

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**

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the CBOE consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

**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-2004-41 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-2004-41. 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 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 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-2004-41 and should be submitted on or before October 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-50339; File No. SR-ISE-2004-01]

**Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change, and Amendments No. 1 and 2 Thereto, by the International Securities Exchange, Inc. Relating to Minimum Size Guarantees for Linkage Orders**

September 9, 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 January 13, 2004, the International Securities Exchange, Inc. ("ISE" or "Exchange") submitted to 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 ISE. On May 10, 2004, the ISE submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On

<sup>9</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> See Letter from Michael J. Simon, Senior Vice President and General Counsel, ISE, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated May 7, 2004 ("Amendment No. 1"). In Amendment No. 1, the ISE amended the proposed rule text to clarify that the general requirement that the Exchange's Firm Customer Quote Size ("FCQS") and Firm

July 30, 2004, the Exchange submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The ISE proposes to amend its rules regarding the minimum size of firm quotes for Principal Orders and Principal Acting as Agent Orders ("P/A Orders") received through the intermarket options linkage ("Linkage"). The ISE proposes that this rule change take effect upon approval by the Commission of both the instant proposal and the corresponding Joint Amendment No. 13 to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Linkage Plan").

The text of the proposed rule change, as amended, is below. Proposed additions are in *italics*.

\* \* \* \* \*

Chapter 19 Intermarket Linkage

Rule 1900. Definitions

The following terms shall have the meaning specified in this Rule solely for purposes of this Chapter 19:

\* \* \* \* \*

(7) "Firm Customer Quote Size" with respect to a P/A Order means the lesser of: (a) The number of option contracts that the Participant Exchange sending a P/A Order guarantees it will automatically execute at its disseminated quotation in a series of an Eligible Option Class for Public Customer orders entered directly for execution in that market; or (b) the number of option contracts that the Participant Exchange receiving a P/A Order guarantees it will automatically execute at its disseminated quotation in a series of an Eligible Option Class for Public Customer orders entered directly for execution in that market. This number shall be at least 10 *unless the receiving Participant Exchange is disseminating a quotation of less than 10 contracts, in which case this number may equal such quotation size.*

Principal Quote Size ("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 Exchange may establish a FQCS or FPQS equal to its disseminated size.

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

(8) "Firm Principal Quote Size" means the number of option contracts that a Participant Exchange guarantees it will execute at its disseminated quotation for incoming Principal Orders in an Eligible Option Class. This number shall be 10, *however if the Participant Exchange is disseminating a quotation size of less than 10 contracts, this number may equal such quotation size.*

## 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 ISE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The ISE 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

The purpose of the proposed rule change is to limit the requirement that ISE Primary Market Makers provide minimum size guarantees for Principal and P/A Orders received through Linkage. This proposal would implement pending Amendment No. 13 to the Linkage Plan into the ISE rules, while providing uniformity between the minimum size guarantees that market makers provide for orders received through Linkage and orders received through other means.<sup>5</sup>

Until recently, the ISE required its Primary Market Makers to disseminate quotations assuring that the Exchange's best bid and offer ("BBO") be for a size of at least 10 contracts. However, the Commission recently approved an amendment to the Exchange rules that significantly changed those restrictions and obligations, permitting the dissemination of a BBO of less than 10 contracts.<sup>6</sup> Notwithstanding that rule change, the Linkage Plan continues to require that the ISE provide an automatic execution for at least 10 contracts for Principal and P/A Orders, regardless of the size of the Exchange's

disseminated quotation (the "10-up requirement"). This is not a requirement that the ISE can unilaterally change; rather, any change to a Linkage Plan rule requires that the six options exchanges that are participants in the Linkage Plan ("Participants") unanimously agree to a Linkage Plan amendment, followed by corresponding changes to the rules of all the Participants.

While the Real Size Filing was pending at the Commission, the Participants agreed to submit Joint Amendment No. 13 to amend the Linkage Plan to eliminate the 10-up requirement. This proposed rule filing would implement that Linkage Plan Amendment by amending the ISE Rule definitions of FCQS and FPQS to recognize that an exchange's disseminated quotation size may be less than 10 contracts. However, as with Principal and P/A Orders today, if an order is of a size eligible for automatic execution at both the sending and receiving exchanges, the ISE will provide an automated execution of the Linkage order. If this is not the case, while the Exchange may allow the order to drop to manual handling, the ISE still must provide a manual execution for at least the FCQS or FPQS, as appropriate.

