registered public accounting firms and one professional association.

In general, commenters were supportive of the changes made by the PCAOB to its initially proposed rules. Two of the comment letters expressed general support and contained no suggestions. However, regarding Rule 3101, one commenter expressed concern about the requirement for auditors to document their decisions not to perform actions or procedures in the Board's standards that are presumptively mandatory. The commenter indicated that the lack of specificity in the proposed rule may prompt auditors to produce extensive and unnecessary documentation in circumstances where a procedure is not followed simply because it is not applicable. In its adopting release, the PCAOB concluded that for a presumptively mandatory responsibility, circumstances will be rare in which the auditor will perform an alternative procedure, thus, the documentation requirement ought not to result in unduly onerous consequences. The same commenter also was concerned that standard setters may be inclined to over use the terms ''must,'' ''shall,'' or ''is required'' in formulating new standards, which could ultimately be counterproductive and detrimental to audit quality, because the use of mandated procedures in inappropriate circumstances may provoke unthinking performance on the part of auditors. We note, however, that in proposing this rule, the PCAOB concluded that ''must'' appears infrequently in the interim standards, and that it expects unconditional responsibilities will be used sparingly in future PCAOB standards.

Two comment letters focused on the effective date. Proposed Rule 3101 provides that the documentation requirement for not performing a presumptively mandatory responsibility would apply to audits or other engagements performed for fiscal years ending (as opposed to ''beginning'') on or after the later of November 15, 2004 or 30 days after the date of approval of the final rule by the Commission. The commenters indicated that in many instances audit procedures are performed throughout the period of audit, and documentation to support these procedures is prepared contemporaneously with the audit, creating the potential need to update already created documentation. As previously noted, the PCAOB concluded that circumstances will be rare in which the auditor will perform an alternative procedure for a presumptively mandatory responsibility. Based on that conclusion, the frequency of such situations occurring during the transition period should be limited. The PCAOB also concluded that the documentation requirements in the proposed rule for a presumptively mandatory responsibility should coincide with the effective date for PCAOB Auditing Standard No. 3, *Audit Documentation*.

IV. Conclusion

On the basis of the foregoing, the Commission finds that proposed Rule 3101 and Rule 1001(a)(xii) are consistent with the requirements of the Act and the securities laws and are necessary and appropriate in the public interest and for the protection of investors.

It is therefore ordered, pursuant to Section 107 of the Act and Section 19(b)(2) of the Exchange Act, that proposed Rule 3101, *Certain Terms Used in Auditing and Related Professional Practice Standards*, and amendment to Rule 1001, *Definitions of Terms Employed in Rules* (File No. PCAOB–2004–06), be and hereby are approved.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–2184 Filed 9–13–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50326; File No. SR–Amex–2004–51]

Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change by the American Stock Exchange LLC To Apply the Current Member Firm Guarantee in Equity Options to Index Options

September 7, 2004.

On June 30, 2004, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Commentary .02(d) to Amex Rule 950(d) to extend the Exchange's current member firm guarantee in facilitation cross transactions to index options. The proposed rule change was published for comment in the **Federal Register** on July 30, 2004.[3] The Commission received no comments on the proposal.

Pursuant to Commentary .02 to Amex Rule 950(d), a floor broker representing a member firm seeking to facilitate its own public customer's order is entitled to a participation guarantee of 20% if the order is traded at the best bid or offer (''BBO'') provided by the trading crowd, or 40% if the order is traded at a price that improves the trading crowd's market, *i.e.*, at a price between the BBO.[4] These participation guarantees currently apply only to transactions in equity options. The Exchange proposes to amend Commentary .02(d) to provide the same participation guarantees for transactions in index options.[5]

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange,[6] and, in particular, the requirements of Section 6(b)(5) of the Act.[7] The Commission believes that participation guarantees are reasonable and within the business judgment of the Exchange, as long as they do not restrict competition and do not harm investors. The Commission has found, with respect to participation guarantees in other contexts, that guarantees of as much as 40% of an order in options trading are not inconsistent with statutory standards of competition and free and open markets.[8]

The Commission notes that, pursuant to Commentary .02(d) to Amex Rule 950(d), if a facilitation trade takes place in a situation in which the specialist is entitled to a participation guarantee, the total number of contracts guaranteed to be allocated to the floor broker and the specialist in the aggregate shall not exceed 40% of the facilitation transaction.[9]

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 50081 (July 26, 2004), 69 FR 45856 (July 30, 2004) (''Notice'').

