

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50562; SR-BSE-2004-14; SR-CBOE-2004-41; SR-ISE-2004-01; SR-PCX-2004-84; SR-Phlx-2004-16]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change and Amendment No. 1 by the Boston Stock Exchange, Inc.; a Proposed Rule Change by the Chicago Board Options Exchange, Inc.; a Proposed Rule Change and Amendments No. 1 and 2 by the International Securities Exchange, Inc.; a Proposed Rule Change by the Pacific Exchange, Inc.; and a Proposed Rule Change and Amendment No. 1 by the Philadelphia Stock Exchange, Inc. Relating to Minimum Size Guarantees for Linkage Orders

October 19, 2004.

I. Introduction

On January 13, 2004, February 13, 2004, April 6, 2004, July 7, 2004, and September 1, 2004, the International Securities Exchange, Inc. ("ISE"), the Philadelphia Stock Exchange, Inc. ("Phlx"), the Boston Stock Exchange, Inc. ("BSE"), the Chicago Board Options Exchange, Inc. ("CBOE"), and the Pacific Exchange, Inc. ("PCX") (collectively, the "options exchanges"), respectively, 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 proposed rule changes to modify the definitions of Firm Customer Quote Size ("FCQS") and Firm Principal Quote Size ("FPQS") contained in their Exchange rules by changing certain minimum size guarantees for Linkage Orders to accommodate the "natural size" of quotations.³

BSE submitted BSE Amendment No. 1 to its proposed rule change on June 9, 2004.⁴ ISE submitted ISE Amendment

No. 1 to its proposed rule change on May 10, 2004,⁵ and ISE Amendment No. 2 to its proposed rule change on July 30, 2004.⁶ Phlx submitted Phlx Amendment No. 1 to its proposed rule change on August 11, 2004.⁷

Notice of BSE's proposed rule change, as amended, was published in the **Federal Register** on September 16, 2004.⁸ Notice of CBOE's proposed rule change was published in the **Federal Register** on September 16, 2004.⁹

Notice of ISE's proposed rule change, as amended, was published in the **Federal Register** on September 16, 2004.¹⁰ Notice of PCX's proposed rule change was published in the **Federal Register** on September 16, 2004.¹¹ Notice of Phlx's proposed rule change, as amended, was published in the **Federal Register** on September 16, 2004.¹² No comments were received on the proposed rule changes. This order approves the proposed rule changes, as amended.¹³

the BSE explained that it may establish a FCQS or FPQS equal to its disseminated size.

⁵ See Letter from Michael J. Simon, Senior Vice President and General Counsel, ISE, to Nancy Sanow, Assistant Director, Division, Commission, dated May 7, 2004 ("ISE Amendment No. 1"). In ISE Amendment No. 1, the ISE amended the proposed rule text to clarify that the general requirement that the ISE's FCQS and FPQS be at least 10 contracts would not apply if the ISE were disseminating a quotation of fewer than 10 contracts. In that case, the ISE explained that it may establish a FCQS or FPQS equal to its disseminated size.

⁶ See Letter from Michael J. Simon, Senior Vice President and General Counsel, ISE, to Nancy Sanow, Assistant Director, Division, Commission, dated July 28, 2004 ("ISE Amendment No. 2"). In ISE Amendment No. 2, the ISE submitted a new Form 19b-4, which replaced and superseded the original filing in its entirety.

⁷ See Letter from Richard S. Rudolph, Director and Counsel, Phlx, to Deborah Lassman Flynn, Assistant Director, Division, Commission, dated August 10, 2004 ("Phlx Amendment No. 1"). In Phlx Amendment No. 1, the Phlx amended the proposed rule text to clarify that the general requirement that the Phlx's FCQS and FPQS be at least 10 contracts would not apply if the Phlx were disseminating a quotation of fewer than 10 contracts. In that case, the Phlx explained that it may establish a FCQS or FPQS equal to its disseminated size.

⁸ Securities Exchange Act Release No. 50341 (September 9, 2004), 69 FR 55850 (September 16, 2004) (SR-BSE-2004-14).

⁹ Securities Exchange Act Release No. 50340 (September 9, 2004), 69 FR 55852 (September 16, 2004) (SR-CBOE-2004-41).

¹⁰ Securities Exchange Act Release No. 50339 (September 9, 2004), 69 FR 55853 (September 16, 2004) (SR-ISE-2004-01).

