and operative immediately. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### 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-CBOE-2003-47. 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-CBOE-2003-47 and should be submitted by March 17, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>20</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49278; File No. SR-ISE-2003-34]

#### Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto by the International Securities Exchange, Inc. Relating to Firm Quotations

February 19, 2004.

On November 20, 2003, the International Securities Exchange, Inc. ("ISE" or "Exchange") 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 require ISE market makers to be firm for the stated size of their quotations in all instances. The ISE submitted Amendment No. 1 to the proposed rule change on December 3, 2003.<sup>3</sup>

Currently, a market maker's disseminated quotation is required to be firm at its stated size for all incoming orders, except when quotes of two ISE market makers interact. In these cases, a market maker may limit its exposure to one contract, regardless of the size of its disseminated quotation.<sup>4</sup> This proposed rule change will eliminate that exception.

The proposed rule change, as amended, was published for comment in the **Federal Register** on December 16, 2003.<sup>5</sup> The Commission received no comments on the proposed rule change.

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, the requirements of Section 6 of the Act.<sup>6</sup> Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>7</sup> which requires that the rules of a national securities exchange be designed 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.<sup>8</sup> The Commission believes that requiring market makers' quotes to be firm for the full stated size in all cases will further the development of the national market system by requiring ISE market makers to comply with the Quote Rule—Rule 11Ac1-1 under the Act.<sup>9</sup>

Execution Size"—a term no longer used in the rule—and substituted the term "a bid or offer."

<sup>4</sup> See Securities Exchange Act Release No. 47220 (January 21, 2003), 68 FR 4260 (January 28, 2003).

<sup>5</sup> See Securities Exchange Act Release No. 48892 (December 8, 2003), 68 FR 70058.

<sup>6</sup> 15 U.S.C. 78f.

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>9</sup> Rule 11Ac1-1 sets forth requirements for the dissemination of quotations and responsibilities of broker-dealers. 17 CFR 240.11Ac1-1. By letter dated January 21, 2003, the Commission granted responsible brokers and dealers on the ISE a limited exemption from the Quote Rule to permit an ISE market maker to be firm for only one contract when its quotations interact with those of other ISE market makers. See letter from Robert L.D. Colby, Deputy Director, Division of Market Regulation, Commission, to Michael J. Simon, Senior Vice President and General Counsel, ISE, dated January 21, 2003. Concurrent with approval of this proposed rule change, the Commission is revoking the ISE's limited exemption to the Quote Rule. See letter from Robert L.D. Colby, Deputy Director, Division of Market Regulation, Commission, to Michael J. Simon, Senior Vice President and General Counsel, ISE, dated January 21, 2003. Concurrent with approval of this proposed rule change, the Commission is revoking the ISE's limited exemption to the Quote Rule. See letter from Robert L.D. Colby, Deputy Director, Division

<sup>16</sup> 17 CFR 240.19b-4(f)(6).

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

<sup>18</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>19</sup> See Securities Exchange Act Release Nos. 47885 (May 16, 2003), 68 FR 28309 (May 23, 2003) (SR-Amex-2001-92); 49191 (February 4, 2004), 69 FR 7055 (February 12, 2004) (SR-BSE-2004-04); 48505 (September 17, 2003), 68 FR 55680 (September 26, 2003) (SR-ISE-2003-20); 48640 (October 16, 2003), 68 FR 60757 (October 23, 2003) (SR-PCX-2003-47); and 48639 (October 16, 2003), 68 FR 60764 (October 23, 2003) (SR-Phlx-2003-65).

<sup>20</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.

<sup>3</sup> See letter from Michael Simon, Senior Vice President and General Counsel, ISE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated December 2, 2003. Amendment No. 1 deleted a reference to "Order

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change, as amended (SR-ISE-2003-34) be, and hereby is, approved.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49285; File No. SR-NASD-2004-031]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Establishing an Effective Date For NASD Rule 3370, Affirmative Determination Requirements

February 19, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 13, 2004, NASD filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. NASD has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule series under paragraph (f)(1) of Rule 19b-4 under the Act,<sup>3</sup> which renders the proposal effective upon receipt of this filing by 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

NASD is filing a proposed rule change to establish April 1, 2004 as the effective date of the amendments to Rule 3370 (the "Affirmative Determination Rule") that the SEC approved in November

2003.<sup>4</sup> The amendments expand the scope of the affirmative determination requirements to include orders received from broker/dealers that are not members of NASD ("non-member broker/dealers"). As revised, Rule 3370 applies to orders received by member firms from both customers and non-member broker/dealers, as well as most firm proprietary orders. The revisions also add an exception for "proprietary" short sales of non-member broker/dealers provided the member can establish that the order meets certain conditions.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its original rule filing with the Commission, NASD 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. NASD 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

NASD is filing the proposed rule change to establish April 1, 2004 as the effective date for the amendments to NASD Rule 3370 that the SEC approved in November 2003.<sup>5</sup> Now, Rule 3370(b)(2)(A) and the corresponding recordkeeping requirements under Rule 3370(b)(4)(B) require that, prior to accepting a short sale order from a broker/dealer that is not an NASD member ("non-member broker/dealer"), a member must make an affirmative determination that the member will receive delivery of the security from the non-member broker/dealer or that the member can borrow the security on behalf of the non-member broker/dealer for delivery by the settlement date. In addition, Rule 3370(b)(2)(A) provides exemptions for, among others, proprietary orders of member firms that are bona fide market making transactions, or transactions that result in bona fide fully hedged or arbitrated positions. Proprietary orders of a non-member broker/dealer likewise are exempt from the affirmative

determination requirements if they meet the same conditions for the exemptions applicable to proprietary orders of member firms, and the following two conditions are satisfied: (1) The non-member broker/dealer must be registered with the SEC; and (2) if using the market maker exemption, the non-member broker/dealer is registered or qualified as a market maker in the securities and is selling such securities in connection with bona fide market making.

Pursuant to the SEC's approval of SR-NASD-2001-85, the amendments to Rule 3370 will go into effect on February 20, 2004. However, NASD seeks to delay implementation of these provisions until April 1, 2004. NASD understands from input received by industry participants that it would be very difficult to comply with the new requirements without making significant technological changes to their systems. For example, according to the NASD, when members receive orders from either another member or a non-member broker/dealer, the broker/dealers placing the orders are identified by a specific market participant identifier ("MPID"). Currently, members' systems do not distinguish between the MPIDs of members and non-member broker/dealers. To comply with the new affirmative requirements, members will have to be able to distinguish the members' MPIDs from the non-member broker/dealers' MPIDs. NASD understands that to do so, firms will have to make sizeable programming changes that will allow firms to tag each MPID as belonging to either a member or non-member broker/dealer and create a master list of MPIDs that show which MPIDs belong to members and which belong to non-member broker/dealers. NASD believes that extending the effective date of the Rule 3370 amendments until April 1, 2004 will provide members sufficient time to make the necessary changes to their systems.

###### 2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,<sup>6</sup> which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that applying affirmative determination requirements to short sale orders of non-member brokers/dealers will ensure the integrity of the

of Market Regulation, Commission, to Michael J. Simon, Senior Vice President and General Counsel, ISE, dated February 19, 2004.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<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.

<sup>3</sup> 17 CFR 240 19b-4(f)(1).

<sup>4</sup> See Securities Exchange Act Release No. 48788 (Nov. 14, 2003); 68 FR 65978 (Nov. 24, 2003).

<sup>5</sup> *Id.*

<sup>6</sup> 15 U.S.C. 78o-3(b)(6).