

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49692; File No. 4-429]

### Joint Industry Plan; Notice of Filing of Joint Amendment No. 12 to the Options Intermarket Linkage Plan Relating to the Limitation in Liability for Filling Satisfaction Orders Sent Through the Linkage at the End of the Trading Day

May 12, 2004.

Pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 11Aa3-2 thereunder,<sup>2</sup> notice is hereby given that on April 26, 2004, April 26, 2004, May 5, 2004, May 7, 2004, May 7, 2004, and May 11, 2004, the International Securities Exchange, Inc. ("ISE"), the Pacific Exchange, Inc. ("PCX"), the American Stock Exchange LLC ("Amex"), the Boston Stock Exchange, Inc. ("BSE"), the Philadelphia Stock Exchange, Inc. ("Phlx"), and the Chicago Board Options Exchange, Inc. ("CBOE") (collectively, the "Participants"), respectively, filed with the Securities and Exchange Commission ("Commission") an amendment ("Joint Amendment No. 12") to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Linkage Plan").<sup>3</sup> In proposed Joint Amendment No. 12, the Participants propose to extend the pilot provision limiting

Trade-Through<sup>4</sup> liability at the end of the trading day for an additional seven months, until January 31, 2005, and to increase the limitation on liability from 10 contracts to 25 contracts. The Commission is publishing this notice to solicit comments from interested persons on the proposed Joint Amendment No. 12.

#### I. Description and Purpose of the Amendment

The Participants are proposing to extend for an additional seven months, until January 31, 2005, the pilot provision in the Linkage Plan<sup>5</sup> that limits Trade-Through liability at the end of the trading day. The Participants are also seeking to increase the limitation on Trade-Through liability for each Satisfaction Order<sup>6</sup> that is sent via Linkage at the end of the trading day from 10 contracts to 25 contracts during the extended pilot period.

The Participants originally proposed a 10-contract limitation on liability during the last seven minutes of the trading day as a one-year pilot in Joint Amendment No. 4 to the Plan.<sup>7</sup> In Joint Amendment No. 4, the Participants represented that members of various exchanges had raised concerns regarding their obligation to fill Satisfaction Orders (which they receive when an options exchange disseminating a better price complains about a Trade-Through) at the close of trading in the underlying security. Specifically, members expressed concern that they may not have time to hedge the positions they acquire.<sup>8</sup> Thus, the Participants proposed to limit liability for Trade-Throughs for the period between five minutes prior to the close of trading in the underlying security and the close of trading in the options class to the filing

of 10 contracts per Participant, per transaction. The Participants represented that they believed that the proposal would protect small customer orders, yet establish a reasonable limit for their members' liability. Further, the Participants represented that the proposal would not affect a member's potential liability under an exchange's disciplinary rule for engaging in a pattern or practice of trading through other markets under Section 8(c)(i)(C) of the Linkage Plan.

In the order approving Joint Amendment No. 4, Commission stated that in the event the Participants chose to seek permanent approval of this limitation, the Participants must provide the Commission with a report regarding data on the use of the exemption no later than 60 days before seeking permanent approval (the "Report").<sup>9</sup> In a subsequent amendment to the Linkage Plan for the purpose of extending the pilot, Joint Amendment No. 8, the Participants represented that if they were to seek to make the limitations on Trade-Throughs permanent, they would submit the Report to the Commission no later than March 31, 2004.<sup>10</sup> With respect to the Report, the Participants represented in Joint Amendment No. 8 that they planned to submit individual Reports regarding the requested data as it pertained to their own exchange. They further represented that these Reports would detail the number of Trade-Throughs in the last seven minutes and the rest of the day, as well as the number and size of Satisfaction Orders that would have been filled absent the current exemption. In addition, the Participants represented that the Reports would provide information on the extent to which the exchange's members hedged their options trading during the day as part of their overall risk management. Finally, the Participants represented that they would make every effort to provide specific information regarding hedging activity at the end of the trading day.<sup>11</sup>

Following the extension of the pilot program, certain Participants provided the Commission with portions of the information required in the Report, but were unable to provide sufficient information to enable the Commission to evaluate whether permanent approval would be appropriate. Extending the pilot through January 31, 2005 would allow the limitation to continue in

<sup>10</sup> 17 CFR 200.30-3(a)(29).

<sup>1</sup> 15 U.S.C. 78k-1.

<sup>2</sup> 17 CFR 240.11Aa3-2.

<sup>3</sup> On July 28, 2000, the Commission approved a national market system plan for the purpose of creating and operating an intermarket options market linkage ("Linkage") proposed by Amex, CBOE, and ISE. See Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000). Subsequently, Phlx, PCX, and BSE joined the Linkage Plan. See Securities Exchange Act Release Nos. 43573 (November 16, 2000), 65 FR 70850 (November 28, 2000); 43574 (November 16, 2000), 65 FR 70851 (November 28, 2000); and 49198 (February 5, 2004), 69 FR 7029 (February 12, 2004). On June 27, 2001, May 30, 2002, February 3, 2003, June 25, 2003, and January 29, 2004, the Commission approved joint amendments to the Linkage Plan. See Securities Exchange Act Release Nos. 44482 (June 27, 2001), 66 FR 35470 (July 5, 2001); 46001 (May 30, 2002), 67 FR 38687 (June 5, 2002); 47274 (January 29, 2003), 68 FR 5313 (February 3, 2003); 48055 (June 18, 2003), 68 FR 37689 (June 25, 2003); and 49146 (January 29, 2004), 69 FR 5618 (February 5, 2004).

