

Finally, the Commission notes that the value of the Index will be disseminated at least once every fifteen seconds throughout the trading day. The Commission believes that providing access to the value of the Index at least once every fifteen seconds throughout the trading day is extremely important and will provide benefits to investors in the product.

The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of the notice of filing thereof in the **Federal Register**. The Exchange has requested accelerated approval because this product is similar to several other instruments currently listed and traded on the Amex.<sup>27</sup> The Commission believes that the Notes will provide investors with an additional investment choice and that accelerated approval of the proposal will allow investors to begin trading the Notes promptly. Additionally, the Notes will be listed pursuant to Amex's existing hybrid security listing standards as described above. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>28</sup> to approve the proposal on an accelerated basis.

## V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>29</sup> that the proposed rule change (SR-Amex-2004-64) is hereby approved on an accelerated basis.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>30</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>27</sup> See Securities Exchange Act Release Nos. 50019 (July 14, 2004), 69 FR 43635 (July 21, 2004) (approving the listing and trading of Morgan Stanley PLUS Notes); 48486 (September 11, 2003), 68 FR 54758 (September 18, 2003) (approving the listing and trading of CSFB Contingent Principal Protection Notes on the S&P 500); 48152 (July 10, 2003), 68 FR 42435 (July 17, 2003) (approving the listing and trading of a UBS Partial Protection Note linked to the S&P 500); 47983 (June 4, 2003), 68 FR 35032 (June 11, 2003) (approving the listing and trading of a CSFB Accelerated Return Notes linked to S&P 500); 47911 (May 22, 2003), 68 FR 32558 (May 30, 2003) (approving the listing and trading of notes (Wachovia TEES) linked to the S&P 500).

<sup>28</sup> 15 U.S.C. 78f(b)(5) and 78s(b)(2).

<sup>29</sup> 15 U.S.C. 78o-3(b)(6) and 78s(b)(2).

<sup>30</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50269; File No. SR-CBOE-2004-42]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Calculation of Securities Indexes Underlying Options

August 26, 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 July 12, 2004, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The CBOE submitted the proposed rule change under section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(1) thereunder,<sup>4</sup> which renders the proposal effective upon filing with 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

The Exchange submits this rule change to amend its rules in order to clarify the determination of the source of securities price information used to calculate values of certain securities indexes underlying options traded on the Exchange. The text of the proposed rule change is below. Proposed new language is *italicized*.

\* \* \* \* \*

#### CHAPTER XXIV

##### Index Options

(Rules 24.1-24.21)

Rule 24.1—Rule 24.8 No Change.

\* \* \* \* \*

Rule 24.9—Terms of Index Option Contracts

Rule 24.9. (a)–(c) No Change.

\* \* \* \* \*

\* \* \* *Interpretations and Policies:*

.01–.11 No Change.

.12 *With respect to any securities index on which options are traded on the Exchange, the source of the prices of component securities used to calculate the current index level at expiration is*

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

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

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(1).

*determined by the Reporting Authority for that index.*

\* \* \* \* \*

#### 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 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. The CBOE has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

###### 1. Purpose

The purpose of the proposed rule change is to clarify CBOE rules related to Index Options as they pertain to the source of pricing information for securities that comprise any particular securities index on which options are traded on the Exchange. Certain CBOE rules may be interpreted in a manner that suggests that the current index value at expiration of any particular securities index is determined by the opening (or closing) prices of the underlying components as reported by each respective underlying component's "primary market." To illustrate, Rule 24.9(a)(4) (*A.M.-Settled Index Options*) provides:

The last day of trading for A.M.-settled index options shall be the business day preceding the last day of trading in the underlying securities prior to expiration. The current index value at the expiration of an A.M.-settled index option shall be determined, for all purposes under these Rules and the Rules of the Clearing Corporation, on the last day of trading in the underlying securities prior to expiration, by reference to the reported level of such index as derived from first reported sale (opening) prices of the underlying securities on such day, except that in the event that the *primary market for an underlying security does not open for trading*, halts trading prematurely, or otherwise experiences a disruption of normal trading on that day, or in the event that the primary market for an underlying security is open for trading on that day, but that particular security does not open for trading, halts trading prematurely, or otherwise experiences a disruption of normal trading on that day, the price of that security shall be determined, for the purposes of calculating the current index value at expiration, as set forth in *Rule 24.7(e)*. (Emphasis added).

