

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49440; File No. SR-Amex-2004-07]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC Relating to ITS Trade-Throughs and Locked Markets

March 17, 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 January 21, 2004, the American Stock Exchange LLC (“Amex” 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. The Exchange filed the proposal pursuant to section 19(b)(3)(A) of the Act,³ and Rule 19b-4(f)(1)⁴ thereunder, which renders the proposal effective upon filing with the Commission. On March 10, 2004, the Amex submitted Amendment No. 1 to the proposed rule change.⁵ 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 Exchange proposes to amend Amex Rule 236 (“Trade Through Rule”), which incorporates certain provisions of the Intermarket Trading System (“ITS”) Plan. Specifically, the Exchange seeks to add Commentary .01 to expressly recognize a long-standing interpretation of Amex Rule 236 that certain executions will not be considered trade-throughs if an ITS commitment to trade is sent contemporaneously with the execution to another market center to fully satisfy the other market’s quote. In addition, the Exchange seeks to add Commentary .02 to expressly recognize another long-standing interpretation of Amex Rule 236 that certain quote disseminations will not be considered to have caused a locked market if an ITS

commitment to trade is sent contemporaneously with the quote dissemination to another market center to fully satisfy the other market’s quote. A complaint in either of these circumstances is not valid, even if the commitment cancels or expires, and even if there is more stock behind the quote in the other market.

The text of the proposed rule change is below. Proposed new language is in *italics*.

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Trade Through Rule

Rule 236. (a) Definitions

(1) An “Exchange trade-through”, as that term is used in this Rule, occurs whenever a member on the Exchange initiates the purchase on the Exchange of a security traded through ITS (an “ITS Security”) at a price which is higher than the price at which the security is being offered (or initiates the sale on the Exchange of such a security at a price which is lower than the price at which the security is being bid for) at the time of the purchase (or sale) in another ITS participating market center as reflected by the offer (bid) then being displayed on the Exchange from such other market center. The member described in the foregoing sentence is referred to in this Rule as the “member who initiated an Exchange trade-through”.

(2) A “third participating market center trade-through”, as that term is used in this Rule, occurs whenever a member on the Exchange initiates the purchase of an ITS Security by sending a commitment to trade through the System and such commitment results in an execution at a price which is higher than the price at which the security is being offered (or initiates the sale of such a security by sending a commitment to trade through the System and such commitment results in an execution at a price which is lower than the price at which the security is being bid for) at the time of the purchase (or sale) in another ITS participating market center as reflected by the offer (bid) then being displayed on the Exchange from such other market center. The member described in the foregoing sentence is referred to in this Rule as the “member who initiated a third participating market center trade-through”.

(3) A “trade-through”, as that term is used in this Rule, means either an Exchange trade-through or a third participating market center trade-through.

(4) A “locked market”, as that term is used in this Rule, occurs whenever the

Exchange disseminates a bid (offer) for an ITS Security at a price that equals or exceeds (is less than) the price of the offer (bid) for the security then being displayed from another ITS participating market center (the “locked offer (bid)”). This Rule refers to the bid (offer) that causes the locked market as the “locking bid (offer)”.

(5) through (6) No Change

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Commentary

.01 *The terms “Exchange trade-through” and “third participating market center trade-through” do not include the situation where a member who initiates the purchase (sale) of an ITS Security, at a price which is higher (lower) than the price at which the security is being offered (bid) in another ITS participating market, sends contemporaneously through ITS to such ITS participating market a commitment to trade at such offer (bid) price or better and for at least the number of shares displayed with that market center’s better-priced offer (bid). A trade-through complaint sent in these circumstances is not valid, even if the commitment sent in satisfaction cancels or expires, and even if there is more stock behind the quote in the other market.*

.02 *The term “locked market” does not include the situation where a member responsible for the dissemination of a bid (offer) for an ITS Security, at a price that equals or exceeds (is less than) the price of the offer (bid) for the security then being displayed from another ITS participating market, sends contemporaneously through ITS to such ITS participating market a commitment to trade at such offer (bid) price or better and for at least the number of shares displayed with that market center’s offer (bid). A locked market complaint sent in these circumstances is not valid, even if the commitment sent in satisfaction cancels or expires, and even if there is more stock behind the quote in the other market.*

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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 Exchange has prepared summaries, set

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(1).