#### 2. Statutory Basis

The ISE believes that the proposed rule is consistent with Section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of Section 6(b)(5)<sup>8</sup> in particular in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transaction in securities, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the proposed rule change would provide uniformity between the minimum size guarantees that market makers provide for orders received through Linkage and orders received through other means.

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

The ISE 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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the ISE consents, the Commission will:

(A) By order approve such proposed rule change, as amended; or

(B) Institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

### 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-ISE-2004-01 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-ISE-2004-01. 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

<sup>5</sup> Telephone conversation between Michael J. Simon, Senior Vice President and General Counsel, ISE, and Tim Fox, Attorney, Division, Commission on August 3, 2004.

<sup>6</sup> See Securities Exchange Act Release No. 49602 (April 22, 2004), 69 FR 23841 (April 30, 2004) (SR-ISE-2003-26) (the "Real Size Filing").

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

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 ISE. 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-ISE-2004-01 and should be submitted on or before October 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

Jill M. Peterson,

Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50335; File No. SR-NASD-2004-136]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Implementation Date of Notice to Members 04-50 (Treatment of Commodity Pool Trail Commissions Under Rule 2810)

September 9, 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 September 8, 2004, the National Association of Securities Dealers, Inc. ("NASD"), filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. NASD has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of NASD under Section 19(b)(3)(A)(i) of the Act<sup>3</sup>

and Rule 19b-4(f)(1) thereunder,<sup>4</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 filing with the Commission a proposed rule change to delay the implementation date of *Notice to Members* 04-50 ("NtM 04-50") until October 12, 2004.

No changes to the text of NASD rules are required by this proposed rule change.

#### 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

On July 13, 2004, NASD filed *NtM* 04-50 with the SEC. In *NtM* 04-50, NASD announced that it was no longer going to exclude the payment of any trail commissions for commodity pool direct participation programs ("DPPs") from the underwriting compensation limits of Rule 2810 ("Direct Participation Programs" or "DPP Rule"). *NtM* 04-50 announced that, "effective immediately, in determining whether to issue a 'no objections' opinion in connection with a commodity pool DPP filed with the [NASD Corporate Financing] Department under Rule 2810, NASD staff will consider, among other things, whether the level of underwriting compensation, including the types of trail commission previously excluded, exceeds the 10% limitation in the DPP Rule." On July 22, 2004, the SEC published the Notice of Filing and

Immediate Effectiveness of the *NtM* 04-50.<sup>5</sup>

In view of certain comments submitted to the SEC in response to SR-NASD-2004-108,<sup>6</sup> NASD is delaying the implementation date of *NtM* 04-50 until October 12, 2004. Thus, the policy announced in *NtM* 04-50 will not apply to commodity pool DPPs filed with the NASD Corporate Financing Department before October 12, 2004.

###### 2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>7</sup> which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change is in the public interest and will benefit investors in commodity pool DPPs by limiting the compensation that can be paid to members for selling commodity pool DPPs, and servicing the accounts that hold such investments, to the same amounts that apply to all other DPP investments. At the same time, the proposed rule change also provides additional time for commodity pool DPPs to adjust to the policy of *NtM* 04-50.

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

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

##### (C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

#### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

NASD has designated the proposed rule change as constituting a stated policy, practice, or interpretation with

<sup>5</sup> Release No. 34-50065 (July 22, 2004), 69 FR 45870 (July 30, 2004) [File No. SR-NASD-2004-108] ("SR-NASD-2004-108").

<sup>6</sup> Eight comment letters were submitted to the Commission during the comment period. The NASD responded to these comment letters on August 31, 2004. These comment letters, the NASD response to these comment letters, and comment letters received after the end of the comment period may be examined at the places specified in Item IV below.

<sup>7</sup> 15 U.S.C. 78o-3(b)(6).

<sup>9</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> 15 U.S.C. 78s(b)(3)(A)(i).

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