

protected against the listing market for a security, not against another market that happens to have had the greatest number of transactions during a given time period. The CHX believes that at a minimum, continual re-designation of the primary market under the CTA Plan definition could prove extremely confusing to CHX order-sending firms and their customers. For these reasons, the Exchange believes that another definition of primary market is amply warranted.

Under the proposed change, the Exchange's Rules Subcommittee would be given the authority to define the primary market for listed securities for purposes of determining the limit order execution guarantees offered on the Exchange. As an initial matter, the Rules Subcommittee intends to designate the initial listing market for a security as the primary market, unless that security is traded by either the New York Stock Exchange, Inc. ("NYSE") or the American Stock Exchange LLC ("Amex"); if the security is traded by one of those markets, then the primary market would be the NYSE (for the securities it trades) and the Amex (for the securities it trades). If a security is traded on both the NYSE and the Amex, whichever of the two is the initial listing market would be designated as the primary market.⁶ If the initial listing market is a market other than the NYSE or the Amex, but is traded by both the NYSE and the Amex, the primary market shall be the market with the largest trading volume in the subject security, calculated on a twelve-month rolling basis. The Exchange believes that the designation guidelines outlined above will ensure that the Rules Subcommittee consistently designates a market that is a significant source of liquidity, to the benefit of customers whose orders are routed to the CHX.

The Exchange already uses a similar method of defining the scope of the limit order protections provided for Over-the-Counter ("OTC") securities. Under a proposal approved last year, each CHX specialist in an OTC security

⁶ If the Rules Subcommittee identifies a different designation for all listed securities traded on the Exchange, the Exchange will notify its order-sending firms of those Exchange-wide changes and 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) thereunder. If, however, the Rules Subcommittee responds to the fragmentation in the market by identifying different designated markets for different securities, the Exchange will file, pursuant to Rule 19b-4(f)(1) under the Act, a new interpretation confirming that the Rules Subcommittee has identified different designated markets in different securities for purposes of this voluntary functionality, but will not list all of those different designations.

has the authority, with the approval of the Exchange, to identify, on an issue-by-issue basis, the designated market against which he or she will protect limit orders.⁷ Through this filing, the Exchange seeks to implement a similar program for determining the scope of the limit order protections given to listed securities.

2. Statutory Basis

The CHX believes the proposal, as amended, 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) of the Act.⁸ The CHX believes the proposal, as amended, is consistent with section 6(b)(5) of the Act⁹ in that it is designed to promote just and equitable principles of trade, to remove impediments, 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 on 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 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 CHX consents, the Commission will:

- By order approve such proposed rule change, or
- 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

⁷ See Securities Exchange Act Release No. 48014 (June 11, 2003), 68 FR 35923 (June 17, 2003) (SR-CHX-2003-05).

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

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-CHX-2003-24. 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 CHX. All submissions should refer to File No. SR-CHX-2003-24, and should be submitted by April 14, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49442; File No. SR-ISE-2004-05]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the International Securities Exchange, Inc., Relating to Customized Market Data Reports ("ISEMine")

March 17, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 4, 2004, the International Securities Exchange, Inc. ("ISE" or "Exchange")

¹⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 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 ISE proposes to amend its Schedule of Fees to establish fees for preparing customized market data reports for both members and non-members. The text of the proposed rule change is available at the ISE and at the Commission.

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 its proposal 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 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 Exchange proposes to establish fees in connection with the preparation of customized market data reports for both members and non-members. The Exchange maintains databases that contain information relating to option contracts traded on the Exchange. This information is of interest to Exchange members and non-members (including academics) who seek statistical information on the options markets. Accordingly, the Exchange is proposing to provide members and non-members with the ability to "mine" this data through the use of customized market data reports. The Exchange refers to this service as "ISEmine."

The ISE is proposing to provide both an initial quarterly report and updates to those reports. The information included in the report will be "data points" selected by the subscriber. Data points consist of information based on "sentiment data" the ISE uses to calculate its ISE Sentiment Index and consists of aggregate cleared volume

data, such as opening to buy, opening to sell, close to buy, close to sell. The ISE tracks this data through the information its members provide when opening and closing positions. ISEmine is a voluntary, optional service provided by the Exchange, meaning members and non-members are neither required nor otherwise obligated to purchase this service. Neither the data mined nor the reports produced will disclose the identity of any parties to any option contracts traded on the Exchange.

An ISEmine initial report will be a single file consisting of all requested data for a calendar quarter. After receiving such a report, a subscriber can request updates to the data contained in that report as frequently as it desires, such as quarterly, monthly, weekly or even daily. The ISE will not provide data more often than a daily basis. Accordingly, all ISEmine reports will consist of "historical" data that will not reflect current transactions in the market; rather, all ISEmine reports will be historical records of transactions from earlier that day or from previous days. This data service thus will not be competitive with real-time market data services a subscriber can receive through the Options Price Reporting Authority.

