

data to the Board, when it so reasonably requests, will be a contractual obligation of all Participants under their agreements governing participation in the Portfolios.

13. All reports of potential or existing conflicts received by the Board, and all Board action with regard to determining the existence of a conflict, notifying Participants of a conflict, and determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the Board or other appropriate records, and such minutes or other records will be made available to the Commission upon request.

14. A Fund will not accept a purchase order from a Qualified Plan if such purchase would make the Qualified Plan shareholder an owner of 10 percent or more of the assets of such Portfolio unless the Qualified Plan executes an agreement with the Fund governing participation in such Portfolio that includes the conditions set forth herein to the extent applicable. A Qualified Plan or Qualified Plan Participant will execute an application containing an acknowledgement of this condition at the time of its initial purchase of shares of any Portfolio.

Conclusion

Applicants submit, based on the grounds summarized above, that the requested exemptions, in accordance with the standards of section 6(c), are necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49863; File No. 4-429]

Joint Industry Plan; Order Approving Joint Amendment No. 12 to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage Relating to the Limitation in Liability for Filling Satisfaction Orders Sent Through the Linkage at the End of the Trading Day

June 15, 2004.

I. Introduction

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").¹ In Joint Amendment No. 12, the Participants propose to extend the pilot provision limiting Trade-Through² 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 proposed amendment to the Linkage Plan was published in the **Federal Register** on May 19, 2004.³ No

¹ On July 28, 2000, the Commission approved a national market system plan for the purpose of creating and operating an intermarket option 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, January 29, 2003, June 18, 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 37869 (June 25, 2003); and 49146 (January 29, 2004), 69 FR 5618 (February 5, 2004).

² 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.

³ *See* Securities Exchange Act Release No. 49692 (May 12, 2004), 69 FR 28956.

comments were received on the proposed amendment. This order approves the proposed amendment to the Linkage Plan.

II. Description of the Proposed Amendment

In Joint Amendment No. 12, the Participants propose to extend the pilot provision contained in Section 8(c)(ii)(B)(2)(c) of the Linkage Plan, which limits Trade-Through liability for the last seven minutes 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, per Satisfaction Order.⁴ The proposed increase in the limit on liability would become effective on July 1, 2004, when the current pilot expires. Pursuant to the pilot as currently in effect, the Trade-Through liability of a member of a Participant is limited to 10 contracts per Satisfaction Order 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.

III. Discussion

When this pilot was originally proposed in Joint Amendment No. 4 to the Linkage Plan,⁵ the Participants represented to the Commission that their members had expressed concerns regarding their obligations to fill Satisfaction Orders (which may be sent by a Participant's member that is traded through) at the close of trading in the underlying security. Specifically, the Participants represented that their members were concerned that they may not have sufficient time to hedge the positions they acquire.⁶ The Participants stated that they believed that their proposal to limit liability at the end of the options trading day to the filling of 10 contracts per exchange, per transaction would protect small customer orders, but still establish a reasonable limit for their members' liability. The Participants further represented that the proposal should not affect a member's potential liability under an exchange disciplinary rule for engaging in a pattern or practice of

⁴ A "Satisfaction Order" is defined as an order sent through the Intermarket Options Linkage to notify a Participant of a Trade-Through and to seek satisfaction of the liability arising from that Trade-Through. *See* Section 2(16)(c) of the Linkage Plan.

⁵ *See* Securities Exchange Act Release No. 47028 (December 18, 2002), 67 FR 79171 (December 27, 2002) (Notice of Proposed Joint Amendment No. 4).

⁶ *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.

trading through other markets under Section 8(c)(i)(C) of the Linkage Plan.

The Commission approved the proposed amendment for a one-year pilot⁷ to give the Participants and the Commission an opportunity to evaluate: (1) The need for the limitation on liability for Trade-Throughs near the end of the trading day; (2) whether 10 contracts per Satisfaction Order is the appropriate limitation; and (3) whether the opportunity to limit liability for Trade-Throughs near the end of the trading day leads to an increase in the number of Trade-Throughs.