⁵ See Letter from William C. Love, Jr., Associate General Counsel, Amex, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated March 9, 2004 (“Amendment No. 1”). Amendment No. 1 replaced the original proposed rule change in its entirety.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to codify two long-standing interpretations of the Trade Through Rule. Commentary .01 codifies an interpretation relating to trade-throughs and Commentary .02 codifies an interpretation relating to locked markets.

The basic concept of the Trade Through Rule is that superior priced quotations in a security displayed from other Participant markets should be protected/satisfied if, in another Participant market, an execution in the security occurs at an inferior price (a trade-through). One of the remedies the Trade Through Rule provides is that, upon a valid complaint of a trade-through, a commitment to trade, at the price and for the number of shares in the disseminated quotation, must be sent to the other Participant market to fully satisfy such quotation. The interpretation in Commentary .01 being filed herewith has long recognized that superior quotations are fully protected/satisfied if an ITS commitment is sent to trade with a bid/offer that would otherwise appear to have been traded through. That is, a trade will not be considered a trade-through if an ITS commitment is sent contemporaneously from the Participant executing the trade for the purpose of being executed against the better-priced displayed bid or offer. A complaint is not valid even if a commitment cancels or expires or there is more stock behind the away quote. Furthermore, the interpretation recognizes the impracticality of having to wait for the other market to revise its quotation as a result of trading with a satisfying commitment before trading activity may occur in other markets.

The basic concept of the locked markets section of the Trade Through Rule is that an offer (bid) in a security displayed from other Participant markets should be protected/satisfied if, in another Participant market, a bid (offer) is disseminated at a price that equals or exceeds (is less than) the first quote, thereby causing a locked market. One of the remedies that the Trade Through Rule provides is that, upon a valid complaint of a quotation that is causing a locked market and is not immediately adjusted by the member responsible for the locking quotation, a commitment to trade, at the price and

for the number of shares in the disseminated quotation, must be sent to the other Participant market to fully satisfy such quotation. The interpretation in Commentary .02 being filed herewith has long recognized that quotations are fully protected/satisfied if an ITS commitment is sent to trade with a bid/offer that would satisfy the quotation that would otherwise be deemed to be locked. That is, a trade will not be considered to have caused a locked market if an ITS commitment is sent contemporaneously from the Participant whose quotation would otherwise be deemed to have caused a locked market for the purpose of being executed against the quotation that would otherwise be deemed to be locked. A complaint is not valid even if a commitment cancels or expires or there is more stock behind the away quote. Furthermore, the interpretation recognizes the impracticality of having to wait for the other market to revise its quotation as a result of trading with a satisfying commitment before trading activity may occur in other markets.

2. Statutory Basis

The Amex believes the proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of section 6(b) of the Act.⁶ Specifically, the Amex believes the proposal is consistent with section 6(b)(5) of the Act,⁷ in that it is designed 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.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition.

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

Because the foregoing proposed rule change constitutes a stated policy, practice or interpretation with respect to

the meaning, administration, or enforcement of an existing rule, it has become effective pursuant to section 19(b)(3)(A) of the Act⁸ and Rule 19b-4(f)(1) thereunder.⁹ At any time within 60 days of the filing of the 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.¹⁰

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-Amex-2004-07. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to the File No. SR-Amex-2004-07 and should be submitted by April 14, 2004.

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f)(1).

¹⁰ For purposes of calculating the 60-day abrogation period, the Commission considers the period to have commenced on March 10, 2004, the date Amendment No. 1 was filed by the Amex.

⁶ 15 U.S.C. 78(f)(b).