Rule 24.7(e) provides:

(e) When the *primary market for a security underlying the current index value of an index option* does not open for trading, halts trading prematurely, or otherwise experiences a disruption of normal trading on a given day, or if a particular security underlying the current index value of an index option does not open for trading, halts trading prematurely, or otherwise experiences a disruption of normal trading on a given day in its primary market, the price of that security shall be determined, for the purposes of calculating the current index value at expiration, in accordance with the Rules and By-Laws of The Options Clearing Corporation.

This rule could be interpreted to mean that the primary market for each security that comprises an index will always be the source of opening and closing prices used in the calculation of the particular index's value at expiration. This may not always be the case. To illustrate, on May 12, 2004, Dow Jones & Company ("Dow Jones") published a plan to implement a pilot program in which Dow Jones will use the opening and closing prices of Nasdaq-listed stocks reported from the American Stock Exchange to calculate certain Dow Jones Averages.<sup>5</sup> CBOE currently lists and trades options on several Dow Jones indexes, including the Dow Jones Transportation Average and the Dow Jones Industrial Average. The Exchange currently trades an options contract under the ticker symbol DJX that is based on one-one hundredth of the value of the DJIA. As the designated Reporting Authority<sup>6</sup> for the DJIA, Dow Jones is responsible for determining the source for the prices used to calculate the opening settlement value for expiring DJX series. Under this pilot program, which Dow Jones subsequently terminated,<sup>7</sup> Dow Jones intended to calculate the opening settlement value for DJX using the opening prices of two Nasdaq-listed components, Microsoft Corporation and

Intel Corporation, as reported from the American Stock Exchange, rather than the primary-market opening prices reported from the Nasdaq National Market System ("NMS").<sup>8</sup>

In order to avoid investor confusion, CBOE proposes to amend its rules to clarify that the Reporting Authority for any securities index on which options are traded on CBOE may determine to use the reported sale prices for one or more underlying securities from a market that may not necessarily be the primary market for that security in calculating the appropriate index value.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,<sup>9</sup> in general, and furthers the objectives of section 6(b)(5)<sup>10</sup> in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system.

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

CBOE does not believe that the proposed rule change will impose any burden on competition 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

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

Because the foregoing rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, it qualifies for effectiveness on filing pursuant to section 19(b)(3)(A)(i) of the Act<sup>11</sup> and subparagraph (f)(1) of Rule 19b-4 thereunder.<sup>12</sup>

<sup>8</sup> Dow Jones intended to continue using NYSE-reported prices for the remaining 28 DJIA components listed on the New York Stock Exchange. However, as stated Dow Jones terminated this pilot program since Nasdaq instituted a "closing-cross" process in its all-electronic system. Telephone discussion between James M. Flynn, Attorney, CBOE and Florence Harmon, Senior Special Counsel, Division, Commission (August 25, 2004).

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

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

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(1).

<sup>12</sup> 17 CFR 240.19b-4(f)(1).

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such 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. 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](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2004-42 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 File Number SR-CBOE-2004-42. 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 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 the filing also will be available for inspection and copying at the principal offices of the CBOE. 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 File Number SR-CBOE-2004-42 and should

<sup>5</sup> On May 12, 2004, Dow Jones issued a press release providing the details of its Pilot Program. The press release provides, in part that: "The program will include two stocks (Intel and Microsoft) in the Dow Jones Industrial Average and seven stocks (Alexander & Baldwin, C.H. Robinson Worldwide, Expeditors International of Washington, J.B. Hunt Transport Services, Northwest Airlines, USF Corp. and Yellow Roadway) in the Dow Jones Transportation Average."

<sup>6</sup> As defined under Rule 24.1(h), a Reporting Authority, "in respect of a particular index means the institution or reporting service designated by the Exchange as the official source for calculating the level of the index from the reported prices of the underlying securities that are the basis of the index and reporting such level."

<sup>7</sup> Telephone discussion between James M. Flynn, Attorney, CBOE and Florence Harmon, Senior Special Counsel, Division, Commission (August 25, 2004).

be submitted on or before September 23, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

Margaret H. McFarland,  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50274; File No. SR-NASD-2004-129]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend, and Provide an Interpretation to, Section 3 of Schedule A to NASD By-Laws and Amend NASD's Permanent Self-Reporting Form

August 26, 2004.