¹¹ Securities Exchange Act Release No. 50346 (September 10, 2004), 69 FR 55857 (September 16, 2004) (SR-PCX-2004-84).

¹² Securities Exchange Act Release No. 50342 (September 9, 2004), 69 FR 55864 (September 16, 2004) (SR-Phlx-2004-16).

¹³ The Commission notes that the American Stock Exchange LLC ("Amex"), filed a comparable proposed rule change with the Commission on August 3, 2004, and Amendment No. 1 thereto on

II. Description of the Proposals

The purpose of the proposed rule changes is to amend the definitions of FCQS and FPQS provided in each of the options exchange's rules¹⁴ to conform them to the definitions provided in the Linkage Plan, as amended by Joint Amendment No. 13.¹⁵ While the proposed rule changes would maintain a general requirement, in each of the options exchange's rules, that the FCQS and FPQS be at least 10 contracts, that requirement would not apply if, pursuant to its rules, an options exchange were disseminating a quotation of fewer than 10 contracts. In that case, the options exchange could establish a FCQS or FPQS equal to its disseminated size, or "natural size."

Under the proposed rule changes, as with Linkage orders today, if an order is of a size eligible for automatic execution, the receiving options exchange must provide an automatic execution of the Linkage order. If this is not the case (for example, the receiving options exchange's automatic execution system is not engaged), the receiving exchange may allow the order to drop to manual handling. However, the receiving options exchange still must provide a manual execution for at least the FCQS or FPQS, as appropriate (in this case, the size of its disseminated quotation of less than 10 contracts).

III. Discussion

After careful review, the Commission finds that the proposed rule changes, as amended, are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁶ In particular, the Commission finds that the proposals, as amended, are consistent with the provisions of

September 10, 2004. Notice of Amex's proposed rule change, as amended, was published in the **Federal Register** on September 23, 2004. See Securities Exchange Act Release No. 50394 (September 16, 2004), 69 FR 57110 (SR-Amex-2004-63). Section 19(b)(2) of the Act provides that the Commission may not approve any proposed rule change prior to the thirtieth day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding. The Commission has determined to wait until the requisite thirty days has passed before acting on the Amex's filing.

¹⁴ See Chapter XII, Sections 1(g) & (h) of the Rules of the BSE's Boston Options Exchange Facility; CBOE Rules 6.80(9) & (10); ISE Rules 1900(7) & (8); PCX Rules 6.92(a)(9) & (10); and Phlx Rules 1083(g) & (h).

¹⁵ See Notice of Joint Amendment No. 13 *supra* note 3.

¹⁶ In approving these proposals, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The options exchanges have also filed an amendment to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Linkage Plan") that corresponds to the proposed rule changes, described herein. ("Joint Amendment No. 13"). See Securities Exchange Act Release No. 50211 (August 18, 2004), 69 FR 52050 (August 26, 2004) (File No. 4-429).

⁴ See Letter from John Boese, BSE, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated June 8, 2004 ("BSE Amendment No. 1"). In BSE Amendment No. 1, the BSE amended the proposed rule text to clarify that the general requirement that the BSE's FCQS and FPQS be at least 10 contracts would not apply if the BSE were disseminating a quotation of fewer than 10 contracts. In that case,

Section 6(b)(5) of the Act,¹⁷ which requires, among other things, that a national securities exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to 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.

The Commission notes that the options exchanges adopted the current definitions of FCQS and FPQS, which impose a "10-up" requirement, at a time when all the options exchanges had rules requiring that their minimum quotation size be for at least 10 contracts. Consequently, an exchange receiving a customer limit order for fewer than 10 contracts would disseminate the price of the customer limit order with a size of 10 contracts and the specialist or the trading crowd would be responsible to make up the difference. Since implementation of the Linkage Plan, several of the options exchanges have modified their rules to permit them to disseminate the "natural size" of customer limit orders that are of a size of less than 10 contracts.¹⁸ The Commission believes that approval of the proposed rule changes, which will permit options exchanges to conform their Linkage rules to other Exchange rules allowing them to disseminate a customer limit order's "natural size," should provide greater transparency to investors and the marketplace and better reflect the true state of liquidity in the marketplace.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁹ that the proposed rule changes (SR-BSE-2004-14; SR-CBOE-2004-41; SR-ISE-2004-01; SR-PCX-2004-84; SR-Phlx-2004-16), as amended, are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁰

J. Lynn Taylor,

Assistant Secretary.