In the order approving Joint Amendment No. 4, the 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").⁸ The Commission specified that the Report should include information about the number and size of Trade-Throughs that occur during the last seven minutes of the options trading day and during the remainder of the trading day, the number and size of Satisfaction Orders that Participants might be required to fill without the limitation on liability and how those amounts are affected by the limitation on liability, and the extent to which the Participants use the underlying market to hedge their options positions.⁹ 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 limitation on Trade-Through liability permanent, they would submit the Report to the Commission no later than March 31, 2004.¹⁰

Following the most recent extension of the pilot program, certain Participants provided the Commission with portions of the data 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 effect, with the increase in liability to 25 contracts, while the Participants continue to compile the data necessary to permit the Commission to evaluate the propriety of permanent approval of the Trade-Through liability limitation.

After careful consideration, the Commission finds that the proposed amendment to the Linkage Plan seeking to extend the pilot provision limiting Trade-Through liability for the last seven minutes of the trading day in the options markets for an additional seven months, and to increase the limitation on liability from 10 contracts to 25 contracts per Satisfaction Order is consistent with the requirements of the Act and the rules and regulations thereunder. Specifically, the Commission finds that the proposed amendment to the Linkage Plan is consistent with Section 11A of the Act¹¹ and Rule 11Aa3-2 thereunder,¹² in that extending the pilot while the Participants gather and the Commission evaluates data relating to the effect of the operation of the pilot, is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets. The Commission further finds that raising the limitation on liability to 25 contracts per Satisfaction Order, which should increase the average size of Satisfaction Order fills during the last seven minutes of the options trading day, is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets. Therefore, the Commission is extending the effectiveness of Section 8(c)(ii)(B)(2)(c) of the Linkage Plan, with the increase in the limitation in liability to 25 contracts per Satisfaction Order, for an additional seven months, until January 31, 2005.

IV. Conclusion

It is therefore ordered, pursuant to Section 11A of the Act¹³ and Rule 11Aa3-2 thereunder,¹⁴ that the proposed Joint Amendment No. 12 is approved on a pilot basis from July 1, 2004 until January 31, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49871; File No. SR-OPRA-2004-03]

Options Price Reporting Authority; Notice of Filing of Proposed Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information To Revise Guideline 1 of the Capacity Guidelines To Confirm That It Is Within the Authority of the Independent System Capacity Advisor To Make Determinations Concerning the Establishment, Modification or Removal of Output Throttles From the OPRA System

June 16, 2004.

Pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act")¹ and Rule 11Aa3-2 thereunder,² notice is hereby given that on May 7, 2004, the Options Price Reporting Authority ("OPRA"),³ submitted to the Securities and Exchange Commission ("Commission") an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA Plan"). The proposed amendment would revise Guideline 1 of the Capacity Guidelines to confirm that it is within the authority of the Independent System Capacity Advisor ("ISCA") under the OPRA Plan to make determinations concerning the establishment, modification or removal of any throttle on the output of the OPRA System. The Commission is publishing this notice to solicit comments from interested persons on the proposed OPRA Plan amendment.

¹⁵ 17 CFR 200.30-3(a)(29).

¹ 15 U.S.C. 78k-1.

² 17 CFR 240.11Aa3-2.

³ OPRA is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 11Aa3-2 thereunder. See Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981).

The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The six participants to the OPRA Plan are the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, Inc., the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc.

⁷ See Securities Exchange Act Release No. 47298 (January 31, 2003), 68 FR 6524 (February 7, 2003) (approval of the pilot program on a 120-day basis); see also Securities Exchange Act Release No. 48055 (June 18, 2003), 68 FR 37869 (June 25, 2003) (Order approving Joint Amendment No. 4).

The Commission subsequently extended the pilot program for five months until June 30, 2004. See Securities Exchange Act Release No. 49010 (December 30, 2003), 69 FR 706 (January 6, 2004) (Order approving Joint Amendment No. 8).

⁸ See Order approving Joint Amendment No. 4, *supra* note 7.

⁹ *Id.*

¹⁰ See Order approving Joint Amendment No. 8, *supra* note 7.

¹¹ 15 U.S.C. 78k-1.

¹² 17 CFR 240.11Aa3-2.

¹³ See *supra* note 11.

¹⁴ See *supra* note 12.