<sup>4</sup> A "Trade-Through" is defined as a transaction in an options series at a price that is inferior to the national best bid and offer in an options series calculated by a Participant. See Section 2(29) of the Linkage Plan.

<sup>5</sup> See Section 8(c)(ii)(B)(2)(c) of the Linkage Plan.

<sup>6</sup> A "Satisfaction Order" is an order sent through the Linkage to notify a Participant of a Trade-Through and to seek satisfaction of the liability arising from that Trade-Through.

<sup>7</sup> The Commission approved the pilot on a 120-day temporary basis on January 31, 2003. See Securities Exchange Act Release No. 47298, 68 FR 6524 (February 7, 2003). On June 18, 2003, the Commission approved the pilot until January 31, 2004. See Securities Exchange Act Release No. 48055, 68 FR 37869 (June 25, 2003) (Order approving "Joint Amendment No. 4"). The Commission subsequently extended the pilot until June 30, 2004. See Securities Exchange Act Release No. 49146 (January 29, 2004), 69 FR 5618 (February 5, 2004) (Order approving "Joint Amendment No. 8").

<sup>8</sup> See letter from Michael Simon, Senior Vice President and General Counsel, ISE, to Annette Nazareth, Director, Division of Market Regulation, Commission, dated November 19, 2002.

<sup>9</sup> See *supra* note 7.

<sup>10</sup> See Securities Exchange Act Release No. 49010 (December 30, 2003), 69 FR 706 (January 6, 2004) (Notice of Filing Joint Amendment No. 8).

<sup>11</sup> *Id.*

effect, with the increase in liability to 25 contracts, while the Participants continue to discuss with Commission staff the information necessary to permit the Commission to evaluate possible permanent approval of the Trade-Through limitation. The proposed increase in the limit on liability would become effective on July 1, 2004, when the current pilot expires. The Participants propose no change to the time period in the trading day during which the limit would apply.

## II. Implementation of the Plan Amendment

The Participants propose to make the proposed amendment to the Linkage Plan reflected in this filing effective on July 1, 2004.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed Joint Amendment No. 12 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 4-429 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 Joint Amendment No. 12 to File Number 4-429. 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 Linkage Plan amendment that are filed with the Commission, and all written communications relating to the proposed Linkage Plan amendment 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

office of the Participants. 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 Joint Amendment 12 to File Number 4-429 and should be submitted on or before June 9, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49694; File No. PCAOB-2003-09]

### Public Company Accounting Oversight Board; Order Approving Proposed Rule and Application Instructions Governing Withdrawal From Registration

May 13, 2004.

#### I. Introduction

On October 15, 2003, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed a Form 19b-4 with the Securities and Exchange Commission (the "Commission") pursuant to Sections 102 and 107 of the Sarbanes-Oxley Act of 2002 (the "Act"), consisting of a proposed rule and application form completion instructions governing withdrawal from registration (collectively the "proposed rule"). Notice of the proposed rule was published in the **Federal Register** on April 8, 2004.<sup>1</sup> The Commission received one comment letter. For the reasons discussed below, the Commission is granting approval of the proposed rule.

#### II. Description

The Act established the PCAOB to oversee the audits of public companies and related matters, to protect investors, and to further the public interest in the preparation of informative, accurate and independent audit reports. The PCAOB is to accomplish these goals through registration, standard setting, inspections, and disciplinary programs.

In furtherance of the registration requirement in Section 102 of the Act, the PCAOB adopted registration rules on April 23, 2003. The Commission approved those rules on August 1, 2003, following a public comment period. The registration rules do not address the process by which a registered public accounting firm may cancel, rescind or withdraw its registration with the PCAOB. Accordingly, the Board published a proposed registration withdrawal rule and related withdrawal application form completion instructions for public comment on July 28, 2003 (PCAOB Release No. 2003-014). The PCAOB revised the proposed rule in response to three letters it received during the comment period. The PCAOB adopted the proposed rule, as revised, and concurrently authorized submission of the proposed rule to the Commission for approval. The proposed rule was filed with the Commission pursuant to the requirements of Section 107(b) of the Act and Section 19(b) of the Securities Exchange Act of 1934 (the "Exchange Act").

The PCAOB has proposed a rule and instructions for completion of an application form (Form 1-WD) to govern the process by which public accounting firms may request leave to withdraw from registration. Under the proposed rule, a registered firm may seek to withdraw at any time by filing Form 1-WD. However, withdrawal from registration is not automatic. The PCAOB may order that withdrawal be delayed while the Board conducts a related inspection, investigation, or disciplinary proceeding. The PCAOB may delay a requested withdrawal for up to 18 months, and, under the rule, that period shall automatically be extended to cover any period necessary to complete a disciplinary proceeding initiated prior to the expiration of the 18-month period.

The proposed rule also provides that, if the PCAOB determines within three years of granting a request for withdrawal that the withdrawal application form contained a material misstatement or omission, the Board may void the withdrawal retroactively. The PCAOB wants to provide a basis for inspecting, investigating and potentially disciplining a registered firm that made a false or misleading statement in its withdrawal application. Because the PCAOB's regulatory authority is greatest over entities registered with the Board, the proposed rule provides that the registration of a suspect firm shall be reinstated, effective from the date of the deemed withdrawal.

While a request for leave to withdraw is pending, the applicant may not

<sup>12</sup> 17 CFR 200.30-3(a)(29).

<sup>1</sup> Release No. 34-49520 (April 2, 2004); 69 FR 18656 (April 8, 2004).