The Exchange is proposing fees for the use of ISEmine. Since the reports are customizable, the amount of the fee in each particular instance will be based on the number of data points selected by user, with the fees increasing depending on the number of data points included in the report. The fee for an initial report that includes data for a calendar quarter varies from \$5,000 to \$11,000, depending on the number of data points. For updates of such reports, the price varies from \$7,500 to \$12,000 per calendar quarter, again depending on the number of data points. The higher charge for updates reflects the fact that the initial report is provided on a one-time basis, while subscribers can receive multiple updates during the quarter, as often as daily.

The ISE has structured these fees to recover, in part, the costs of collecting, storing, extracting and processing this market data. The preparation of these reports will require significant programming efforts at the ISE to prepare these customized reports. Moreover, the updated reports will require a continuing processing effort by the ISE. The Exchange also is proposing to discount all stated fees by 25 percent for Exchange members. This discount recognizes that Exchange members pay transaction fees when trading on the exchange and it is the data from these transactions that forms the database

from which the ISE prepares the ISEmine reports. Thus, the ISE believes that charging members the full fee would partially charge them twice for the same data. The ISE believes that the 25 percent discount properly avoids the double-charging issue. However, both members and non-members would pay the ISE's costs of shipping and handling the reports on a non-discounted basis.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the Act in general, and Section 6(b)(5)³ in particular. The proposed rule change establishes fees for a voluntary, optional service provided by the Exchange. Neither members nor non-members are required to purchase this service. The service is intended to provide interested parties with statistical information about options transactions on the Exchange, thus providing an opportunity for greater transparency of options market information.

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

The Exchange believes that the proposed rule change does not impose any burden on competition that is 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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 ISE 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

³ 15 U.S.C. 78(f)(b)(5).

arguments concerning the foregoing, including whether the proposal 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-ISE-2004-05. This file number should be included on the subject line if e-mail is used. To help the Commission process and review 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 at the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-ISE-2004-05 and should be submitted by April 14, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁴

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49439; File No. SR-NASD-2004-023]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by National Association of Securities Dealers, Inc. To Amend Order Audit Trail System Rules Relating to Execution Reports

March 17, 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 5, 2004, the National Association of Securities Dealers, Inc. ("NASD") 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 NASD. On March 11, 2004, NASD filed Amendment No. 1 to the proposed rule change.³ 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 proposing to amend NASD Rule 6954(d) to require that members record and report the execution price and firm capacity in Order Audit Trail System ("OATS") Execution Reports. The text of the proposed rule appears below. Proposed new text is in italics. Deleted text is in brackets.

* * * * *

NASD Systems and Programs

6950. Order Audit Trail System

6951. through 6953. No Changes.

6954. Recording of Order Information

(a) through (c) No Changes.

(d) Order Modifications, Cancellations, and Executions.

Order information required to be recorded under this Rule when an order is modified, canceled, or executed includes the following.

(1) and (2) No Change.

(3) When a Reporting Member executes an order, in whole or in part, the Reporting Member shall record:

(A) through (G) No Change.

(H) the date and time of execution, [and]

(I) *the execution price,*

(J) *the capacity in which the member executed the transaction (e.g., agency, principal or riskless principal), and*

(K) the national securities exchange or facility operated by a registered securities association where the trade was reported.

* * * * *

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

In its 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

On March 6, 1998, the Commission approved NASD Rules 6950 through 6957 ("OATS Rules").⁴ NASD represents that OATS provides a substantially enhanced body of information regarding orders and transactions that NASD believes improves its ability to conduct surveillance and investigations of member firms for potential violations of NASD rules and the federal securities laws.

When the OATS Rules initially were adopted, it was determined that NASD would obtain execution price and firm capacity (*i.e.*, the capacity in which the member acted for purposes of the transaction, for example, on an agency, principal or riskless principal basis) information from trading information rather than from information submitted to OATS. At that time, the vast majority of trading in Nasdaq securities was reported through Nasdaq's Automated Confirmation Transaction Service ("ACT").⁵ Members are required to input order identifier information into ACT trade reports, and NASD systematically matches the ACT trade reports with corresponding OATS reports to obtain certain trade-related information including execution price and firm capacity. Similarly, members using the NASD Alternative Display Facility ("ADF") Trade Reporting and Comparison Service ("TRACS") are required to record OATS order identifier information in TRACS trade reports, which also is then matched with OATS information to obtain execution price and firm capacity.

NASD believes that recently, however, the "ACT/TRACS matching" process has become more and more limited, in part because a percentage of trades in Nasdaq securities are no longer reported to ACT or TRACS. Furthermore, NASD believes that if there are any errors in the linking

³ See letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated March 10, 2004 ("Amendment No. 1"). Amendment No. 1 replaces the proposed rule change in its entirety.

⁴ See Securities Exchange Act Release No. 39729 (March 6, 1998), 63 FR 12559 (March 13, 1998) (SR-NASD-97-56).

⁵ ACT is an automated system owned and operated by Nasdaq that captures transaction information on a real-time basis.

⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.