⁷ 15 U.S.C. 78f(b)(5).

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49434; File No. SR-BSE-2004-10]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to the Amendment of its Constitution to Permit the Separation of the Chairman and Chief Executive Officer Positions

March 17, 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 March 2, 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 BSE. 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 seeks to amend its Constitution to permit the separation of the Chairman and Chief Executive Officer roles. The proposed rule change is attached as Exhibit A hereto.

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

In its filing with the Commission, BSE 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. BSE 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 BSE proposes to amend its Constitution to permit the separation of the Chairman and Chief Executive Officer functions. The separation would not be mandatory, but would be an option to be utilized by the Exchange's Board of Governors (the "Board") as deemed necessary and/or prudent to enhance the governance of the Exchange. The separation would also allow for the disconnection and independence of the Exchange's regulatory function from the exchange's marketplace function.

The BSE is not proposing this constitutional change due to any internal issues arising from its current governance structure. Rather, the Exchange is seeking to be proactive in concert with changes occurring in the control mechanisms of other market centers, particularly the New York Stock Exchange ("NYSE"). For that reason, the BSE is seeking effectiveness of the changes proposed by its next Board meeting in April 2004. However, the BSE, as a regional exchange, does not propose all of the changes recently enacted by the NYSE, primarily due to the fact that the BSE's size alone would make such a governance structure unwieldy and unworkable. The changes the Exchange proposes, though, do seek to achieve the same overall result of the separation of the Exchange's regulatory and marketplace functions, as warranted.

Moreover, in order to maintain flexibility in its primary governing document, the Exchange is purposefully not constitutionally mandating the separation of the Chairman and Chief Executive Officer roles, but is providing for their separation in the event that the Board determines such a separation to be practical, in light of current internal or external events. Presently, the Chairman has determined, and the Board has concurred, that it is desirous of more flexibility within the Exchange's Constitution so that it will be able to separate the Chairman and Chief Executive Officer roles.

As envisioned, the separation of the Chairman and Chief Executive Officer of the Exchange would provide for the independence of the BSE's regulatory function from any potentially inappropriate linkage with the marketplace function. Yet, the regulatory function would retain sufficient proximity to the marketplace to assure the market sensitivity that is

fundamental to effective regulation. If the Chairman and Chief Executive Officer of the Exchange are not the same person, then the present intention is that the Chairman, as an executive officer of the Exchange, would (1) preside over all meetings of the Board; (2) be responsible to the Board for the management of the BSE's regulatory affairs; (3) be responsible for the oversight of all exchange facilities,³ subsidiaries, or other legal entities to which the Exchange is a party; and, (4) act as Board liaison to the Exchange's Chief Executive Officer and management. The Chief Executive Officer, according to present intention, would (1) be responsible for the management and administration of the affairs of the Exchange's marketplace functions; (2) not participate in executive sessions of the Board; and, (3) be subject to the authority of the Board.

The Exchange believes that the proposed governance architecture provides the best model for the BSE. It will permit the BSE, as a relatively small exchange, to resolve and manage conflicts of interest inherent in self-regulation while maintaining the marketplace proximity requisite for optimizing regulatory intervention in market mechanisms. Moreover, it will allow the Exchange to remain flexible in regard to its governance structure if and when future events may require a response.

2. Statutory Basis

The statutory basis for the proposed rule change is the requirement under section 6(b)(1) of the Act⁴ that an exchange be organized and have the capacity to be able to carry out the purposes of the Act, the requirement under section 6(b)(3) of the Act⁵ that the rules of an exchange assure a fair representation of its members in the selection of its directors and administration of its affairs, and the requirement under section 6(b)(5) of the Act⁶ to have rules that are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in

³ Under the Act, "the term 'facility' when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction to an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service." See 15 U.S.C. 78c(a)(2).

⁴ 15 U.S.C. 78f(b)(1).

⁵ 15 U.S.C. 78f(b)(3).

⁶ 15 U.S.C. 78f(b)(5).

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.