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> notice is hereby given that on August 23, 2004, the National Association of Securities Dealers, Inc. ("NASD" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by NASD. NASD has designated the proposed rule change as constituting a "non-controversial" rule change pursuant to Rule 19b-4(f)(6) 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 proposing to amend Section 3 of Schedule A to NASD By-Laws to remove references to the "SEC." In addition, NASD filed portions of a *Notice to Members* relating to interpretations of Section 3 of Schedule A to NASD By-Laws. NASD also filed two self-reporting forms that are to be used by members to report trade data that is not captured by NASD's trade reporting systems. The text of the proposed rule change and the self-

reporting forms and the relevant portions of the *Notice* are available at NASD 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, 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

Section 31 of the Act<sup>4</sup> requires that NASD, as a national securities association, and the national securities exchanges pay transaction fees and assessments to the Commission that are designed to recover the costs related to the government's supervision and regulation of the securities markets and securities professionals. On June 28, 2004, the Commission established new procedures governing the calculation, payment, and collection of fees and assessments on securities transactions owed by national securities exchanges and associations to the Commission pursuant to Section 31 of the Act.<sup>5</sup> The new procedures became effective on August 6, 2004. In accordance with the new procedures, NASD must now provide the Commission with trade data, which the Commission will use to calculate the amount of fees and assessments due by NASD. Accordingly, the calculation of fees and assessments owed by NASD pursuant to Section 31 of the Act will now be performed exclusively by the Commission. To recover the costs of NASD's Section 31 obligation, NASD assesses a transaction fee on its member firms under Section 3 of Schedule A to NASD By-Laws.

In response to the new procedures adopted by the Commission and interpretive guidance provided in the Adopting Release, NASD has filed with the Commission: (1) A proposed rule change to amend Section 3 of Schedule A to NASD By-Laws to remove

references to the "SEC"; (2) portions of a forthcoming Notice to Members relating to interpretations of Section 3 of Schedule A; and (3) two self-reporting forms that are to be used by members to report trade data that is not captured by NASD's trade reporting systems.

Pursuant to Section 3 of Schedule A, NASD assesses a transaction fee on its member firms, the amount of which is determined periodically in accordance with Section 31 of the Act, to recover the costs of NASD's Section 31 obligation. The current title of Section 3 of Schedule A is "SEC Transaction Fee," and the text of Section 3 of Schedule A states: "[e]ach member shall be assessed a SEC transaction fee. The amount shall be determined by the SEC in accordance with Section 31 of the Act." The current title and text of Section 3 of Schedule A were filed with the Commission for notice and review in 2002.<sup>6</sup>

NASD is proposing to amend Section 3 of Schedule A in response to statements made by the SEC in its Adopting Release that "it is misleading to suggest that a customer or [a self-regulatory organization] member incurs an obligation to the Commission under Section 31."<sup>7</sup> While NASD notes that the Commission has previously reviewed Section 3, formerly Section 8, of Schedule A to NASD By-Laws and deemed it to be consistent with the Act,<sup>8</sup> to avoid any possible confusion as discussed in the Adopting Release, NASD is now amending Section 3 of Schedule A to delete any references to the "SEC". In addition, in conformity with the Adopting Release, NASD is proposing to refer to the transaction fee as a "Regulatory Transaction Fee" in the title and text of Section 3 of Schedule A. The transaction fee assessed by NASD will continue to be set, as it is today, in accordance with Section 31 of the Act.<sup>9</sup> Therefore, NASD is not

<sup>6</sup> See Securities Exchange Act Release No. 46168 (July 8, 2002), 67 FR 46558 (July 15, 2002) (notice of filing and immediate effectiveness of SR-NASD-2002-65); Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003) (order approving SR-NASD-2002-148).

<sup>7</sup> See *supra* note 5 at 41072.

<sup>8</sup> See Securities Exchange Act Release No. 38133 (January 7, 1997), 62 FR 1940 (January 14, 1997) (notice of filing and immediate effectiveness of SR-NASD-96-57); Securities Exchange Act Release No. 46168 (July 8, 2002), 67 FR 46558 (July 15, 2002) (notice of filing and immediate effectiveness of SR-NASD-2002-65); Securities Exchange Act Release No. 46416 (August 23, 2002), 67 FR 55901 (August 30, 2002) (notice of filing and immediate effectiveness of SR-NASD-2002-98); Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003) (order approving SR-NASD-2002-148).

<sup>9</sup> NASD also is amending Section 3 of Schedule A to NASD By-Laws to reflect that the applicable

Continued

<sup>13</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)(6).

<sup>4</sup> 15 U.S.C. 78ee.

<sup>5</sup> See Final Rule Regarding Collection Practices Under Section 31, Securities Exchange Act Release No. 49928 (June 28, 2004), 69 FR 41059 (July 7, 2004) ("Adopting Release").