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¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ See Securities Exchange Act Release Nos. 46325 (August 8, 2002), 67 FR 53376 (August 15, 2002) (SR-Phlx-2002-15); 46029 (June 4, 2002), 67 FR 40363 (June 12, 2002) (SR-PCX-2002-30); 45067 (November 16, 2001), 66 FR 58766 (November 23, 2001) (SR-CBOE-2001-56); 47959 (May 30, 2003), 68 FR 34441 (June 9, 2003) (SR-CBOE-2002-05); and 48957 (December 18, 2003), 68 FR 75294 (December 30, 2003) (SR-Amex-2003-24).

¹⁹ 15 U.S.C. 78s(b)(2).

²⁰ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50577; File No. SR-NASD-2004-128]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change To Modify the Annual Fee for Certain Issuers Listed on the Nasdaq Stock Market, Inc.

October 21, 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 25, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. 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 the Substance of the Proposed Rule Change

Nasdaq proposes to amend NASD Rules 4510(c) and 4520(c) to modify the annual fee for domestic and foreign issuers (other than American Depositary Receipts ("ADRs")) listed on the Nasdaq National Market and for all issuers listed on The Nasdaq SmallCap Market. Nasdaq will implement the proposed rule change on January 1, 2005, for issuers listed on Nasdaq as of the date of approval of this rule filing, and upon approval for all new listings after the date of approval of this rule filing. In addition, Nasdaq proposes to adopt new IM-4520-1 to clarify that no fees are due from issuers described in Rule 4320(c).

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.³

* * * * *

4510. The Nasdaq National Market

(a)-(b) No change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Changes are marked to the rule text that appears in the electronic NASD Manual found at www.nasd.com, which was current as of the date of this filing. No pending rule filings would affect Rule 4510(c) and 4520(c). Telephone conversation between Arnold Golub, Office of General Counsel, Amex, and Richard Holley, Attorney, Division of Market Regulation, Commission, dated October 14, 2004.

(c) Annual Fee—Domestic and Foreign Issues.

(1) The issuer of each class of securities, other than an ADR, that is a domestic or foreign issue listed in The Nasdaq National Market shall pay to The Nasdaq Stock Market, Inc. an annual fee calculated on total shares outstanding according to the following schedule:

| | |
|---------------------------|------------|
| Up to 10 million shares | [\$21,225] |
| | \$24,500 |
| 10+ to 25 million shares | [\$26,500] |
| | \$30,500 |
| 25+ to 50 million shares | [\$29,820] |
| | \$34,500 |
| 50+ to 75 million shares | [\$39,150] |
| | \$44,500 |
| 75+ to 100 million shares | [\$51,750] |
| | \$61,750 |
| Over 100 million shares | [\$60,000] |
| | \$75,000 |

(2)-(4) No change.

(d)-(e) No change.

* * * * *

4520. The Nasdaq SmallCap Market

(a)-(b) No change.

(c) Annual Fee

(1) The issuer of [a] *each* class of securities that is a domestic or foreign issue, including American Depositary Receipts (ADRs), listed in The Nasdaq SmallCap Market shall pay to The Nasdaq Stock Market, Inc. an annual fee [to be computed as follows:] *calculated on total shares outstanding according to the following schedule:*

| | |
|-------------------------|----------|
| Up to 10 million shares | \$17,500 |
| Over 10 million shares | \$21,000 |

[(A) 15,000 for the first issue if it has total shares outstanding of up to 10 million shares; or

(B) \$16,000 for the first issue if it has total shares outstanding of 10 million or more shares; plus

(C) \$2,000 for each additional issue.

(D) For companies with more than one issue, the first issue is the company's common stock or common stock equivalent with the highest total shares outstanding. For companies with no common stock or common stock equivalent, the first issue is the issue with the highest total shares outstanding.]

(2)-(4) No change.

(5) *Total shares outstanding means the aggregate of all classes of equity securities included in The Nasdaq SmallCap Market as shown in the issuer's most recent periodic report required to be filed with the issuer's appropriate regulatory authority or in more recent information held by Nasdaq. In the case of foreign issuers, total shares outstanding shall include only those shares issued and outstanding in the United States.*