[4] These guarantees apply only when the original order is equal to or larger than 400 contracts, or other eligible size as established by the Exchange, but in no case less than 50 contracts. *See* Commentary .02(d)(1)–(2) to Amex Rule 950(d).

[5] All other rules that apply to participation guarantees for transactions in equity options would also apply to transactions in index options. *See* Notice.

[6] 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)

[7] 15 U.S.C. 78f(b)(5)

[8] *See, e.g.*, Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) at 11398.

[9] *See* Commentary .02(d)(3) to Amex Rule 950(d). In such a situation, if the facilitation transaction occurs at the specialist's bid or offer, the specialist

Continued

It is therefore ordered, pursuant to section 19(b)(2) of the Act [10], that the proposed rule change (File No. SR–Amex–2004–51) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–2180 Filed 9–13–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50322; File No. SR–BSE–2004–41]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Boston Stock Exchange, Inc. Relating to Fees Applicable to Newly Listed Classes and New Market Maker Positions in Currently Listed Classes on the Boston Options Exchange Facility

September 7, 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 August 30, 2004, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') 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. On September 2, 2004, the Exchange submitted Amendment No. 1 to the proposal.[3] The proposed rule change has been filed by the Exchange as establishing or changing a due, fee, or other charge under Section 19(b)(3)(A)(ii) of the Act [4] and Rule 19b–4(f)(2) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fee Schedule for the Boston Options Exchange [6] to allow the Exchange to take into account newly listed classes and new market maker positions in currently listed classes. Newly listed classes are classes not traded by BOX Market Makers on the date new market maker appointments are made in such classes; currently listed classes are classes traded by BOX Market Makers on the date new market maker appointments are made in such classes. The text of the proposed rule change appears below. Proposed new text is in *italics* and language to be deleted is in brackets.

BOSTON OPTIONS EXCHANGE FACILITY FEE SCHEDULE

* * * * *

Sec. 3 Market Maker Trading Fees

a. No change.

b. Minimum Activity Charge (''MAC'')

* * * * *

1. MAC ''Levels''

a. For Classes that have been trading *on any options exchange* for at least six calendar months

The table below provides the MAC for each of the six ''categories'' of options classes listed by BOX. The category for each class is determined by its total trading volume across all U.S. options exchanges as determined by OCC data. The classifications will be adjusted at least twice annually (in January and July, based on the average daily volume for the preceding six month period).

Class category	OCC average daily volume (# of contracts)	MAC per Market Maker per appointment per month
A	>100,000	$15,000
B	50,000 to 99,999	3,000
C	25,000 to 49,999	2,000
D	10,000 to 24,999	750
E	5,000 to 9,999	250
F	Less than 5,000	100

b. For Classes that have been trading for less than six calendar months

A class will not be placed into a MAC category [A MAC will not be applied] until a class has been trading *on any options exchange* for a full calendar month. After a class has been trading for a full calendar month, the MAC category for such class will be determined, applying the criteria set forth in the table above, based on the average daily volume for such full calendar month across all U.S. options exchanges as determined by OCC data. The classification will be adjusted at the beginning of each new calendar month thereafter based on the average daily trading volume for the previous calendar months in which the options class was traded for the entire month, until the class has been trading for six full calendar months. Thereafter, the classification will be adjusted at least twice annually (in January and July, based on the average daily volume for the preceding six month period) as set forth in subsection 1.a. above. Until an options class is placed in a MAC category, only per contract trade execution fees will apply to trades in that class.

2. MAC ''Adjustments''

[The MAC will not be applied during the first three calendar months following launch.] *With respect to market makers appointed to classes traded by BOX Market Makers on the date of such appointment, if the market maker is not already a BOX Market Maker in at least one other class, the MAC will be applied the earlier of either*

shall be allocated the greater of either (1) 20% of the executed contracts if the facilitating floor broker has participated in 20% of the executed contracts or (2) a share of the executed contracts that have been divided equally among the specialist and other participants to the trade. In each case, the specialist's participation allocation shall only apply to the number of contracts remaining after all public customer orders and the floor broker's facilitation order have been satisfied. *See id.*

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Annah Y. Kim, Chief Regulatory Officer, Boston Options Exchange Regulation, BSE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated September 1, 2004 (''Amendment No. 1''). In Amendment No. 1, the Exchange revised the filing to clarify the text of the proposed rule change.

[4] 15 U.S.C. 78s(b)(3)(A)(ii).

[5] 17 CFR 240.19b–4(f)(2).

[6] *http://www.bostonoptions.com/pdf/FeeFilingSECofficial.pdf* (accessed Sept. 7, 2004).